2008/01/31 - PL. ÚS 24/07: STABILIZATION OF PUBLIC BUDGET - TAX AMENDMENTS

HEADNOTES

1) Substantial revisions of the legal order in the field of both public and private law are an inevitable part of societal development, and it is in the hands of the democratic legislature to determine the structure of law and to delimit the subject of legal regulation in individual statutes – within that framework also to weigh the degree to which substantial revisions of certain segments of the legal order can be effectuated in part by putting through amendments to statutes currently in force and in part by the adoption of original statutory norms. Reform in the sense of a fundamental revision of a certain segment of private or public law in a single statute is not the equivalent of codification, as it can be carried out even through other technical legislative methods.

If the maxim of a statute's substantive consistency, as declared in Judgment No. Pl. ÚS 77/06 („[i]n a substantive law-based state, a statute in the formal sense cannot be understood as a mere repository of a wide variety of changes made throughout the legal order"), should be conceived of in the sense of being a derogational ground, then it would be so only in an extreme situation, such as, for ex., the case posed by the petitioner in which the Government would concentrate „once annually all of its legislative program into a single act 'on the Regulation of Legal Relations in the Czech Republic' or even into an act 'on the Improvement of the Fate of Citizens of the Czech Republic'".

2) The bi-cameral structure of the Parliament of the Czech Republic is also an expression of the principle of the separation of powers within the legislative power. With the purpose of ensuring that the separation of powers genuinely functions, differing electoral systems were enshrined in Art. 18 paras. 1, 2 of the Constitution, with the objective of thereby bringing about dissimilar political structures in the two chambers, that is, the state of affairs in which the Senate did not become merely a political copy of the Assembly of Deputies, and thus is able genuinely to fulfill the function of a check and a counterweight within the legislative power. In a constitutional model conceived in this way, the abuse of the institute of not dealing with a bill when it is considered before the Senate does not at present appear to be a real contingency. A different situation would arise, however, in the case that the Constituent Assembly's original intention is not realized and, in terms of its political structure, the Senate becomes a mere copy of the Assembly of Deputies. However much this observation appears rather as a contemplation de constitutione ferenda, in extreme cases (that is, in cases of the repetition and abuse of this manner of proceeding, directed in its effects at excluding Parliament's second chamber from genuine participation in the adoption of statutes), it could even become the basis for interpreting the relevant provisions of the Constitution and give rise to derogational grounds for the violation of the constitutional standards for the adoption of statutes.

3) Should the legislature, in its statutory arrangement, depart from the traditional conceptual framework for income tax, that would be in conflict with the constitutional order solely in the case that such construction should have a confiscatory impact, if it should be exceedingly disproportionate, alternatively if it were indefinite to such a degree as to exlude the determination of its

content by the usual interpretive methods.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 31 January 2008, the Constitutional Court, in its Plenum composed of its Justices Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, on the petitions: 1) of a group of 67 Deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Michal Hašek; 2) of a group of 43 Deputies of the Parliament of the Czech Republic, represented by Deputy JUDr. Vojtěch Filip; and 3) of a group of 19 Senators of the Parliament of the Czech Republic, represented by JUDr. Kateřina Šimáčková, an attorney with her office at Mojžíšova 17, 612 00 Brno, proposing the annulment of Part One, Part Two, Part Three, Part Four, Part Five, Part Six, Part Seven, Part Eight, Part Nine, Point 1 in Art. XVII of Part Ten, Part Eleven, Part Twelve, Part Thirteen, Part Fourteen, Part Forty-Five, Part Forty-Six, Part Forty-Seven, Part Fifty, Part Fifty-One, and Part Fifty-Two of Act No. 261/2007 Sb., on the Stabilization of Public Budgets, and proposing the annulment of § 6 para. 4, first sentence, § 6 paras. 13 and 14, § 7 para. 8, first sentence, § 16, § 21 para. 1, and § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as amended, with the participation of: A) the Assembly of Deputies of the Parliament of the Czech Republic and B) the Senate of the Parliament of the Czech Republic, and of, as secondary parties to the proceeding, C) the group of 43 Deputies of the Parliament of the Czech Republic, represented by Deputy Vojtěch Filip; and D) the group of 19 Senators of the Parliament of the Czech Republic, represented by JUDr. Kateřina Šimáčková, an attorney, decided as follows:

The petition is rejected on the merits.

REASONING

I.
The Subject of the Proceeding in the Matter

By its petition, submitted to the Constitutional Court on 22 October 2007, a group of 67 Deputies of the Assembly of Deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Michal Hašek, seeks, pursuant to Article 87 para. 1, lit. a) of the Constitution of the Czech Republic (hereinafter „Constitution“) and pursuant to § 64 para. 1, lit. b) of Act No. 182/1993 Sb., on the Constitutional Court, the annulment of Act No. 261/2007 Sb., on the Stabilization of Public Budgets, in its entirety, alternatively the annulment of the particular

provisions thereof designated in more detail in the petition.

Apart from that, by the same petition this group of 67 petitioners sought the annulment of certain provisions, more specifically designated in the petition, of acts amended by Act No. 261/2007 Sb.:
- Act No. 48/1997 Sb., on Public Health Insurance and on Amendments and Supplements to Certain Related Acts, as subsequently amended;
- Act No. 551/1991 Sb., on the Universal Health Insurance of the Czech Republic, as subsequently amended;
- Czech National Council Act No. 280/1992 Sb., on Departmental, Trade Union, Entrepreneurial and further Health Insurance Companies, as subsequently amended;
- Act No. 586/1992 Sb., on Income Tax, as subsequently amended.

By its 8 January 2008 ruling, No. Pl. ÚS 24/07-147, the Constitutional Court Plenum placed into separate proceedings those portions of the petitions proposing the annulment of those parts of Act No. 261/2007 Sb., and therewith any prospective related petitions, which concern the substantively distinct problems of the financing of health care from public health insurance and those portions of the petitions proposing the annulment of those parts of Act No. 261/2007 Sb. which concern the substantively distinct problem of social security. Separate proceedings on those excluded portions of the petitions were designated as Nos. Pl. ÚS 1/08 and Pl. ÚS 2/08

The proceeding designated as Pl. ÚS 24/07 concerns the remaining portions of the petitions, that is, those proposing the annulment of Part One (the amendment to the Act on Income Tax), Part Two (the amendment to the Act on the Amendment to Acts relating to the Adoption of the Act on Insurance for Employee Injuries), Part Three (the amendment to the Act on Reserves for the Determination of the Income Tax Base), Part Four (the amendment to the Act on Value-Added Tax), Part Five (the amendment to the Act on Property Tax), Part Six (the amendment to the Act on Inheritance Tax, Gift Tax, and Tax from the Transfer of Property), Part Seven (the amendment to the Act on Cash Offices which are Subject to Registration), Part Eight (the amendment to the Act on the Administration of Taxes and Fees), Part Nine (the amendment to Act No. 545/2005 Sb.), Point 1 in Art. XVII of Part Ten (the amendment to the Act on Administrative Fees), Part Eleven (the amendment to the Act on Sales Taxes), Part Twelve (the amendment to the Act on the Living and Subsistence Minimum), Part Thirteen (the amendment to the Act on Appreciation of the Participants in the Struggle for the Creation and Liberation of Czechoslovakia and Certain of their Survivors, on Special Contributions to the Pension of Certain Persons, and on a Lump-Sum Monetary Payment to Certain Participants in the National Struggle for Liberation in the Years 1939 to 1945 and on the Amendment to Certain Acts), Part Fourteen (the amendment to the Act on Registered Partnership and on Amendments to Certain Related Acts), Part Forty-Five (Tax on Natural Gas and other Types of Gases), Part Forty-Six (Tax on Solid Fuels), Part Forty-Seven (Tax on Electricity), Part Fifty (the amendment to the Act on Accounting), Part Fifty-One (repealing provisions), and Part Fifty-Two (the entry into effect) of Act No. 261/2007 Sb., on the Stabilization of Public Budgets, and on the petition proposing the annulment of § 6 para. 4, first sentence, § 6 paras. 13 and 14, § 7 para. 8, first sentence, § 16, § 21 para. 1, and § 38h para. 1, lit. b) of

Act No. 586/1992 Sb., on Income Tax, as amended.

II.
Parties and Secondary Parties

The party – petitioner in this proceeding is a group of 67 Deputies of the Assembly of Deputies of the Parliament of the Czech Republic, represented by Deputy Mgr. Michal Hašek. The Constitutional Court found that the submitted petition meets all statutory procedural requirements and prerequisites, so that nothing hinders consideration and decision on the merits of the matter. In the sense of § 69 para. 1 of the Act on the Constitutional Court, the other parties to this proceeding are 1. the Assembly of Deputies and 2. the Senate of the Parliament of the Czech Republic.

In a petition, delivered to the Constitutional Court on 19 November 2007, a group of 43 Deputies, represented by Deputy JUDr. Vojtěch Filip, likewise sought the annulment of Act No. 261/2007 Sb., alternatively of individual provisions thereof specified in more detail in the petition. In accordance with § 43 para. 2, lit. b), in conjunction with § 43 para. 1, lit. e), of the Act on the Constitutional Court, in its 23 November 2007 ruling, No. Pl. ÚS 28/07, the Constitutional Court rejected the petition on the grounds of lis pendens. The Constitutional Court granted this group of 43 Deputies, in the sense of § 35 para. 2 of the Act on the Constitutional Court, status as a secondary party to the previously instituted proceeding on the petition of the group of 67 Deputies. Secondary parties have the same rights and duties in a proceeding as do parties (§ 28 para. 2 of the Act on the Constitutional Court).

In a petition, delivered to the Constitutional Court on 7 December 2007, a group of 19 Senators of the Parliament of the Czech Republic, represented by an attorney, JUDr. Kateřina Šimáčková, likewise sought the annulment of portions of Act No. 261/2007 Sb., specified in more detail in the petition. In accordance with § 43 para. 2, lit. b), in conjunction with § 43 para. 1, lit. e), of the Act on the Constitutional Court, in its 12 December 2007 ruling, No. Pl. ÚS 29/07, the Constitutional Court rejected this petition on the grounds of lis pendens. The Constitutional Court granted this group of 19 Senators, in the sense of § 35 para. 2 of the Act on the Constitutional Court, status as a secondary party to the previously instituted proceeding on the petition of the group of 67 Deputies. Secondary parties have the same rights and duties in a proceeding as do parties (§ 28 para. 2 of the Act on the Constitutional Court).

In its submission made on 21 November 2007, designated as „An Announcement of the Municipal Court in Brno concerning its Entry as a Secondary Party into an already Instituted Proceeding“, the Municipal Court in Brno sought to be treated, pursuant to § 35 para. 2 of the Act on the Constitutional Court, as a secondary party, because its preceding petition of 12 November 2007 had been rejected by the Constitutional Court, in its 21 November 2007 ruling, No. Pl. ÚS 27/07, on the grounds of the obstacle of lis pendens.

However, the Municipal Court in Brno could not be dealt with as a secondary party in this proceeding, for the following reasons. Status as a secondary party arises in

the case that the Constitutional Court has already acted in the same matter, but where an authorized petitioner subsequently submits a petition. Courts can also, as a general matter, be such an authorized petitioner, namely on the basis of Art. 95 para. 2 of the Constitution. That article provides as follows: Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court. In the case under adjudication, the pivotal issue is how to view the condition that a submission must concern a statute "which should be applied in the resolution of a matter". There is no dispute concerning the fact that this condition is always met where a submission concerns a statute, alternatively individual provisions thereof, whose application should be proximate, thus if such provision should be applied in the decision on the merits. In its jurisprudence, the Constitutional Court has deduced that in order for a court to be able to call into question the constitutionality of a legal enactment, its unavoidable application in the matter in question is essential, not its merely hypothetical application, or some other broader connections [compare Ruling No. Pl. ÚS 39/2000, The Collection of Judgments and Rulings of the Constitutional Court (hereinafter „Collection of Decisions"), Volume 20, Ruling No. 39, p. 353; Ruling No. Pl. ÚS 20/02, Collection of Decisions, Volume 28, ruling No. 42, p. 477].

In the matter of the Municipal Court in Brno, No. 50 C 259/2007, from which the Municipal Court's above-mentioned petition arose, on 5 November 2007 JUDr. M. V., judge of the Municipal Court in Brno, submitted a suit which sought from the Czech Republic – Municipal Court in Brno a payment of 2600 Czech Crowns, the amount by which his salary for the month of January, 2008 had been reduced, as well as a lump-sum expense allowance to which he had a claim, had his pay not been frozen by Art. XLVIII, Part Thirty of Act No. 261/267 Sb. According to settled judicial practice and doctrine, one can assert his rights before a court as of the moment when a claim arises, stated otherwise actio nata. A claim arises only after a debtor should have fulfilled his obligation. In the case under adjudication, however, this is an unmatured claim, as it is not at all certain whether the claimant will in fact be damaged, nor in what amount. Thus, the Municipal Court should not have even reached consideration of the possible unconstitutionality of Act No. 261/2007 Sb., because it should have rejected the suit as unripe. As follows from 95 para. 2 of the Constitution, ordinary courts have both the right and the obligation to submit matters to the Constitutional Court only if a genuine dispute exists, and not for the purpose of ascertaining the Constitutional Court's opinion on certain legal questions. On the basis of what has been mentioned, the Constitutional Court came to the conclusion that the Municipal Court in Brno was not an authorized petitioner in the sense of § 35 para. 2 of the Act on the Constitutional Court. By its 15 January 2008 ruling, No. Pl. ÚS 24/07-158, the Constitutional Court decided that the Municipal Court in Brno is not a secondary party to the proceeding.
[Parts III through VI omitted]

VII.
Evidentiary Material Obtained by the Constitutional Court from Public Sources

As the basis for its decision, the Constitutional Court obtained stenographic recordings from the debates before the Assembly of Deputies, the Senate, and their committees, as well as their resolutions and Assembly prints freely accessible in the digital libraries on the web sites of the Assembly of Deputies and the Senate of the Parliament of the Czech Republic, at www.psp.cz and www.senat.cz.

VIII.
Description of the Legislative Proceedings for the Adoption of Act No. 261/2007 Sb.

The Constitutional Court has ascertained the following from the statements of both chambers of the Parliament of the Czech Republic, from appendices attached thereto, and from documents accessible by electronic means in the digital libraries:

on 24 May 2007 the Government submitted to the Assembly of Deputies a governmental bill (Print No. 222/0). On 25 May 2007 the bill was distributed to the Deputies. On 24 May 2007, the Organizational Committee of the Assembly of Deputies recommended the consideration of the bill. It designated Mgr. Bohuslav Sobotka as the bill's rapporteur and proposed that the bill be assigned for hearing in three committees: 1. the Committee on Health Care, 2. the Committee on Social Policy, and 3. the Committee on the Budget;

- the first reading took place on the 6th and 7th of June 2007 at the Assembly's 15th Session. The bill was assigned for hearing by the above-mentioned committees (Resolution No. 335);
- the Assembly's Committee on Health Care considered the bill on 20 June 2007, but did not adopt any resolutions. The Committee on Social Policy considered the bill on 2 July 2007 and in its resolution recommended that the bill be defeated. The Committee on the Budget considered the bill on 8 August 2007 and in its resolution recommended that the bill be defeated;
- in its second reading in the Assembly, on the 14th and 15th of August at the 18th Session, the bill was the subject of general and detailed debate; submitted proposed amendments were prepared as Print No. 222/3, which was distributed on 16 August 2007;
- the third reading in the Assembly took place on 21 August 2007 at the 18th Session; the bill was adopted: of the 200 Deputies present, 101 Deputies voted in favor of the bill and 99 voted against it;
- on 31 August 2007 the Assembly of Deputies transmitted the bill to the Senate as Print No. 106/0; the Senate placed the bill on the agenda for its 8th Session and debated it on 19 September 2007; in its resolution No. 192, the Senate expressed its intention not to deal with the bill;
- on 25 September 2007, the Act was delivered to the President of the Republic for his signature, and the President signed it on 5 October 2007;
- the Act was promulgated on 16 October 2007 in the Collection of Laws, Part 85, as number 261/2007 Sb.

IX.
The Public Hearing before the Constitutional Court

At the oral hearing of the Constitutional Court Plenum, held on 31 January 2008, the parties and secondary parties to the proceeding repeated the arguments contained in their petitions, or statements furnished the Constitutional Court, and adhered to their positions, as well as their proposals for decision by the Constitutional Court in the matter at hand. In addition, JUDr. Vojtěch Filip, in his capacity as a person authorized to act on behalf of a secondary party - the group of 43 Deputies of the Assembly of Deputies of the Parliament of the Czech Republic, asserted a substantive objection in relation to the introduction of a new subject of value-added tax - the group of persons registered as taxpayers by means of group registration. The crux of the objection was the fact that the given subject does not possess legal personality.

Further JUDr. Vojtěch Filip submitted a proposal to supplement evidence taking by including the analytic material prepared for the Bill on the Stabilization of Public Budgets by the Legislative Committee of the Office of the Senate of the Parliament of the Czech Republic.

Pursuant to § 48 para. 1 of Act No. 182/1993 Sb., the Constitutional Court rejected the mentioned proposal, as it followed from the nature of the matter that the analytical material in question related to legal, and not factual, circumstances.

X.
Constitutional Conformity of the Competence and of the Legislative Process

According to § 68 para. 2 of Act No. 182/1993 Sb., as subsequently amended, within the framework of a norm control proceeding, the Constitutional Court reviews three components, which, in their totality, comprise the issue of a statute‘s conformity with the constitutional order, alternatively, in the case of another legal enactment, that is, its conformity with statutes. These components are the competence of the body which issued the contested legal enactment, the procedure by which the contested legal enactment was issued, and its content. The sequence of the review is determined by a precise algorithm: from the nature of the matter, the Constitutional Court deals first of all with the competence of the relevant organ of public power to issue the legal enactment contested in the petition, then, assuming a positive finding on the existence of such competence, the observance of the constitutionally-prescribed manner for the issuance of the contested legal enactment, and finally, in the instance that the observance of procedure is ascertained, an adjudication of the contested enactment’s substantive conformity with the constitutional order, alternatively with statutes.

In adjudging the constitutionality of the contested Act, the Constitutional Court has accepted the petitioner‘s procedural objection to the effect that the chairpersons of chambers of the Parliament are not authorized independently to fashion the chamber‘s will on behalf of their respective chamber. In the chambers‘ statements, submitted in their capacity as parties to a proceeding, the chairpersons are entitled, on behalf of their respective chamber, solely to inform the Constitutional Court of the factual and non-contentious circumstances of the debate on the bill. Beyond those limits, the assessment of a contested statute and disagreements with the petition proposing annulment by the Constitutional Court

no longer form a part of the chamber‘s statement, rather are merely the personal opinion of its chairperson.

The subject of review in the matter under consideration is the constitutionality of the precisely-designated parts of the Act on the Stabilization of Public Budgets and the Act on Income Tax. The competence of the Parliament of the Czech Republic, which adopted these statutes, follows from Art. 15 para. 1 of the Constitution.

The first group of objections of both the petitioner and the secondary parties concerns the constitutionality of the procedure employed for Act No. 261/2007 Sb.

The petition proposing the annulment of the cited parts of Act No. 261/2007 Sb. rests, in the first place, on the asserted constitutional violation in the adoption of the contested Act as a whole. One objection alleges that the Act is inconsistent, and the objection of the second secondary party (the group of Senators) asserts the unconstitutionality of the Senate‘s decision not to deal with the Bill on the Stabilization of Public Budgets.
From the perspective of procedural objections conceived in this way, one must recall the maxim which in this connection flows for the requested relief [petit] of a decided matter (Judgment of the Constitutional Court No. Pl. ÚS 7/03, Collection of Decisions, Volume 34, Judgment č. 113, published as No. 512/2004 Sb.): „If, in a norm control proceeding, the petitioner alleges a violation of the legislative competence and the legislative process as defined in the constitutional order (§ 68 para. 2 of Act No. 182/1993 Sb.), then the requested relief [petit] is directed at all provisions forming the legal enactment upon which the criticized constitutional defect falls.

The petitioner and the secondary parties have then spotted procedural errors relating to the individual parts, or provisions, of the Act on the Stabilization of Public Budgets in the absence of a close relation linking the proposed amendments to the subject of the bill, in the violation of the statutory framework for the submission of technical legislative proposals during the third reading of a bill, and in the violation of the Government’s Legislative Rules in relation to those parts of the Act at issue which represent an original, new (non-amending) legal enactment.

X/a
On the Objection that the Act is Inconsistent

According to the petitioner, the lack of consistency, of internal harmony, and of transparency of Act No. 261/2007 Sb. is, on the one hand, in conflict with the principle of the law-based state and, on the other, in conflict with the principle of parliamentary democracy and with the separation of powers between the executive and legislative powers, due to the fact that it results in the limitation of the genuine possibility for Parliament to consider such a statute.

From the technical legislative perspective, Act No. 261/2007 Sb. is a mixed statute. It contains in part the amendment of precisely designated statutes (Parts 1 to 36, 38 to 44, and 48 to 50), then original statutory provisions (Parts 37, 45, 46, and 47), and finally a repealing provision (Part 51), as well as a provision on entry into

effect (Part 52). In other words, it is a statute which is partly a „collective amending act“ and partly new statutory regulation.

The Constitutional Court already expressed its opinion on the constitutionality of „collective amending acts“ in its Judgment No. Pl. ÚS 21/01 (Collection of Decisions, Volume 25, Judgment No. 14, published as No. 95/2002 Sb.), in which it asserted the following: „[T]he practice by which several diverse statutes are simultaneously amended by the adoption of a single statute is a relatively common one in legislative practice. . . this practice is in principle constitutionally conforming, but only in the case that the amended statutes bear mutual substantive connection to each other. On the other hand, the situation where several statutes bearing no direct substantive connection to each other are amended by a single act, must be designated as an undesirable phenomena, and one not corresponding to the purpose and principles of the legislative process. Such a situation comes about, for example, due to the speeding up of the legislative process, in part by means of submitted proposed amendments. . . Such a manner of proceeding, thus, does not correspond to the basic principles of a law-based State, among which belong the principle that laws should be foreseeable and comprehensible, and the principle that they should be internally consistent. If then the substantive content regulated in several statutes is affected by a single statute (in the formal sense), and these affected statutes do not, either by content or systemic considerations, have any connection with each other, then a quite murky legal situation often emerges which does not respect the principles of foreseeability, comprehensibility or internal consistency.“ The Constitutional Court would admonish that it decided the given matter by rejecting the petition on the merits, thus the requirement of internal substantive consistency of „collective amending acts“ contained in that Judgment cannot be evaluated in the sense of an argument directed at derogation.

The Constitutional Court of the Austrian Republic expressed a similar opinion on the practice of „collective amending acts“ in it Judgment of 16 March 2001 (G 150/00-12). On the issue of the „common legislative practice of adopting collective amending acts“, it declared that it is “detrimental to the utmost in terms of the law being cognizable“. Nonetheless, even in that case, this reproach did not constitute a derogational ground, rather it was mere obiter dictum.

In its existing jurisprudence, the Constitutional Court has annulled, on the grounds of indefiniteness, incomprehensibility, or lack of clarity, only individual statutory provisions, but not a statute in its entirety. This fact results as well from the very conception of the indefiniteness of a statute, which was defined as the absence of the possibility to establish its normative content with the aid of customary interpretive approaches. Thus, this test can be applied transparently and persuasively only in relation to the concrete test of definiteness of a detailed statutory provision. In this connection, the Constitutional Court explicitly declared, in its Judgment No. Pl. ÚS 10/06 (published as No. 163/2007 Sb.): „It can generally be asserted that the indefiniteness of certain provisions of a legal enactment must be considered as in conflict with the requirements of legal certainty, thus even of the law-based state (Art. 1 para. 1 of the Constitution), only in the case that the intensity of that indefiniteness excludes the possibility of their normative content being established with the aid of customary interpretive approaches.“ [Judgments

No. Pl. ÚS 4/95 (Collection of Decisions, Volume 3, Judgment No. 29, published as No. 168/1995 Sb.), No. Pl. ÚS 9/95 (Collection of Decisions, Volume 5, Judgment No. 16, published as No. 107/1996 Sb.), No. Pl. ÚS 2/97 (Collection of Decisions, Volume 8, Judgment No. 91, published as No. 186/1997 Sb.), No. Pl. ÚS 23/02 (Collection of Decisions, Volume 33, Judgment No. 89, published as No. 476/2004 Sb.), No. Pl. ÚS 40/02 (Collection of Decisions, Volume 30, Judgment No. 88, published as No. 199/2003 Sb.), No. Pl. ÚS 44/02 (Collection of Decisions, Volume 30, Judgment No. 98, published as No. 210/2003 Sb.), No. Pl. ÚS 25/06 (published as No. 487/2006 Sb.)].

In its existing jurisprudence, the Constitutional Court has founded the annulment of a statute in its entirety, alternatively a discrete part thereof, on the grounds of the dissimilitude of the constitutional and statutory procedures for the adoption of an act, a dissimilitude which has impact on its individual structural parts. In Judgment No. Pl. ÚS 21/01 (Collection of Decisions, Volume 25, Judgment No. 14, published as No. 95/2002 Sb.) the Court declared on this point the following thesis in connection with the adoption of a state budget act: „Since in relation to acts on the state budget, the Constitution does not empower the Senate to intervene into the legislative process and such an act, on the proposal of the government, can be debated and adopted only by the Chamber of Deputies, it is evident that the sole possible constitutionally conforming means of proceeding is that in which such an act is debated and adopted entirely separately. For this reason also § 101 para. 3 of the Standing Orders of the Chamber of Deputies (Act No. 90/1995 Sb., on the Standing Orders of the Chamber of Deputies) explicitly provides that 'Provisions amending, supplementing, or repealing provisions of other acts may not form a part of an act on the State budget.' (Note bene: Of course, Act No. 10/1993 Sb was adopted before the cited act, No. 90/1995 Coll. came into effect). In the Constitutional Court's view, it can be deduced from the wording of this statute that neither can provisions amending, supplementing, or repealing provisions of an act on the state budget form a part of an 'ordinary' statute. The situation where, together with an act on the state budget, other acts are also proposed, or when an act on the state budget as well as further acts are amended by means of a single act, is thus a situation which, as was already stated, is not in conformity either with the Constitution or with the law (see cited Act No. 90/1995 Sb.). "

If the petitioner argues in terms of the inconsistency of Act No. 261/2007 Sb., establishing the grounds of its unconstitutionality, that is an argument differing from the present line of argument on the indefiniteness of statutory provisions, or the violation of the procedure for the adoption of statutes, in view of their differences in relation to its particular parts.

It has already been stated that, in terms of legislative technique, Act No. 261/2007 Sb. is a mixed statute, that is, it contains not only amendments to specifically designated acts (Parts 1 to 36, 38 to 44, and 48 to 50), but also further original statutory arrangements (Parts 37, 45, 46, and 47), and finally repealing provisions (Part 51) and the provision on entry into effect (Part. 52); thus, it is an act which is in part a „collective amending act" and in part a set of new statutory rules.

If the Act at issue had been adopted as 50 separate statutes, 46 of them amending statutes and 4 original statutes, the argument of inconsistency would lose its

foundation. Thus the jist of the objection is neither that it is impossible to reconstruct the normative content of the statutory provisions with the aid of customary interpretive approaches, nor the objection that divergent procedures were not observed in view of the individual parts of the adopted Act. Let us recall that in the case of „collective amending act“ the amending provisions become a part of the „comprehensive version“ of the individual amended acts and are thus accessible to the addressees in computerized legal information systems; the original, non-amending provisions, are accessible to the addressees in the same way as is the case for other statutory rules.

The list of the objection of unconstitutionality is thus the „lack of transparency“ and „indefiniteness“ which is established by the „mass“ of newly adopted law, both for the addressees of the act and in terms of the genuine capability of Parliament to consider such a „mass“ of law within the framework of the adoption of a single statute, that is, in terms of the principle of parliamentary democracy and the separation of powers. The jist of the stated objection of „inconsistency“ is, among other things, expressed by the following assertion by the petitioner: „In an absurb extreme case, the Government might concentrate once annually all of its legislative program into a single act ‘on the Regulation of Legal Relations in the Czech Republic‘ or even into an act ‘on the Improvement of the Fate of Citizens of the Czech Republic‘ and through political pressure compel the governing majority to adopt just such a version of the bill. Deputies‘ actual influence on the content of statutes would be entirely marginalized thereby . . Such a Parliament would be a mere facade entirely contradicting the principle of its democratic character and the separation of powers.“

The second component of the petitioner’s asserted objection of inconsistency is the reference to the constitutional limits operative for the legislature when forming a system of law by its framing of the structure and content of adopted statutes.

In terms of constitutionalism, it is necessary in this connection to protect two values guaranteed by the constitional order:

The first is the value of parliamentarianism and of the separation of powers, reflected in the procedure, which must, even in such cases, allow for the genuine assessment and consideration of a bill by the Parliament (especially by the parliamentary opposition).

The second is then the value of the substantive law-based state, reflected in the maxim, formulated in Constitutional Court Judgment No. Pl. ÚS 77/06: „In a substantive law-based state, a statute in the formal sense cannot be understood as a mere repository of a wide variety of changes made throughout the legal order. On the contrary, the substantive conception of the law-based state requires that a statute be, both in terms of form and substance, a predictable, consistent source of law.“

As to a): The Government Bill on the Stabilization of Public Budgets was adopted by the Assembly of Deputies at its 18th Session held on 21 August 2007 in voting under Serial No. 23, in which, of the 200 Deputies present, 101 voted for the Bill, and 99

against (see the Stenographic Record of the Proceedings before the Assembly of Deputies, the digital archive of the Assembly of Deputies, www.psp.cz). On 19 September 2007 the Bill was considered by the Senate at its 8th Session, which expressed its intent not to deal with the Bill by adopting its Resolution No. 192 – of the 80 Senators present, 49 Senators voted in favor of that Resolution, 27 voted against it, and four abstained (see the Record of Voting in the Senate, www.senat.cz). After it was signed by the competent constitutional officials, the Act was promulgated on 16 October 2007 in Part 85 of the Collection of Laws, as No. 261/2007 Sb.

In terms of the protection of the values of parliamentarianism and the separation of powers reflected in the legislative procedure, it is necessary to review the opportunity for genuine examination and consideration of a bill by Parliament (especially by the parliamentary opposition).
The Standing Orders of the Assembly of Deputies establish a time limit for individual readings of a bill, the purpose of which is to create a sufficient amount of time for parliamentary consideration of a bill (§ 89, § 91 para. 2, and § 95 para. 1 of Act No. 90/1995 Sb.). One of these time limits is the 60-day limit for the consideration of a bill in committee, which is part of the first reading of a bill, and which the Assembly of Deputies can, pursuant to § 91 para. 3 of the Act on the Standing Orders of the Assembly of Deputies, extend by up to 20 days. This is a statutory instrument serving to create a greater time frame for the consideration of more extensive bills.

In the course of the first reading of the Bill on the Stabilization of Public Budgets on 6 and 7 June 2007 (see the stenographic record of the 15th Session of the Assembly of Deputies, held on 6 and 7 June 2007, www.psp.cz) Deputies Bohuslav Sobotka, Stanislav Křeček, Václav Votava, Zdeněk Jičínský and Jeroným Tejc referred to the scope and internal disunity of the schema under consideration. In this connection, Bohuslav Sobotka brought a motion to assign the consideration of individual parts of the Bill at issue to separate committees. Kosta Dimitrov moved to reject the Government Bill on the Stabilization of Public Budgets, and in the case that this motion was not carried, he moved „the extension by 30 days of the time period for the consideration in committee“. Jeroným Tejc then tabled a procedural motion to extend by 20 days the time period for the consideration of the Bill due to its scope.

On 7 June 2007 in response to Deputy Bohuslav Sobotka’s motion, the Minister of Finance, Miroslav Kalousek, tabled a motion before the Assembly of Deputies for „the entire Print 222 to be assigned to the committees on the budget, on social policy, and on health care. Not in parts, but so that the entire print would be assigned to these three committees.“ In the vote (serial No. 60), of the 197 Deputies present, 113 voted in favor of the motion by the Minister of Finance, and 8 voted against. It follows therefrom that even the opposition Deputies voted in favor, or did not vote against.

The motions of Deputies Dimitrov and Tejc were rejected (of the 198 Deputies present, 97 voted to reject the motions, 94 voted in favor of them), without any of the members of the Government, or the Deputies in the governing coalition, even making substantive responses to the arguments.

In terms of compliance with the temporal and procedural framework for the consideration of statutes as delimited in the Act on the Standing Orders of the Assembly of Deputies, which reflects the protection of the constitutional guarantee of the genuine functioning of parliamentariansim, all time limits and procedural steps within the framework of the consideration of the Government Bill on the Stabilization of Public Budgets were complied with, also the time limit under § 95 para. 1 of Act No. 90/1995 Sb.

If the time for consideration of the Bill in committee was not extended, that did not result in a violation of the standards of parliamentary procedure. In this connection, however, a phenomenon occurred which, although it affects „solely" the area of political culture, cannot be overlooked in the adjudication of the course of the consideration of the Bill on the Stabilization of Public Budgets. The principle of democracy is not limited solely to majority rule, rather its content is found in the democratic competition of view, in a democratic discussion. In view of the extent and complexity of this statutory proposal, one can hardly imagine another one for which a motion to extend the period for its consideration would be better founded. If this motion by the opposition were rejected, nota bene without any sort of substantive argumentation, then this fact cannot be evaluated as other than a deficit in the democratic political culture on the part of the governing majority. The same reproof applies also to the circumstances surrounding the Prime Minister's introduction of the proposed amendment to the Act on 15 August 2007, an amendment numbering 37 pages of text – although the time limit of 72 hours between the second and third reading of the Bill was observed (§ 95 para. 1 of Act No. 90/1995 Sb.), the governing majority made no attempts to make available to the parliamentary opposition a more adequate time frame for the assessment of such an extensive and significant set of proposed amendments.

As to b): It is possible to join into one theme the search for answers to the two above-mentioned components of the objection of inconsistency, that is the violation of the principle of parliamentarianism along with the separation of powers and the non-transparency of the structure for the adoption of statutes, and therewith the system of law. That theme could be formulated as follows: whether or not the „reform" program of the parliamentary majority can be carried out alone by the method that is harmonious with the traditional conceptions of the system of law and legislative techniques, as they have developed since the end of the 19th Century? Thus, if it is acceptable, in terms of the principles of parliamentarianism and the separation of powers, to reform the private law by the adoption of a new Civil Code, running to over 2700 section, on what grounds is it then not acceptable to reform public finance in the form of an extensive statute encompassing in part „a collective amending act" and in part original statutory provisions. After all, certain categories become a natural component of legal thought only with the passage of time, and their original controversial nature is already long forgotten. Among the most famous legal disputes in European legal history belongs the dispute between Friedrich Carl von Savigny and Anton Friedrich Justus Thibaut at the start of the 19th Century on the necessity, or contrariwise the lack thereof, to codify the civil law in Germany (see Thibaut und Savigny. Ein programmatischer Rechtsstreit auf Grund ihrer Schriften, publ. J. Stern, Darmstadt 1959) – one cannot fail to observe that it was Savigny's view, directed against the codification efforts in the field of private law which prevailed in Germany at the

time thus putting off, in comparison with France and Austria, the adoption of the Civil Code by one hundred years.

Substantial revisions of the legal order in the field of both public and private law are an inevitable part of societal development, and it is in the hands of the democratic legislature to determine the structure of law and to delimit the subject of legal regulation in individual statutes – within that framework also to weigh the degree to which substantial revisions of certain segments of the legal order can be effectuated in part by putting through amendments to statutes currently in force and in part by the adoption of original statutory norms. Reform in the sense of a fundamental revision of a certain segment of private or public law in a single statute is not the equivalent of codification, as it can be carried out even through other technical legislative methods. At this juncture it is appropriate to make an empirical excursus with reference to the shift in the modalities of law formation. Quantitative research on the Czech legal order demonstrates that, in the case of statutes and regulations, „the production of revisions since 1990 is unprecedented in the history of the Czech legal order . . . [whereas] in principle it applies that the revisions focus primarily on legal enactments adopted in the previous electoral term and legal enactments from the then current electoral term. Reaching back into the distant past is on the whole exceptional. It seems that at the present time, with a certain degree of hyperbole, the Parliament‘s focus is on the revision of its own amending acts.“ (F. Cvrček, The Basic Quantitative Parameters of the Czech Legal Order, Lawyer [Právník], No. 4, 2006, pp. 442 – 443).

The Constitutional Court‘s reasoning here is not a philippic in favor of the adoption of „collective amending acts“. It is merely a reference to the variable form of the legal system and to the dissimilarity of the legislative objectives of the presents and past periods. It is the expression of a self-restrained assessment, but by no means an unconditional acceptance.

If the maxim of a statute’s substantive consistency, as declared in Judgment No. Pl. ÚS 77/06 („[i]n a substantive law-based state, a statute in the formal sense cannot be understood as a mere repository of a wide variety of changes made throughout the legal order“), should be conceived of in the sense of being a derogational ground, then it would be so only in an extreme situation, such as, for ex., the case posed by the petitioner in which the Government would concentrate „once annually all of its legislative program into a single act ‘on the Regulation of Legal Relations in the Czech Republic‘ or even into an act ‘on the Improvement of the Fate of Citizens of the Czech Republic‘“. In spite of all possible doctrinal doubts concerning the acceptability and suitability of a voluminous combination of collective amending acts and original statutory rules, the matter under adjudication is not such a case.

According to the Explanatory Report to the Bill on the Stabilization of Public Budgets „the submitted set of legal arrangements relates to the field of tax, including ecological tax, of almost all social systems (primarily they are changes in the system of state social support, living and subsistence minimums, the system of sickness insurance, the field of pay and the field of employment) and in the field of health care of public health insurance, insurance premiums for this type of insurance and the activities of health insurance companies. Its objective is to

strengthen the protection of the environment through the optimalization of the revenue of the state budget to support economic growth and the regulation of ecological taxes; on the side of expenditures, the proposed measures pursue a halt in the increase in finances expended in the mentioned systems which, in view of the increasing share of these expenditures on the emergence of deficits in public budgets, is untenable.“ In in his 6 June 2007 speech before the Assembly of Deputies at its 15th Session during the first reading of the Bill on the Stabilization of Public Budgets, Prime Minister, Mirek Topolánek, described the objective of that Bill in other words, or by a different „nomenclature“, where he said the following: „We are striving to apply the emergency brake in several fields. And here in relation to those opponents who assert that it is unconstitutional, I want to say that this constitutional analysis exists. This is not a limpet; it is called the stabilization of public budgets and all its norms relate to the stabilization of the public budgets. There is no limpet there.“ Let us recall that the Prime Minister was not employing the term, “limpet“, in the sense it was used by the Constitutional Court in its Judgment No. Pl. ÚS 77/06, that is, for amendments proposed during the second reading when they lack a close relation to the subject-matter of the bill under consideration, rather with a distinct signification, in the signification of its substantive inconsistency with parts of the original bill.

Act No. 261/2007 Sb. is composed of three crucial parts – the legal framework for tax, the social system and public health insurance – which have substantive connections to the field of public budgets. One cannot reach the conclusion in the case of this Act that there has been extreme systemic arbitrariness such as to give rise, in relation to it as a whole, to a derogational ground due to the violation of the principles of the substantive law-based state or of parliamentary democracy.

X./b

On the Objection that the Senate‘s Decision not to Deal with the Bill is Unconstitutional

Next to the objection that the Act is inconsistent, the second general objection directed at Act No. 261/2007 Sb. as a whole is that the Senate‘s decision not to deal with the Bill on the Stabilization of Public Budgets is unconstitutional. According to Art. 46 para. 2 of the Constitution, one form of the consideration of a bill is to declare the intention not to deal with it. A more detailed treatment of this constitutional provision is found in § 107 of Act No. 107/1999 Sb., on the Standing Orders of the Senate, which reads as follows: “After the Rapporteur’s speech, and if the Committee’s recommendation does not contain a motion that the Senate express its intention not to deal with the Bill, the Presiding Senator shall call upon Senators to indicate whether or not they wish to so move. If such a motion is contained in the Committee’s recommendation or put forward by Senators, the motion shall be put to a vote without debate. If the motion is passed, the Senate shall conclude its consideration of the Bill.” If the Senate declares its intention not to deal with a bill, then pursuant to Art. 48 of the Constitution the bill is adopted as a result of that resolution.

In the given matter the Assembly of Deputies transmitted the bill to the Senate on 30 August 2007. On the following day the Organizational Committee assigned the

senate print for consideration by committees, namely to the guarantee committee, which was the Committee on National Economy, Agriculture and Transport, which considered the Bill on 13 September 2007, also to the Committee on Health and Social Policy, which considered the Bill on 12 September 2007, and finally to the Committee on Public Administration, Regional Development and the Environment, which considered the bill on the same day, that is, on 12 September 2007. Consideration in the Senate Plenary Session of the Bill on the Stabilization of Public Budgets was begun on 19 September 2007 with the extensive introductory speeches of the Prime Minister, as well as of the ministers of finance, labor and social affairs, and health care. As was already mentioned above, at its 8th Session, held on 19 September 2007, the Senate expressed its intention not to deal with the Bill, 49 of the 80 Senators present (thus with a quorum of 41) voting for, and 27 against (see www.senat.cz), this motion, which had been introduced by Senator Jiří Oberfalzer.

Senator Jiří Oberfalzer substantiated his motion not to deal with the Bill on the Stabilization of Public Budgets, as follows: „In treating this Bill here it has already come to pass that it was approved, in its current version, in the Assembly of Deputies by a narrow and fragile political majority. In other words, there is no political lattitude for improving it by adding proposed amendments and returning this Bill to the Assembly. Nor is there even physical time for the improvement of this Bill and its return to the Assembly of Deputies. The validity of this set of statutes is a condition for the stabilized form of the budget, or an acceptable level of deficit. Moreover, such a form of budget is necessary for the Czech Republic to observe the convergence program. And the observance of the convergence program is an indispensable condition for drawing upon the European funds. I think that, in and of themselves, these are sufficiently weighty reasons for us to make it as easy as possible for this Bill to pass the Senate. This Bill was considered by three Senate committees, and each concluded their proceedings with the same motion - they recommended that the Plenary Session approve this Bill. “

In reaction to this motion, the chairpersons of the Senate caucuses, or in some instances the deputy chairpersons of the Senate, took the floor. Some of them subjected the Bill to criticism in terms of its limitation on the principle of parliamentary democracy. Senator Alena Gajdůšková had the following to say: „This Bill has really taken us very much by surprise because I consider it as heading in the direction of authoritarian processes, regimes. Therefore, if it is not possible to have a discussion on it, then we really are not in a democratic and a law-based state. . . I genuinely consider this situation – in a democracy – as very irregular. Prime Minister Topolánek has stated that the Act, upon which we are at this moment acting, is fundamental, which merits a more general debate in the Senate. In direct conflict with his statement is the motion from ODS to vote that we not deal with this Act. If I recall correctly, during the five years that I have been in the Senate, we have only ever made use of this institute wholly exceptionally and only in situations concerning a technical matter: in relation to those norms which the Senate did not consider as, so to speak, worthy of its interest. If then ODS in the Senate does not consider this norm as worthy of its interest, then I frankly do not understand the astronomical clock at the start of our consideration of this point, beginning with the Prime Minister and continuing with a further three ministers, moreover in conflict with the Senate’s Standing Orders.

Should the Senate in fact carry the motion not to deal with the Bill, thus precluding a general, alternatively an extended, debate, then that will betoken that the Czech Republic has once again grown into the rule of one party. Then everyone in this land who is in earnest about democracy and human rights, should promptly, earnestly and in great detail grapple with the current level of Czech democracy." Senator Josef Novotný state the following: „It is necessary to recall the words of the Senate Chairperson, who at the end of August rejected the efforts to have this norm considered in accelerated proceedings and promised that the Senate will deal with this norm seriously and examine it responsibly. The institute of not dealing with a bill entirely negates the promise given by the Senate Chairperson . . . I would just like to remark that if we carry the motion not to deal with the bill, then at the conclusion of our business, we should just switch off the lights here." Deputy Chairperson of the Senate, Jan Rakušan, drew attention to the following: „. . . in his introduction the Prime Minister said that this Act merits sufficient discussion and debate in the Senate. Unfortunately, he is no longer here, but I understood him such that the other side should be heard as well. A month ago I read that our Senate Chairperson, Doctor Sobotka, whom I very much esteem, said that the Senate is not a voting conveyor belt and that we need at least a month for due consideration. Thus I understood him to mean that we would be dealing with it in some manner. Just as I understand § 107, that is not to deal with a statute, and perhaps I am mistaken, but I regarded it as an accelerated yes; I regarded that as an effective method for marginal statutes, so as to leave us sufficient time for statutes which are very important. It is possible that you have not given any thought at all to the point that, if we carry the motion not to consider the Bill, then we return to the time before 1989, when the regime and the government feared words, sentences and expressed opinions. In this case, not to deal with means the end of freedom of speech."

On the other hand, Senator Adolf Jílek stated „we should be done with this Act today. If somebody asserts that there is no room for discussion here, then they are only those who want this room due to the fact that there are cameras here and that our deliberations will be aired in the night by Czech Televions on its second channel sometime between three and six in the morning and some of them are glad to see themselves there. Therefore, they want to have the opportunity to appear here. I would like to point out that this Act, which was considered in the Assembly of Deputies, has been followed from the very beginning by all rapporteurs both of committes and of caucuses. The Senate held a seminar on this topic; the Minister was before the committee, was in the caucuses, which requested him to do so. Thus, I think that these discussions have already gone on for quite some time, and I do not see a light at the end of the tunnel."

The caucus chairpersons made use of their speeches not only to express their positions on Senator Jiří Oberfalzer's motion not to deal with the Bill on the Stabilization of Public Budgets, but they also put forth their positions on the merits, that is, on the Bill on the Stabilization of Public Budgets itself, while the Minister of Finance, M. Kalousek, and the Minister of Health, T. Julínek, made substantive responses to their speeches (see the stenographic record from the 8th Session of the Senate of the Parliament of the Czech Republic, held on 19 September 2007, www.senat.cz).

The relation between the two chambers of the Parliament of the Czech Republic is asymmetrical. Apart from the exceptions laid down in the Constitution for the adoption of constitutional acts and of precisely designated types of statutes, as a rule the adoption of statutes by both assemblies (Art. 39 para. 4 and Art. 40 of the Constitution) is a process in which the Assembly of Deputies enjoys a stronger position, enabling it to overturn the Senate‘s refusal to consent to a bill (Art. 47 para. 3 of the Constitution). The relation between the two chambers constitutionally-delimited in this manner is the necessary starting point also for the interpretation of Art. 46 para. 2 of the Constitution. Art. 46 of the Constitution enshrines two means of proceeding which result in a bill being adopted without it even having been considered in the Senate. First, there is the alternative for the Senate to remain passive (Art. 46 para. 3 of the Constitution), then the alternative for the Senate explicitly to express its intent not to deal with a bill. The Constituent Assembly‘s original intention in this connection is bound up with its conception of the selection of bills with which the Senate will deal in the legislative process [see J. Syllová, Constitutional Characteristics of the Parliament of the Czech Republic and their Evolution, in J. Kysela (ed.), Ten Years of the Constitution of the Czech Republic: Starting Points, Current Situation, Perspectives, Prague 2003, p. 263 and foll.]. However, J. Kysela has the following view: “One cannot discern a clear conception in the usage of the institute ‘not to deal with a bill’, since, apart from a perfectly proper ground, consisting in the absence of objections (sped up approval), other grounds (a statute that is bad but necessary) are commonly expressed in the debate, alternatively it is possible to speculate on unexpressed reasons (kill a debate that is capable of influencing the undecided, prevent the minority from criticizing the probable voting coalition, speeding up the course of the session in its concluding stages, etc.). In certain cases, then, bills ‘approved’ by this route are free of substantive and technical legislative defects, at other times, however, not entirely perfect yet highly ‘technical’ amendments to acts. One cannot speak, however, of a distinct crystallization of the Senate’s interests in certain types of statutes - for which it would shun a resolution “not to deal with” (J. Kysela, Bi-Cameral Systems: Theory, History and Comparison of Bi-Cameral Parliaments, Prague 2004, pp. 552 – 53). In other words, in terms of existing legislative practice, one cannot frame a clear constitutional custom from the manner in which the Senate has proceeded in accordance with Art. 46 para. 2 of the Constitution and § 107 of Act No. 107/1999 Sb., on the Standing Orders of the Senate. In addition, it must be noted, in relation to the interpretation of Art. 46 of the Constitution, that in the situation where the Constituent Assembly declined to limit the types of statutes which the Senate may decline to deal with, the interpretation of these types results from a procedure, that is, the Senate‘s voting in individual cases. If, however, the type of statutes included in this group were to be determined subsequently (ex post) by means of Constitutional Court jurisprudence in norm control proceedings, that would entail for the legislative process a considerable degree of uncertainty as to whether adopted statutes are valid.

The difference in the means by which the Senate proceeds when adopting a bill and by which it expresses its intention not to deal with one, is reflected in the fact that the second alternative does not provide the opportunity for plenary debate, and with it the opposition’s opportunity to make a critical assessment of a bill. At this juncture it is necessary to answer the basic question of whether it is or is not

in harmony with the principle of parliamentarianism to have a situation in which the majority in the second assembly of Parliament can, by their decision, block the public consideration of a bill, and thereby preclude the free parliamentary expression of the minority. In the case under adjudication, the principles of the mutual relations of the two chambers in the constitutional design of the Parliament of the Czech Republic stands in collision with the characteristics of the democratic functioning of Parliament couched in this manner, that is, with the right of the parliamentary minority freely to express its views on the content of statutes within the context of the consideration of them.

At this juncture, we cannot fail to point out that the bi-cameral structure of the Parliament of the Czech Republic is also an expression of the principle of the separation of powers within the legislative power. With the purpose of ensuring that the separation of powers genuinely functions, differing electoral systems were enshrined in Art. 18 paras. 1 and 2 of the Constitution, with the objective of thereby bringing about dissimilar political structures in the two chambers, that is, the state of affairs in which the Senate did not become merely a political copy of the Assembly of Deputies, and thus is able genuinely to fulfill the function of a check and a counterweight within the legislative power. In a constitutional model conceived in this way, the abuse of the institute of not dealing with a bill when it is considered before the Senate does not at present appear to be a real contingency. A different situation would arise, however, in the case that the Constituent Assembly's original intention is not realized and, in terms of its political structure, the Senate becomes a mere copy of the Assembly of Deputies. However much this observation appears rather as a contemplation de constitutione ferenda, in extreme cases (that is, in cases of the repetition and abuse of this manner of proceeding, directed in its effects at excluding Parliament's second chamber from genuine participation in the adoption of statutes), it could even become the basis for interpreting the relevant provisions of the Constitution and give rise to derogational grounds for the violation of the constitutional standards for the adoption of statutes.

In a system in which the Assembly of Deputies enjoys a dominant position in the legislative process, while the constitutional and statutory standards for the consideration of bills excludes the possibility to restrict parliamentary discussion in the Assembly of Deputies; further in a situation where, in the given matter, the Bill was considered by three committees of the Senate and the actual content of the debate on the motion not to deal with the Act on the Stabilization of Public Budgets, on the part of the caucus chairpersons, was for the most part the content of the Bill itself; and finally, in a situation in which there has as yet not been a repeated process signalling the effort by the parliamentary majority to exclude the Parliament's second chamber from genuine participation in the adoption of statutes, in the matter at issue one cannot spot in the manner in which the Senate proceeded pursuant to Art. 46 para. 2 of the Constitution and § 107 of Act No. 107/1999 Sb., on the Standing Orders of the Senate, a violation of the principle of parliamentary democracy. One can spot therein rather a manifestation falling within a field which is already removed from the field of constitutional review, that of the level of democratic political culture of the Senate majority.

X./c

On the Objections that the Proposed Amendments Lacked a Close Relation to the Subject-Matter of the Act and that the Statutory Framework for the Submission of Technical Legislative Proposals during the Third Reading of a Bill Has Been Exceeded

In relation to the following provisions of Act No. 261/2007 Sb., the petitioner objects that, as regards the following provisions, the proposed amendments lack a close relation to the subject-matter of the Act itself:

- in Part Four (the Amendment to the Act on Value-Added Tax) in Art. VIII, in relation to points 1, 3, 4, 5 and 15 to 21,
- in Part Five (the Amendment to the Act on Accounting) in relation to Arts. LXXVIII and LXXIX.

In the first instance, in support of this line of argument, the petitioner draws our attention to the fact that the proposed amendment introduced during the second reading of the Bill by Prime Minister, M. Topolánek, contains the addition of a new subject of value-added tax – a group of persons registered as taxpayers by means of group registration (points 4, 5, 15 to 21 of Art. VIII of Act No. 261/2007 Sb., which amended and supplemented Act No. 235/2004 Sb., on Value-Added Tax, as subsequently amended, namely in § 5a to 5c, § 28 para. 11, § 93a, § 95a, § 99 para. 11, § 100 para. 5, § 105 para. 2, § 106a, and § 107 para. 3). In the second instance, the second secondary party adds as an objection its conviction that the Act on Accounting is not a legal enactment which could in any manner relate to the reform of public finance, rather it is a statute which governs, in particular, the techniques of accounting, not a statute intruding into the system of taxes or influencing the expenditures in the state budget.

In its Judgment No. Pl. ÚS 77/06, the Constitutional Court formulated standards for the constitutionally-conforming interpretation of § 63 paras. 1 to 5 of Act No. 90/1995 Sb., on the Standing Orders of the Assembly of Deputies, which governs the right to submit proposed amendments to a bill under consideration. In this connnection, the Court emphasized the condition of a close relation between the subject-matter of a bill which is just then going through the legislative process and a proposed amendment submitted in the second reading of the bill. In that decided matter, the Assembly of Deputies considered the bill of Deputies M. Hašek, M. Kraus and J. Dolejš for the issuance of an act which amends Act No. 178/2005 Sb., on the Dissolution of the Fund of National Property of the Czech Republic and on the Competence of the Ministry of Finance in the Privatization of the Property of the Czech Republic (Act on the Dissolution of the Fund of National Property) (Assembly Print No. 1222/0). In the second reading of the Bill at issue, a proposed amendment was put forward by Deputy M. Doktor and incorporated into Print No. 1222/3, which added to the Bill‘s original title the words, ” . . . and Act No. 319/2001 Sb., which Amended Act No. 21/1992 Sb., on Banks, as subsequently amended“, and which inserted after Art. I of the Bill a new Part Two, which, including the heading, read as follows: „PART TWO – The Amendment of Act No. 319/2001 Sb., on Banks“, and which contained a provision amending and supplementing the legislative scheme on the disbursement of supplementary compensation from the Depositor Insurance Fund. The vote on this proposed amendment was then held in the 3rd reading, on 23 May 2006 at the 56th Session,

as serial number 16, when 142 of the 167 Deputies present voted in favor of its adoption, with three against. Thereafter the amended bill was approved by the Assembly of Deputies (Resolution No. 2470). This means of proceeding resulted in the creation of a situation where the original bill contained an amendment to § 5 para. 3, lit. j) of Act No. 178/2005 Sb., on the Dissolution of the Fund of National Property, according to which property designated for privatization, the proceeds from the sale of this property, and the profit from the state's participation in commercial companies could also be used to transfer 2 billion Czech Crowns to the Ministry of Labor and Social Affairs in support of the renovation of retirement homes; however, the proposed amendment contained legal rules from an entirely different area, namely, rules on the disbursement of supplementary compensation from the Depositor Insurance Fund. In other words, the subject-matter of the bill was the issue of the purposes for which money from the Fund of National Property could be employed, and the subject-matter of the proposed amendment was an entirely distinct issue, namely, the disbursement of compensation from the Depositor Insurance Fund in banks.

The matter being decided is not a case of such a deviation from the subject-matter of the originally submitted bill.
If the argument is made, as it is in the case of the first petitioner, that the proposed amendment, introduced by the Prime Minister, M. Topolánek, during the second reading of the Bill, introduced a new subject of value-added tax - the group of persons registered as taxpayers by means of group registration (points 4, 5, and 15 to 21 of Art. VIII. of Act No. 261/2007 Sb., which Amended and Supplemented Act No. 235/2004 Sb., on Value-Added Tax, as subsequently amended, in particular in § 5a to 5c, § 28 para. 11, § 93a, § 95a, § 99 para. 11, § 100 para. 5, § 105 para. 2, § 106a, and § 107 para. 3), it was a case that differed from the matter adjudicated in Judgment No. Pl. ÚS 77/06. The proposed amendment did not depart from the framework of the original bill under consideration, which was an amendment and supplement to the Act on Income Tax.

An analogous finding applies in relation to the objection of the second secondary party, to the effect that the Act on Accounting, which governs, in particular, the techniques of accounting and which neither intrudes into the system of taxes nor influences the expenditures in the state budget, is not a legal enactment which could in any manner relate to the reform of public finance.

At the joint session of the Assembly of People and the Assembly of Nations of the Federal Assembly, held on 12 December 1991, the Deputy Prime Minister and Minister of Finance of the CSFR, Václav Klaus, formulated the purpose and significance of the Act on Accounting as follows: „The Act on Accounting lays down the extent and manner for conducting accounting and its cogency for all legal persons as well as for natural persons who engage in entrepreneurial or other gainful activity in accordance with separate legal enactments, if for tax purposes they demonstrate, in addition to their income, also their expenditures based on the attainment, securing, and maintenance of that income. Among the natural persons who engage in entrepreneurial or other gainful activity, the Act does not apply to those who are assessed income tax of inhabitants by a lump sum or for whom tax is assessed by the deduction of expenditures set as a percentage of their income in accordance with the Tax Act. These persons are thus subject to the obligation

imposed upon them solely by tax organs in accordance with legal enactments on tax.“ (See the digital archive of the Assembly of Deputies of the Parliament of the Czech Republic).

The purpose of the Act at issue is also analogously defined in the jurisprudence: „Accounting by tax subjects duly conducted and submitted within the framework of a tax proceeding to the tax administrator constitutes a basic form of direct evidence for the assessment of income tax. In the case the accounting is incomplete, then, the tax subject must, as part of his evidentiary burden, produce such evidence as would make up for that lack of completeness in his accounting and which would incontestably corroborate all income and expenditures which the tax subject declared in his tax return. Such is the case because the facts relating to the amount of taxable income is demonstrated by the tax subject through the accounting which he is obligated to keep, if for tax purposes he asserts and demonstrates his expenditures based on the attainment, securing, and maintenance of that income.“ (Decision of the Regional Court in Hradec Králové, No. Ca 25/2005 of 31 October 2005.)

If duly conducted accounting is a basic prerequisite for the fulfilment of tax obligations, and if the amendment to the Act on Accounting under review lays down a definitional characteristic of the legal definition of the group of natural persons who are entrepreneurs and who are not inscribed in the Commercial Register, then for the purposes of conducting accounting in accordance with Act No. 563/1991 Sb., as subsequently amended, one cannot fail to acknowledge the close relation, in Act No. 261/2007 Sb., between the tax and the accounting rules.

The petitioner also includes, among the procedural errors relating to individual parts, alternatively provisions, of the Act on the Stabilization of Public Budgets, a breach of the statutory framework for the submission of technical legislative motions during the third reading of a bill.

According to § 95 para. 2 of Act No. 90/1995 Sb., in the third reading a debate shall be held in which can be proposed solely corrections of technical legislative errors, grammatical errors, or spelling or printing errors, modifications which logically follow from the proposed amendments.

In the third reading of the Government Bill for the adoption of the Act on the Stabilization of Public Budgets (Print 222), held on 21 September 2007, Deputy Daniel Rovan submitted in relation to that part of the Act, the constitutional review of which forms the subject of this proceeding before the Constitutional Court, according to his own designation, „a technical legislative proposed amendment“: „[It] concerns the specification of point 7 of Part Six of Print 222. Point 7 should correctly read – and I quote: In § 13a para. 2, lit. d), after the first word, ‚tax‘, shall be added the words ‚if a municipality thus provides, by means of a generally binding municipal ordinance under § 4 para. 1, lit. v) or‘, which incoroporates the word, ‚first‘, into the existing text, in view of the fact that the word, tax, appears in the text three times in total.“ (see the stenographic record of the 18th Session of the Assembly of Deputies of the Parliament of the Czech Republic, held on 21 September 2007, www.psp.cz).
In terms of its content, the cited proposal can be assessed as the correction of

legislative-technical errors, and thus as a proposal which did not overstep the bounds laid down in § 95 para. 2 of Act No. 90/1995 Sb.

X./d

On the Objection that the Government's Legislative Rules Have Been Violated

The petitioner further objects to a violation of the Government's legislative rules in those parts of the Act at issue which represent an original, new (non-amending) legal enactment.

The Constitutional Court formulated, in its Judgment No. Pl. ÚS 7/03 (Collection of Decisions, Volume 34, Judgment No. 113, published as No. 512/2004 Sb.), the test for assessing this type of procedural objections in norm control proceedings. In that Judgment it declared that the violation of legislative rules, without more, that is, without a violation of the competence prescribed by the Constitution and by statute, alternatively without a violation of the constitutionally-prescribed manner for the adoption and issuance of a statute, or other legal enactment, would not give rise to grounds for derogation under § 68 para. 2 of Act No. 182/1993 Sb. due to a failure to observe the constitutionally-prescribed manner for the adoption of statutes or other legal enactments.

A departure from the methodical rules for the classification of legal enactments, pursuant to Art. 28 of the Government's Legislative Rules, adopted by the 19 March 1998 Government Resolution No. 188, would bring about a conflict with the constitutional principle of the law-based state only in the case that it would not allow for a legal enactment (statute) to be precisely identified by the designation employed by the legislature, distinguishing it from other legal enactments (statutes), or other legal enactment (statute).

As regards Parts Forty-Five to Forty-Seven (Arts. LXXII to LXXIV) of Act No. 261/2007 Sb., however, this is not such a case. All of the statutory provisions contained therein are designated in a manner that is definite and identifiable without confusion within the system of the legal order.

XI.

The Substantive Conformity of the Contested Statutory Provisions with the Constitutional Order

In its constant jurisprudence the Constitutional Court has asserted that the amendment of a legal enactment does not have separate normative existence, rather it becomes a part of the amended legal enactment [Judgment No. Pl. ÚS 5/96 (Collection of Decisions, Volume 6, Judgment No. 98, published as No. 286/1996 Sb.), Ruling No. Pl. ÚS 25/2000 (Collection of Decisions, Volume 19, Ruling No. 27), Judgment No. Pl. ÚS 21/01 (see above), and Judgment No. Pl. ÚS 33/01 (Collection of Decisions, Volume 25, Judgment No. 28, published as No. 145/2002 Sb.)], and as such, its constitutionality is adjudged. If, in a norm control proceeding, the grounds for derogation are either the lack of norm-creation competence or the violation of the constitutionally-prescribed manner of adopting

the legal enactment, then the constitutionality of the entire amending act is adjudged [see Judgments No. Pl. ÚS 5/02, and No. Pl. ÚS 7/03 (see above)].

In keeping with the cited constant jurisprudence, in the given matter solely the following provisions form the subject of substantive review:
- Part Forty-Five (Tax on Natural Gas and other Types of Gases);
- Part Forty-Six (Tax on Solid Fuels);
- Part Forty-Seven (Tax on Electricity) of Act No. 261/2007 Sb.;
- § 6 para. 4, first sentence, § 6 paras. 13 and 14, § 7 para. 8, first sentence, § 16, § 21 para. 1, and § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb.
Seeing as the first secondary party introduced, at the oral proceeding, the fact that, according to Act No. 261/2007 Sb., a new subject of value-added tax – a group of persons registered as taxpayers by means of group registration – does not possess legal personality, still the petitioner did not expand the relief requested in the petition, which, in agreement with the above-cited maxim, the line of argument would explicitly convey.

However much, the Constitutional Court has repeatedly emphasized that, in assessing the conflict of a statute, or individual provisions thereof, with the constitutional order, it is bound only by the requested relief [the petit], but not by the reasoning given therefore [Judgment No. Pl. ÚS 16/93 (Collection of Decisions, Volume 1, Judgment No. 25, published as No. 131/1994 Sb.) and others], the conclusion does not follow therefrom that the petitioner in a norm control proceeding, if it argues on the basis of the substantive non-conformity of a statute with the constitutional order, is not charged with the burden of assertion. In other words, should a petitioner object to an act‘s substantive conflict with the constitutional order, for the purposes of constitutional review, the mere designation of the act (or individual provisions thereof) proposed for annulment is not sufficient, rather it is also indispensable on the petitioner’s part to state the grounds for objecting to its constitutionality. Within the context of a norm control proceeding then, the Constitutional Court then is not bound by these grounds - it is bound solely by the requested relief [the petit], not however by the breadth of review as would be set by the grounds contained in the norm control petition. Should the petitioner in a norm control proceeding fail to meet the burden of asserting unconstitutionality, then there is no option other than to consider such a petition as inconsistent with § 34 para. 1 of the Act on the Constitutional Court, thus not eligible for consideration on the merits (see Judgment No. Pl. ÚS 7/03).

The implications of the mentioned maxim apply fully to those parts of the requested relief in which the petitioners (secondary parties) seek the annulment of Part Forty-Five, Part Forty Six, and Part Forty-Seven of Act No. 261/2007 Sb. Thus, apart from procedural objections in relation to these parts of the Act, they did not raise any substantive criticisms.

XI./a

Proposed points in relation to the Act on Income Tax
In contrast to Part Forty-Five, Part Forty Six, and Part Forty-Seven of Act No.

261/2007 Sb., in relation to § 6 para. 4, first sentence, § 6 paras. 13 and 14, § 7 para. 8, first sentence, § 16, § 21 para. 1, and § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., the petitioner made specific objections as to how their content conflicts with the constitutional order.

It calls attention to the fact that up until now income tax has been calculated from individual incomes after deducting social security insurance premiums, which comprise insurance premiums for pension insurance, insurance premiums for sickness insurance, and contributions to the state employment policy (paid in accordance with Act No. 589/1992 Sb., on Social Security Premiums and Contributions to the State Employment Policy, as subsequently amended), and insurance premiums for public health insurance (paid in accordance with Act No. 592/1992 Sb., on Premiums for Universal Health Care, as subsequently amended); this principle applied both for income from independent activities and job perquisites (§ 6 of Act No. 586/1992 Sb.), and income from entrepreneurial and other independent gainful activity (§ 7 of the cited act). Thus only that income was taxed which individuals had at their disposal after the deduction of insurance premiums manditorily levied into the public systems of social and health insurance.

According to the petitioner, up until Act No. 261/2007 Sb. was adopted, the payment of these insurance premiums was regarded such that they were not a component of the base for the calculation of income tax (§ 6 para. 13, § 7 paras. 6, 7 and 10 of the Act on Income Tax, in the version valid until 31 December 2007), as they are not income of natural persons, rather it concerns their participation in maintaining the systems of public insurance, or the system of benefits guaranteed by the state. According to the petitioner, the contested statutory arrangement creates a fiction that insurance premiums payed out constitute income, alternatively a part of the income of natural persons in the wider sense of the word. Apart from conflict with Arts. 30 and 31 of the Charter and with the Social Security (Minimum Standards) Convention (No. 102) (Federal Ministry of Foreign Affairs Notice No. 461/1991 Sb.), with the European Social Charter (Ministry of Foreign Affairs Notice No. 14/2000 Sb., Collection of International Agreements) and the European Code of Social Security (Ministry of Foreign Affairs Notice No. 90/2001 Sb., Collection of International Agreements), in this connection the petitioner objects also to the conflict with the principle that law be comprehensible and cognizable, the fulfillment of which is one of the basic presuppositions of the existence of the law-based state.

Apart from the levy for insurance premiums paid from the income of natural persons, especially in the case of income tax from independent activities and job perquisites, the employers also pay further levies into the public systems of social and health insurance. In describing their legal nature, the petitioner emphasized that levies upon employers do not constitute a component of employers‘ income and are only indirectly related to employees‘ incomes. In the situation where since 1 January 2008 not only are obligatory levies into the system of health and social security taxed, but so are payments which are imposed upon employers [§ 6 paras. 13 and 14, § 38h para. 1, lit. b) of Act No. 586/1992 Sb.], thus, the new statutory rules count, for taxation purposes, the levied insurance premiums, as well as payments imposed upon employers, as part of natural persons‘ income. According

to the petitioner, levies imposed on employers have nothing in common with employee income and are not a part of the employment contract, since this is a public-law obligation imposed upon employers by law by means of which employers share in the maintenance of the systems of public insurance. The mentioned assertion rests also on the reference to § 2 of Act No. 589/1992 Sb., on Insurance Premiums for Social Security and Contributions to the State Employment Policy, in its current wording, according to which insurance premiums are revenue to the state budget, from which can be deduced that, in the case of levies upon employers, this is the transfer of financial means directly to the state, moreover from its own income, not from the income of employees, therefore in the given case this is an act founded on bilateral public-law relations between employers and the state, to which employees are not a party. The mentioned legal construction which, according to the petitioner, gives rise to unequal positions, in which a subject, who is in no manner connected with the object of taxation, is compelled to pay a tax, is regarded as in conflict with the principle of equality (Arts. 1 and 3 of the Charter) and the principle of the minimum rationality and justice of legal enactments, which is a further prerequisite of the existence of the law-based state (Art. 1 of the Constitution).

According to the petitioner, the taxation of insurance premiums paid by natural persons and of levies paid by the employer cannot be regarded as taxation of income which arises in the future, since no „direct connection exists as to the mutual amounts and periods of levying“ (there is not even any guarantee that the specific insured person will gain a claim to pensions payments at all, that is, whether he will attain in the future the income for which he is being taxed in the present) between the levying on insurance premiums and possible future income in the form of certain of the pensions or health care, health aides, or medicinal preparations. In this connection, it is objected that the contested statutory construction is in conflict with the fundamental principle of the taxation of income, according to which taxation occurs at the moment income comes into being, and not prior thereto. According to the petitioner, the statutory framework at issue employs terminology which does not correspond to the current state of affairs, it clouds the existing clarity of conceptual phrases, since in places where, in the case of levies upon insurance premiums to the system of health and social security, it speaks of taxable income, in reality it is a tax on health and social insurance, which, according to it, erases the fundamental difference between the systems of taxes and fees, which have their constitutional foundation in Art. 11 para. 5 of the Charter, and the systems of public social and health insurance, which rest on Arts. 30 and 31 of the Charter.

The petitioner further objects that § 16 and § 21 para. 1 of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., are unconstitutional on the grounds of their indefiniteness, giving rise to conflict with the principle of the law-based state.

Points 49 and 50 of Art. I of Act No. 261/2007 Sb. amend the same provisions of the Act on Income Tax (§ 16), while the otherwise identical text contains a different tax rate – point 49, a rate of 15 % of the tax base, and point 50, a rate of 12.5 % of the tax base. In the sense of potential means of proceeding, the petitioner is contemplating the possibility, when interpreting, to accord the mentioned point 50

priority, namely proceeding from the argument lex posterior derogat legi priori.

According to point 64 of the same article, in § 21 para. 1 of the Act on Income Tax, the number, „24“, is replaced by the number, „21“, in point 65 of the same provision of the Act on Income Tax the number, „21“, is replaced by the number, „20“, and in point 66, again of the same provision, the number, „20“, is replaced by the number, „19“. Then according to Art. LXXXI point 1, lit. c) of Act No. 261/2007 Sb., Art. I, point 65 of the mentioned Act comes into effect on 1 January 2009, and according to Art. LXXXI point 1, lit. e) of Act No. 261/2007 Sb., Art. I point 66 of the mentioned Act comes into effect on 1 January 2010. The petitioner asserts that these rules result in indefiniteness in determining at which rate legal persons will be taxed after 1 January 2008, when the Act contains no express provisions on the issue.

XI./b
The Wording of the Contested Provisions from the Act on Income Tax

It was already mentioned that, in the relief requested in its petition [petit], the petitioner seeks the annulment of § 6 para. 4, first sentence, § 6 paras. 13 and 14, § 7 para. 8, first sentence, § 16, § 21 para. 1, and § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb.

The first sentence of § 6 para. 4 of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb. provides: „Income billed or paid by an employer with its headquarters or residence within the Czech Republic and income from taxpayers as defined in § 38c are, after the increase under paragraph 13, a separate tax base for the assessment of tax collected by withholding at a tax rate under § 36 para. 2, if it is income under paragraph 1, lit. a) and d) and under paragraph 10, the aggregate amount of which, prior to the increase under paragraph 13, does not exceed, in relation to the same employer, the amount of 5000 Czech Crowns per calendar month.“

Sec. 6 paras. 13 and 14 of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., provide:
„(13) The tax base (partial tax base) comprises incomes from independent activities or job perquisites with the exceptions given in paragraphs 4 and 5, increased by an amount corresponding to the insurance premium for social security and the contribution to the state employment policy, the insurance premium for universal health insurance, which is from among those incomes which the employer on his own is obligated to pay, pursuant to separate legal enactments, and to which applies mandatory foreign insurance of the same type, increased by an amount corresponding to the employer’s contribution to the foreign insurance.

(14) If it is income flowing from sources abroad, then, in the case of taxpayers mentioned in § 2 para. 2, the tax base is their income from independent activities performed in a state with which the Czech Republic has not concluded a treaty limiting double taxation, increased by an amount corresponding to the employer’s contributions to insurance manditorily paid pursuant to paragraph 13 and decreased by the tax paid abroad on this income. If the independent activity is

performed in a state with which the Czech Republic has concluded a treaty limiting double taxation, the tax base is the income from independent activities performed in that state increased by an amount corresponding to the employer's contributions to insurance manditorily paid pursuant to paragraph 13 and decreased by the tax paid abroad on this income, but only to the extent to which this tax was not, in the preceding tax period, included in the inland tax obligation pursuant to § 38f. "
The first sentence of § 7 para. 8 of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., provides: „If the taxpayer claims expenditures under paragraph 7, it is presumed that the amount of the expenditures includes all of the taxpayer's expenditures incurred in connection with earning income from entrepreneurial aktivity and from other independent gainful activity."

Sec. 16 of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., which is another of the contested provisions of that Act, provides: „Tax from the tax base reduced by the untaxable parts of the tax base (§ 15) and by the amounts deductible from the tax base (§ 34) rounded downward to the next whole hundred amount in Czech Crowns." Then § 21 para. 1 of the same act, provides: „The tax rate is 19 %, unless provided otherwise in paragraphs 2 and 3. This tax rate relates to the tax base reduced by the amounts in § 34 and § 20 paras. 7 and 8, rounded down to the next whole thousand Crown amount."

The wording of the last of the contested provisions, § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., reads as follows: „The taxpayer shall calculate the amount to be withheld from income of natural persons from independent activity and job perquisites from the base for the calculation of withholding. The base for the calculation of withholding is the aggregate of incomes from independent activity and job perquisites billed or paid to the taxpayer during a calendar month or during a tax period, with the exception of taxable income by taxes collected by withholding at the tax rate under § 36 and income which does not form the object of tax, increased by an amount corresponding to the insurance premium for social security and contributions to the state employment policy and insurance premium for universal health insurance (hereinafter „insurance premium") which, pursuant to separate legal enactments, the employer is obliged to pay on his own from billed or paid income and, in the case of employees to whom manditory foreign insurance of the same type applies, increased by an amount corresponding to the employer's contributions to this foreign insurance."

XI./c

The Object of Tax and the Tax Base for Income Tax in Relation to the Maxim of the Definiteness and Clarity of the Legal Order as a Component of the Principle of the Substantive Law-Based State

The first group of Constitutional Court decisions on the issue of the constitutionality of the legal framework for taxes and fees comprises its jurisprudence on the interpretation and application of Art. 11 para. 5 of the Charter in connection with the provisions of Art. 79 para. 3 and Art. 104 para. 3 of the Constitution in the matter of the limits of sub-statutory legal provisions on

taxes and fees [see especially Judgments No. Pl. ÚS 3/95 (Collection of Decisions, Volume 4, Judgment No. 59, published as No. 265/1995 Sb.), No. Pl. ÚS 63/04 (Collection of Decisions, Volume 36, Judgment No. 61, published as No. 210/2005 Sb.), No. Pl. ÚS 20/06 (published as No. 164/2007 Sb.)].

The second group comprises those reviewing the constitutionality of the legal framework for taxes, fees, or other analogous statutory provisions on obligatory charges (statutorily-prescribed obligatory insurance is also included within this framework), as well as for monetary sanctions. The Constitutional Court has adumbrated the following standards therefor [No. Pl. ÚS 3/02 (Collection of Decisions, Volume 27, Judgment No. 105, p. 177, published as No. 405/2002 Sb.), No. Pl. ÚS 12/03 (Collection of Decisions, Volume 32, Judgment No. 37, p. 367, published as No. 300/2004 Sb.), No. Pl. ÚS 7/03 (Collection of Decisions, Volume 34, Judgment No. 113, p. 184, published as No. 512/2004 Sb.)]: it follows from the constitutional principle of the separation of powers (Art. 2 para. 1 of the Constitution), as well as from the constitutional delimitation of the legislative power (Art. 15 para. 1 of the Constitution), that the legislature enjoys wide latitude to decide as to the object, rate and extent of taxes, fees, and pecuniary sanctions. The legislature bears the corresponding political responsibility for the consequences of its decision-making. However much taxes, fees, or pecuniary sanctions are obligatory public law pecuniary performances to the state, and thus an intrusion into the property base, thus also of the proprietary rights of the obligated subject, they do not, without further conditions being met, represent an injury to the proprietary position protected by the constitutional order (Art. 11 of the Charter, Art. 1 of the Additional Protocol to the Convention). The constitutional review of taxes, fees, and pecuniary sanctions encompasses an assessment in terms of the observation of the standards flowing from the constitutional principle of equality, both non-accessory (Art. 1 of the Charter), that is flowing from the requirement excluding the arbitrary distinguishing of subjects and rights, and accessory to the extent laid down in Art. 3 para. 1 of the Charter (a hypothetical illustration of the violation of the standards of accessory inequality would be a rule distinguishing the level of tax in view of religious conviction, which would be discriminatory in the sense of Art. 3 para. 1 of the Charter and would at the same time intrude upon the fundamental right flowing from Art. 15 para. 1). If the subject of constitutional review is the accessory inequality vis-a-vis the prohibition of property discrimination, alternatively solely the factual adjudication of whether the taxes, fees, or pecuniary sanctions do not represent an injury to proprietary rights (Art. 11 of the Charter, Art. 1 of the Additional Protocol to the Convention), then such review is restricted to cases in which the extent of public-law monentary performance by the individual toward the state attains a strangling (throttling) effect on the individual's property base, in other words, if the taxes, fees, or pecuniary sanctions under adjudication have a confiscatory impact in relation to the individual's assets.

Finally the third group of decisions on the issue of the constitutionality of the legal framework for taxes, fees, or other analogous statutorily prescribed charges, is represented by the Judgment of the Constitutional Court of the CSFR No. Pl. ÚS 22/92 (The Collection of Rulings and Judgments of the Constitutional Court of the CSFR, No. 11, p. 37), which lays down the test for review of tax equality, or tax proportionality. The Court stated the following: „Not even the state's sovereignty

entails for it the possibility to impose arbitrary taxes, even if such were laid down in a statute . . . In the field of tax, it is necessary to require the legislative body to support its decision with objective and rational criteria. One cannot in principle rule out that the legislature lays down differential taxes according to the principle that higher taxes will be levied on the more effective subjects. It is not permissible to proceed in the contrary manner and place more burdens upon the economically and socially weaker subjects. It is up to the state, in the interest of its ensuring its own functioning, to decide that certain groups will be accorded less benefits than others. Not even in this respect, however, can it act arbitrarily." Then on the issue of whether decisions of the Constitutional Court of the CSFR are binding for its jurisprudence, the Constitutional Court of the Czech Republic, in Judgment No. Pl. ÚS 9/01 (Collection of Decisions, Volume 24, Judgment No. 192, published as No. 35/2002 Sb.), asserted the following: "The 'Constitutional Court of the CSFR' cannot be considered to be the 'Constitutional Court' under § 35 para. 1. of the Act on the Constitutional Court. A systematic interpretation of § 35 para. 1 of this Act leads to the conclusion that this provision has in mind only the Constitutional Court of the CR, as it is a component of that part of the Constitution of the CR which establishes the Constitutional Court of the CR. Thus, even though the judgments of the Constitutional Court of the CSFR do not create for the Constitutional Court of the CR the formal obstacle of an already decided matter, they represent for it a real authority, based on the fact that the Constitutional Court of the CSFR was the 'judicial body for protection of constitutionalism' with jurisdiction in the Czech Republic, which this Court itself now is. The postulate of continuity of the protection provided, which is characteristic for the decision-making of a judicial body which steps into the place of a body which has ceased to exist or been annulled, has two aspects. On the one hand it permits the new court to diverge from the legal opinion of the preceding court if there has been a change in the circumstances under which that previous court made its decision, and on the other hand it requires it not to cast doubt on the decisions of the previous court if no such change in circumstances has occurred."

None of the proposed points objecting to the constitutionality of § 6 para. 4, the first sentence, § 6 paras. 13 and 14, § 7 para. 8, the first sentence, and § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., can be brought within the framework thus indicated for the constitutional review of the legal framework for taxes, fees, or other analogous statutorily-prescribed obligatory charges. It is thus necessary to respond to the question whether certain of these proposed points do not give rise to further derogational grounds in the matter of the constitutionality of the legal framework for taxes, fees, or other analogous statutorily-prescribed obligatory charges.

The categories of tax object and tax base are defined by legal theory in the following manner: „The tax object is an economic fact on the basis of which it is possible to lay a tax obligation upon taxpayers. It can be a certain income, object, transaction or property. The tax object also determines the name of the tax (for ex., income tax, land tax, construction tax). The determination of the tax object is the starting point for setting the tax base. The tax base is in money, alternatively a tax object set in some other way, from which the tax is measured. Whereas the tax object tells us the purpose for which the tax obligation was set, the tax base determines what the tax is measured from. The objective of the determination of the tax base is to establish the overall amount of the taxable object." (M. Bakeš et al., Financial Law, 4. Ed., Prague 2006, p. 194).

The Act on Income Tax, as amended by Act No. 261/2007 Sb., defines by legal definitions the basic components of the income tax structure. The objects of income tax on natural persons are the incomes from independent activities and job perquisites [§ 3 para. 1, lit. a) of the mentioned act], and the tax base is comprised of incomes from independent activities or job perquisites, increased by an amount corresponding to the insurance premium on social security and the contribution to the state employment policy and insurance premium for universal health insurance which, in accordance with separate legal enactments, the employer on its own is obliged to pay from these incomes (§ 6 para. 13 of the given act).

The base of assessment for sickness insurance, pension insurance, and the levy for the state employment policy, both for employees and for employers, is the aggregate of incomes which are the subject of income tax on natural persons pursuant to the Act on Income Tax [§ 5 para. 1, § 5a lit. a) and b) of Act No. 589/1992 Sb., as subsequently amended]; the base of assessment for public health insurance is an analogous aggregate of incomes from independent activities and job perquisites which are the subject of income tax of natural persons pursuant to the Act on Income Tax (§ 3 para. 1, § 5 para. 1 of Act No. 592/1992 Sb., as subsequently amended; § 9 para. 2 of Act No. 48/1997 Sb., on Public Health Insurance).

In other words, sickness insurance, pension insurance, levies for the state employment policy, as well as from public health insurance, are calculated from the „gross“ salary; income tax, on the other hand, is calculated from a different object, from the „super-gross“ salary, encompassing, apart from the „gross“ salary, also the levies upon the employer and the employee for sickness insurance, pension insurance, the state employment policy and the public health insurance. The base for the calculation of income tax is thus also an object other than the statutorily-prescribed object of income tax; in terms of the actual object, the tax regulated by Act No 592/1992 Sb., as subsequently amended, is thus an income tax on independent activity and job perquisites and on levies for sickness insurance, pension insurance, the state employment policy and the public health insurance. In this connection, one cannot accept the counterargument that the levies for sickness insurance, pension insurance, the state employment policy and the public health insurance represent potential future taxpayer income. If such an interpretation were accepted, then taken to its absurd conclusion, even tax (for ex. income tax) could be regarded as an income, since they are used to finance public goods, in whose enjoyment the tax subject would potentially share in the future.

It is necessary at this juncture to react to the objection that the mentioned arbitrariness of the legislature in the treatment and definition of statutory terms gives rise to conflict with the principle of the substantive law-based statute on the grounds of indefiniteness and lack of clarity.
According to the Constitutional Court’s constant jurisprudence, „the indefiniteness of certain provisions of legal enactment must be considered as in conflict with the requirements of legal certainty, thus even of the law-based state (Art. 1 para. 1 of the Constitution), only in the case that the intensity of that indefiniteness excludes the possibility of their normative content being established with the aid of customary interpretive approaches.“ (Judgments No. Pl. ÚS 4/95, No. Pl. ÚS 9/95,

No. Pl. ÚS 2/97, No. Pl. ÚS 23/02, No. Pl. ÚS 40/02, No. Pl. ÚS 44/02, No. Pl. ÚS 10/06, and No. Pl. ÚS 25/06 – see above).

The requirement of definiteness of tax provisions in statutes is found also in economic scholarship. Karl Engliš wrote: „if it is required for tax obligations to be prescribed in a statute, protection is sought for the taxpayer from arbitrariness by the public authorities, thus, there is naturally also the requirement for this obligation to be prescribed definitely, in a manner excluding arbitrariness, definitely as regards the obliged subjects, the base of the tax and payment obligation, its extent and period.“ (K. Engliš, The National Economic System, Vol.. II., Prague 1937, p. 193; id., Financial Theory – The Outline of Economic Theory of Public Authorities, Brno 1929, p. 196).

However much we cannot but agree with the petitioner that, in Act No. 592/1992 Sb., as amended by Act No. 261/2007 Sb., the legislature made arbitrary use of the categories of tax object and tax base, and in consequence thereof the Act in question ushers in a tax the actual subjects of which are not only income from independent activity and from job perquisites, rather also levies on sickness insurance, pension insurance, on the state employment policy, and on public health insurance, despite the fact that the legal rules under adjudication do not give rise to indefiniteness which would exclude the possibility to establish its content by the usual interpretive methods (or the determination of the base and rate of tax).

It it necessary to react to the implications which flow from the preceding considerations. Is it constitutionally acceptable to tax any sort of subject? Should the legislature, in its statutory arrangement, depart from the traditional conceptual framework for income tax, that would be in conflict with the constitutional order solely in the case that such construction should have a confiscatory impact, if it should be exceedingly disproportionate, alternatively if it were indefinite to such a degree as to exlude the determination of its content by the usual interpretive methods. None of these alternatives, which would give rise to a derogational ground, was met in this case, especially in view of the income tax rate under Act No. 586/1992 Sb., as amended by Act No. 261/2007 Sb.

There remains only to make a side note or, in judicial language, obiter dictum. The taxation of taxes, fees, or other analogous statutorily-prescribed obligatory charges is certainly at the present time an „original“ thought. This calls to mind one of history’s famous taxes, that of the Roman Emperor, Vespasian, who in reaction to the criticism of his son, Titus, relating to its lack of dignity, uttered the famous phrase: „Pecunia non olet.“ [Translator’s Note: This Latin phrase means “Money does not smell”.]

XI./d

The Objection of Technical Legislative Defects

If the petitioner objects that § 16 and § 21 para. 1 of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb., are unconstitutional, namely on the grounds of their indefiniteness, which gives rise to a conflict with the principle

of the law-based state, then Court cannot agree with its arguments.

Points 49 and 50 of Art. I of Act No. 261/2007 Sb., which amend the same provisions of the Act on Income Tax (§ 16) – the otherwise identical text contains a different tax rate (point 49, a rate of 15 % of the tax basis, then point 50, a rate of 12.5 % of the tax basis), whereas according to Art. LXXXI para. 1 of Act No. 261/2007 Sb., § 16 of Act No. 586/1992 Sb., as amended by Art. I, Point 49 of Act No. 261/2007 Sb., enters into effect on 1 January 2008, then according to Art. LXXXI para. 1, lit. c) of Act No. 261/2007 Sb., § 16 of Act No. 586/1992 Sb., as amended by Art. I, Point 50 of Act No. 261/2007 Sb., enters into effect only as of 1 January 2009. Due to these facts no indefiniteness arises between Points 49 and 50 of Art. I of Act No. 261/2007 Sb.

As has already been mentioned, according to Point 64 of the same Article, in § 21 para. 1 of the Act on Income Tax, the number, „24“, is replaced by the number, „21“, in Point 65 the number, „21“, is replaced by the number, „20“, in the same provision of the Act on Income Tax, and in Point 66, the number, „20“, is replaced by the number, „19“,.again in the same provision. Then according to Art. LXXXI point 1, lit. c) of Act No. 261/2007 Sb., Art. I, Point 65 of the mentioned Act comes into effect on 1 January 2009, and according to Art. LXXXI point 1, lit. e) of Act No. 261/2007 Sb., Art. I, Point 66 of the mentioned Act comes into effect on 1 January 2010. The rate at which legal persons will be taxed after 1 January 2008 is at the same time determined by Art. LXXXI para. 1, according to which § 21 para. 1 of Act No. 586/1992 Sb., as amended by Art. I, Point 64 of Act No. 261/2007 Sb., enters into effect on 1 January 2008; therefore, not even in this case have the statutory provisions given rise either to any indefiniteness or any gaps in the setting of the date of entry into effect.

XII.

Proceeding from all the grounds discussed, the Constitutional Court has rejected on the merits [§ 70 para. 2 of Act No. 182/1993 Sb.] the proposed annulment of Part One, Part Two, Part Three, Part Four, Part Five, Part Six, Part Seven, Part Eight, Part Nine, Point 1 in Art. XVII of Part Ten, Part Eleven, Part Twelve, Part Thirteen, Part Fourteen, Part Forty-Five, Part Forty-Six, Part Forty-Seven, Part Fifty, Part Fifty-One, and Part Fifty-Two of Act No. 261/2007 Sb., and the proposed annulment of § 6 para. 4, first sentence, § 6 paras. 13 and 14, § 7 para. 8, first sentence, § 16, § 21 para. 1, and § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as subsequently amended.

Notice: A decision of the Constitutional Court cannot be appealed. (§ 54 para. 2 of the Act on the Constitutional Court).

Brno, 31 January 2008

The Dissenting Opinion of Constitutional Court Justices Pavel Rychetský and Jan Musil

We do not agree either with the statement of judgment or with the reasoning of Judgment No. Pl. ÚS 24/07. Pursuant to § 14 of Act No. 182/1993 Sb., on the Constitutional Court, as subsequently amended, we file an opinion dissenting from the Judgment, for which we give the following reasons:

1. We are of the view that Act No. 261/2007 Sb., on the Stabilization of Public Budgets, was not adopted in the constitutionally-prescribed manner. The consideration of the Bill in the Parliament of the Czech Republic was marked by several defects, which are of constitutional dimension.

2. The Bill submitted by the Government affected a broad and bright palette of statutes, no part of which can be classified under a unifying idea. The Government Bill is rather a conglomerate of all possible legal rules. Alone the designation of the proposed act as an „Act on the Stabilization of Public Budgets" is misleading – in reality a considerable part of the provisions of this Act bear either no or a negligible connection to the stabilization of public budgets. Not even the most controversial novelties introduced by this new statutory regulation, that is the regulation of fees in health care, have no direct connection with public budgets – they concern the receipts of health care facilities, the predominant portion of which are private. The changes in the staffing of organs of the Universal Health Insurance Company of the CR (Part Forty-Two of the Act), for ex., bear no relations whatsoever to public budgets, nor do the amendments to the Labor Code, for ex. in the content of the confirmation of employment in § 313 para. 1 (Part Twenty-Seven, Art. XLI of the Act), changes in the Act on Electronic Communications (Part Forty-Four of the Act), or the repeal of the Act on Cash Desks Subject to Registration (Part Seven of the Act), etc.

3. The subject matter of the legal rules are matters which in substance do not relate to each other and which it would be appropriate to regulate entirely separately. This is quite evident in those parts of the Act relating to ecological taxes (Part Forty-Five of the Act – „Tax on Natural Gas and other Types of Gases"; Part Forty-Six – „Tax on Solid Fuels"; and Part Forty-Seven – „Tax on Electricity"). The inclusion of what are, in the substantive sense, three new statutes into one collective statute is a serious violation of the legislative directive (Government's Legislative Rules). At the same time, they have in part the character of „concealed legislation" (see Constitutional Court Judgment No. 37/2007 Sb.), as the title of the Act does not express its actual content.

4. We find to be constitutionally defective the manner in which extensive substantively unrelated proposed amendments („limpets", which are characterized in Constitutional Court Judgment No. Pl. ÚS 77/06) were submitted and considered. This occurred during the detailed debate in the second reading of the Bill in the Assembly of Deputies with the submission of proposed amendments by Deputies Mirek Topolánek and Petr Tluchoř. The amendments were very voluminous – Mirek Topolánek's amendments contained 81 changes on 37 pages of text; Petr Tluchoř's proposed amendments cover 14 pages of text. The submitted proposed amendments were in no way substantiated and, as is customary in the case of

Assembly amendments, they were not subject to the comment procedure, which is otherwise required for Government bills. The Deputies had only a very short time in which to become acquainted with them (five days prior to the start of the third reading). The proposed amendments contained extensive changes to the Government Bill, overstepped its original intent, and did not relate to the basic themes and objectives of the Act. These problems are manifested, for ex., in the the following points:
- the enlargement of the original Bill with additions to the Act on Public Health Insurance (Part Forty of the Act, Art. LXIV) in a new Part Six „The Regulation of Prices and the Reimbursement of Medicinal Preparations and Foodstuffs for Special Medical Purposes“, which introduces a new system of regulation of the price of medicines (Assembly Print No. 222/3, Proposed Amendment No. B14/8);
- amendments to the Act on Public Health Insurance (Part Forty of the Act), especially the introductory provisions (Proposed Amendment No. B14/1);
- amendments to the Act on Value-Added Tax (Part Four of the Act) supplemented by a provision on groups and group registration (Proposed Amendments Nos. B2/1 and B2/3);
- an amendment to the Act on Pension Insurance (Part Twenty-Four of the Act), which relates to taking into account, in the period for pension insurance, of the time devoted to care for handicapped children up to the age of 10 (Proposed Amendment No. B12);
- certain proposed amendments effected the amendment of statutes which were not even referred to in the Government Bill, specifically the amendment to the Act on the Competence of Czech Republic Organs in the Field of Prices (Part Forty-Eight, Proposed Amendment No. B16), the amendment to the Act on Prices (Part Forty-Nine, Proposed Amendment No. B16), and the Act on Accounting (Part Fifty, Proposed Amendment No. B17).

5. When the bill was considered in the Assembly of Deputies, the democratic rules on free and informed parliamentary debate were violated. Due to the extensive volume and complexity (as well as non-transparency) of the submitted proposed amendments, which were not substantively related to the Bill, there was no actual opportunity, in the Assembly of Deputies‘ Plenary Session during the second reading, either for serious debate on them or to oppose them effectively. Nor was opportunity to do so made available in the subsequent third reading, which is designated rather for eliminating technical legislative errors in a bill (§ 95 para. 2 of the Act on the Standing Orders of the Assembly of Deputies) and for the concluding vote. In this situation, prior to the approval the submitted Bill by the Assembly of Deputies, neither the Deputies, nor even citizens or interest groups, had the opportunity, while having sufficient information on the matter, to make their views known. One of the fundamental objectives of public parliamentary debate on bills was thereby disavowed. Without doubt that had negative impact on the opportunity for parliamentary debate, and the quality thereof, consequently also on the opportunity for, and quality of, public discussion, on the rights of interest group to have their opinions heard, and finally on the information of the public on ongoing political decisions. It thereby also resulted in a violation of the protection of the minority in political decision-making, enshrined in Article 6 of the Constitution.

6. If extensive and comprehensive proposed amendments are tabled by a Deputy, who is at the same time the Prime Minister, such a situation would thrust upon an objective observer justified doubts as to whether this approach did not result in the circumvention of the institute of legislative initiative under Article 41 para. 2 of the Constitution and the principle of collegial decision-making by the Government under Article 76 of the Constitution. Such a manner of proceeding makes it more difficult to recognize (both for the legislative organ and the citizens) what is the relevant will of the Government, a constitutional body. This approach (non-observance of the role and boundaries of the legislative and the executive powers in the legislative process) results in a violation of the principle of the separation of powers, which is an immanent principle of the democratic law-based state, protected by Article 1 para. 1 of the Constitution.

7. We are of the view that the manner in which Act No. 261/2007 Sb. was considered in the Senate of the Parliament of the Czech Republic, resulting in its decision not to deal with the Bill, was not in conformity with constitutional requirements.

8. The Senate's expression of intent not to deal with a bill is one type of resolution on the merits of a bill, provided for in Art. 46 para. 2 of the Constitution; there is no doubt that, as a general matter, this alternative for decision-making by the second chamber of the Parliament must be regarded as constitutionally-conforming. However, the question is whether the choice of this possible decision in a specific case can be entirely left to the unfettered discretion of the Senate and not subject to any objective and democratically revisable criteria. We believe that to countenance absolute license in the application of this alternative for decision-making by the Senate is not compatible with the constitutional principle of the democratic law-based state, expressed in the Preamble and in Article 1 para. 1 of the Constitution. By proceeding in such a capricious manner, the Senate would call into question the very reason for its own existence in a democratic parliamentary system.

9. We are convinced that in each individual case in which the Senate explicitly makes known its intention not to deal with a bill, there should exist an objective reason for the selection of this alternative for decision-making. The reason for choosing not to deal with an act should, during the course of its consideration in the Senate, be expressly and transparently made known so that it is accessible to external democratic review mechanisms. After all, only in that way would it be possible to prevent the abuse of this institute, for ex., to silence the opposition.

10. It must be acknowledged that to lay down generally in advance such objective criteria for the consideration of bills before the Senate is not simple and the advancement up till now of Czech parliamentarianism has not yet succeeded in reaching its definitive and explicit standardization. As this problem has been assessed in the expert literature, the purpose of several alternatives for the consideration of a bill before the Senate, which are provided in Art. 46 of the Constitution, is to allow for the separation of those bills which the Senate will give thorough consideration to, from those for which such consideration is not regarded as necessary (for ex., Kysela, J., Bi-Cameral Systems: Theory, History and Comparison of Bi-Cameral Parliaments, Prague, Eurolex Bohemia, 2004, pp. 477-

479).

11. We do not aspire to enounce categorical and exhaustive enumeration of the objective criteria for the mechanism for selecting the manner of considering bills in the Senate. It should rather be a task for the legislature de lege ferenda to find and lay down such criteria and then enshrine the applicable rules in the Standing Orders of the Senate. It would be desirable to lay down at the same time the procedure for such selection; discussions have weighed, for ex., a scheme for the preliminary selection of the manner of considering bills to be conducted in the guarantee committee or in the Senate caucuses.

12. Nonetheless, we believe that one of the indispensable objective criteria for decision as to whether the Senate should deal with a bill or not, is the substantive weight of the act under consideration and its significance in the state's legal system. The existing conventions in parliamentary procedure, which have been formed during the period of the Senate's existence, actually evince a stable trend toward dealing with important legislative enterprises having serious impact on citizens. During the first decade of the Senate‘s operation, 1081 bills were submitted to it, and resolutions not to deal with a bill have been adopted only in 244 cases (that is, in 23% of them). In the Senate's fifth electoral term (2004-6), of the 237 bills submitted to it, the Senate expressed its intention not to deal with a bill in a mere 30 instances (that is, about 13% of the time). In the year 2006, 126 bills were submitted to the Senate, which declined to deal with only 19 of them (that is, 15%). The Senate even dealt on the merits with such complicated reform bills as the acts adopted in connection with the creation of regions (Act No. 132/2000 Sb. and Act No 320/2002 Sb.), as it was acknowledged that they were important norms.

13. The failure to respect this criterion of the significance of an act in the Senate's decision whether or not to deal with the bill can, in specific cases, be regarded as a serious procedural error in the legislative procedure which can call into doubt the constitutionality of the act‘s adoption and can be weighed by the Constitutional Court as one of the grounds for annulling the act.

14. The case under consideration concerns a statute which, without doubt, is of extraordinary consequence for citizens‘ future life and for their future legal and social position. It is indispensable in the course of the parliamentary consideration of such a fundamental norm, to accord the widest lattitude possible in order to seek and find societal consensus, on which depends the statute‘s acceptance and effectuation.

15. The manner in which the Senate proceeded in this case embodied the characteristic features of capriciousness, among others due to the fact that the Prime Minister and members of the Government were permitted to speak during the general debate, whereas (with the exception of procedural points by Senate officials), „ordinary“ Senators and representatives of the opposition were not. This resulted, among other things, in the violation of the procedural rule, „the equality of arms“, and with the constitutional rule of the protection of the minority in political decision-making, as enshrined in Article 6 of the Constitution.

16. We believe that the Constitutional Court should, in connection with its adjudication of the legislative procedure employed in adopting the contested act, raise the question whether the content and form of the approved text of Act No. 261/2007 Sb. even fulfills the conceptual requirements for a statute, in the substantive sense of the word. We are convinced that a negative response must be given to this question.

17. The Czech Constitution does not define the term, „statute"; its conceptual characteristics can, however, be deduced from general principles of the democratic law-based state, primarily from Article 1 para. 1 of the Constitution, which provides that „[t]he Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens." From the perspective of constitutionalism, an act of state power addressed to citizens as a statutory norm, purporting to be of a generally binding nature and enforceable by sanction in relation to all its addressees, must satisfy certain substantive and formal requirements, deducible from the constitutional texts, from the general principles of the law-based state, and also from Constitutional Court jurisprudence. Even though designated by the legislative power as a statute, a text which, due to serious constitutional defects, does not satisfy the requirements of the substantive conception of the law-based state and which an entitled petitioner submits to the Constitutional Court for its adjudication, is subject to the Constitutional Court's derogational authority.

18. Since it began its operations, the Constitutional Court has placed extraordinary emphasis on the fact that a statute be, both in terms of form and of content, a predictable, consistent source of law (Judgment Pl. ÚS 77/06). The Constitutional Court underlined that „in a law-based state a statute is not merely an internal memorandum for the state machinery", rather that it is „a publically-issued medium which should, first of all, lay out for the citizens themselves what they are permitted to do and what they must not do, what they are still permitted to do what they must no longer do". In a law-based state „not only is the manner in which the courts are capable of interpreting the laws important, but so is how they will be interpreted by the civic public. Legal uncertainty for the citizens means the loss of the credibility of the law-based state and, equally, an impediment to civic activity." (Judgment No. Pl. ÚS 43/93, published as No. 16/1994 in the Sb. n. a u. ÚS [Translator's Note: "Sb. n. a u. ÚS" is the abbreviation in Czech for the Court's reporter, The Collection of Judgments and Rulings of the Constitutional Court], Vol. 1). In a later judgment, the Constitutional Court asserted that „the principles of clarity and definiteness in the law represent a component of the principle of legal certainty, thus of the principle of the law-based state." (Judgment No. Pl. ÚS 16/93, published as No. 25/1994 Sb. n. a u. ÚS, Vol. 1). In Judgment No. Pl. ÚS 21/01 the Constitutional Court emphasized that among the basic principles of a law-based state "belong the principle that laws should be foreseeable and comprehensible, and the principle that they should be internally consistent". A given act cannot be a statute if it lacks the character of rules that people can acquaint themselves with and which they can follow.

19. Lon L. Fuller, an eminent figure in legal philosophy and theory, included among his eight principles of law the indispensable requirement of the clarity of statutes (Fuller, L., The Morality of Law, Prague, Oikoymenh, 1998, p. 63 and foll.

[Translator's Note: The reference here is to the Czech translation of the English original.]). The equally renowned British legal philosopher H. L. A. Hart asserted that rules of law „must be intelligible and within the capacity of most to obey." (H. L. A. Hart, The Concept of Law, Oxford, Oxford University Press, 1961, p. 202).

20. The constant jurisprudence of the European Court for Human Rights has also declared the same requirements on the quality of a statute (a statute must be accessible to all affected persons, who must be enabled to foresee the consequences for them following from the act; the statute must be precise) (compare, for ex., Berger, V., The Jurisprudence of the European Court for Human Rights, IFEC 2003, pp. 455-6, point 4: Kruslin v. France, Huvig v. France; pp. 502-503, point 4, Autronic AG v. Switzerland). The Strasbourg court has deduced these requirements from the principle of the law-based state, declared in the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms.

21. We are cognizant of the fact that the criteria laid down by the Constitutional Court „of harmonious, predictable, and transparent law" (for ex., in Judgment No. Pl. ÚS 21/01) cannot be understood absolutely, in a concrete case it is necessary to specify the degree of their violation. The Constitutional Court ties the assessment of the degree of violation of the principles of legislative process in concrete cases with the test of proportionality in linkage with the principles of the protection of citizens' justified confidence in law, legal certainty, and acquired rights, alternatively to further principles protected by the constitutional order, fundamental rights, freedoms and public goods.

22. After weighing the tests mentioned in the preceding paragraphs, we submit that Act No. 261/2007 Sb. has trespassed against the elementary and essential requirements placed on statutes in such a gross manner that it has disrupted the very principle of the law-based state, enshrined in the Preamble and in Article 1 para. 1 of the Constitution. The text of the Act is substantively inconsistent, unclear and incomprehensible. Orientation in the complicated text of the Act is extremely onerous even for experts – lawyers, for citizens – laymen, who are, of course, also the addressees of the legal norm, the text of the Act is practically incomprehensible.

23. The Act's text suffers from a number of deficiencies and errors of a technical legislative nature, which will without doubt bring about interpretive problems. Without proposing to carry out a detailed analysis of each particular error of this type, we will merely draw attention to several examples:
- in Part One (Art. I) – points 49 and 50 – both points lay down a new wording of § 16 on Income Tax, yet they have a different content and a different day for coming into effect (point 49, on 1 January 2008, point 50, on 1 January 2009);
- in Part One (Art. I) – point 58 repeals litera „zq" in § 19 para. 1 of Act No. 586/1992 Sb., on Income Tax; however, such litera does not appear in the valid statutory text;
- in Part Thirteen (Art. XXI), Part Three of Act No. 357/2005 Sb. is repealed as of 1 January 2008; Part Three of Act No. 357/2005 Sb. contains an amendment to Act No. 463/1991 Sb., which was repealed as a whole by Act No. 110/2006 Sb., in effect as of 1 January 2007;
- in Part Fourteen (Art. XXII), Part Ten of Act No. 115/2006 Sb. is repealed as of 1

January 2008; Part Ten of Act No. 115/2006 Sb. contains an amendment to Act No. 463/1991 Sb., which was repealed as a whole by Act No. 110/2006 Sb., in effect as of 1 January 2007;
- Part Twenty-Six (Art. XI) – the legal text is considerably non-transparent, as it repeals several provisions of particular articles or entire articles of Act No. 189/2006 Sb., which Amends Several Acts in Connection with the Adoption of the Act on Sickness Insurance; these (now amended or repealed) articles amended various acts with effect from 1 January 2007;
- Part Thirty-Two (Art. LII) – points 1 and 2 amend § 73 paras. 3 and 4 of Act No. 128/2000 Sb., on Municipalities, which, according to Article XLV of Act No. 189/2006 Sb., should have already been amended as of 1 January 2007; however, that Article XLV had already been repealed by Article XL point 9, currently of Act No. 261/2007 Sb.;
- Part Thirty-Three (Art. LIV) – points 1 and 2 amend § 48 paras. 2 and 3 of Act No. 129/2000 Sb., on Regions, which, according to Article XLVII of Act No. 189/2006 Sb., should have already been amended as of 1 January 2007; however, that Article XLVII had already been repealed by Article XL point 9, currently of Act No. 261/2007 Sb.;
- Part Thirty-Four (Art. LVI) – points 1 and 2 amend § 53 paras. 3 and 4 of Act No. 131/2000 Sb., on the Capitol City of Prague, which, according to Article XLIX of Act No. 189/2006 Sb., should have already been amended as of 1 January 2007; however, that Article XLVII had already been repealed by Article XL point 9, currently of Act No. 261/2007 Sb.;
- Part Thirty-Eight (Art. LXII) – the end of the text reading „in Part Six of Art. VI, points 1, 5, 7, and 10 are repealed“ is incomprehensible (it is not clear to which act these repealing provisions relate);
- Parts Forty-Five (Art. LXXII), Forty-Six (Art. LXXIII) and Forty-Seven (Art. LXXIV) are actually separate tax acts; it is open to question whether this manner of promulgating acts (incorporated into the test of another act) is at all in harmony with Article 52 of the Constitution or with Act No. 309/1999 Sb., on the Collection of Laws and on the Collection of International Agreements – according to this Act, statutes are promulgated by the publication of their full text and their designation by the corresponding serial number; it will be cumbersome to find a comprehensible manner for citing or making reference to particular sections of statutory text because the numbering of sections in Parts Forty-Five , Forty-Six, and Forty-Seven of Act No. 261/2007 Sb. is repeated – which can cause a muddle for those using the Act.
- the repealing provisions, found in various places in the textu of Act No. 261/2007 Sb., and coming into effect on differing dates, are so complicated as to verge on utter unintelligibility; as an example can be give the amendments to the provisions on the pay of state attorneys in the case of temporary incapacity to carry out their office (§ 9a of Act No. 201/1997 Sb., due to amendment to its text by Act. 279/2002 Sb.); already prior to the approval of Act No. 261/2007 Sb., this provision was repealed by Act No. 189/2006 Sb., which Amends Certain Acts in Connection with the Adoption of the Act on Sickness Insurance, as amended by Act No. 585/2006 Sb. (in effect from 1 January 2008); the repealing provision of Article XL of Act No. 189/2006 Sb. is repealed in Part Twenty-Six of the contested Act No. 261/2007 Sb., in the first instance with effect from 31 December 2007 (Art. XL, point 9 in conjunction with Art. LXXXI point 1, lit. b/), so that it could be newly formulated in Part Thirty-One (in Art. XLIX point 5) with effect from 1 January

2008, and immediately thereafter, in the very next point, it was once again reapealed with effect from 1 January 2009 (Art. XLIX point 6, in conjunction with Art. LXXXI point 1, lit. c/);
- a consequential constitutional problem is presented by the actual retroactivity of statutes, which arises due to the fact that in point 1, lit.a) of Article LXXXI, the entry into effect of certain of the Act's provisions was set as the day of the Act's promulgation; after all, it is evident that all of the addressees of the Act could not acquaint themselves with its wording on the day of its promulgation, as the distribution of the particular installment of the Collection of Laws is always delayed past the date of the formal promulgation; although § 3 para. 3 of Act No. 309/1999 Sb., on the Collection of Laws and on the Collection of International Agreements, allows for such an approach, however, only as an exception and „if such is required by an urgent general interest" – in this case, such urgent interest was in no way substantiated; the abuse of this manner of proceeding may lead to an unconstitutional state of affairs, as actual retroactivity is manifest; this problem has been criticized in the literature many times (Cvrček, F., Vacatio Legis in Czech Legislative Practice, Lawyer [Právník], No. 7/2001; Kysela, J., On the Margin of Validity, Entry into Effect, and the Retroactivity of Statutes, Legal Perspectives [Právní rozhledy] No. 22/2005).

24. The difficulty with becoming acquainted with this very extensive Act is amplified by the very brief vacatio legis (for the majority of provisions the time elapsing between their publication and their entry into effect amounts to about two-and-a-half months; certain provisions entered into effect on the day of their promulgation – see Art. LXXXI, point 1, lit. a/)

25. The Constitutional Court has already in its preceding jurisprudence (see especially Judgment No. Pl. ÚS 21/01) made an emphatic appeal to the Parliament of the Czech Republic in respect of the observance of the principles of comprehensibility, transparency and clarity of the legal order, which rank among the components of the law-based state, as well as compliance with democratic principles in the legislative process (Art. 1 of the Constitution); the Constitutional Court has thereby opened up, also pro futuro, a derogational grounds under Art. 1 para. 1 of the Constitution of the CR. It is generally asserted by the civic public and by legal theory, that the legislative process in the Czech Republic is suffering further defects (for ex. the increase in cases where statutes are adopted whose date of entry into effect is the date of promulgation). Gloomy relations in the creation of statutes in the Czech Republic is shown by the inadequate functionality of control mechanisms from within the legislative process. Naturally, that increases the pressure on the operation of external mechanisms, represented, as far as concerns constitutionalism, by the Constitutional Court (see also Filip, J., Legislative Practice and Constitutional Court Jurisprudence, The Journal of Legal Science and Practice [Časopis pro právní vědu a praxi] No. 3/2005, writing about „legislative mischief and atrocities").

26. This is a situation that is all the more serious because it is not an excess, rather it is becoming an unfortunate practice of which, in addition, the Members of Parliament are aware, which is attested, for ex., by the critical 25 January 2006 Senate Resolution No. 303, in which was asserted, among other things: „the unremitting amendment of statutes that have already been amended several times

and the practice of carrying it out by appending them to bills with unrelated content makes more difficult or even precludes the stabilization of a consciousness as to what applies as law". The literature has already drawn attention to that for years, in part as a violation of the Act on the Standing Orders of the Assembly of Deputies, in part as a circumvention of the right of the Government, pursuant to Art. 44 of the Constitution, to give its opinion on each bill, which can also be seen as the right of other participants in the legislative process to know the Government's opinion (Hujer, M., Proposed Amendments in the Assembly often Have no Substantive Relation with the Bill under Consideration, Parliamentary Report [Parlamentní zpravodaj] No. 8-9/2001; Kysela, J, in Klíma, K. et. al., Commentary on the Constitution and Charter, Pilsen, 2005, p. 236; Voříšek, V., The Sins of the Priests-Lawgivers, Legal Perspectives [Právní rozhledy] No. 16/2006).

27. After summarizing all of the above-mentioned defects in the procedure for the adoption of the contested Act, we concluded that the unprecedented high number of these defects, as well as their gravity, reaches a constitutionally relevant level and it was appropriate for the Constitutional Court to annul Act No. 261/2007 Sb., due to the violation of the principle of the separation of powers and its democratic nature (the Preamble to, as well as Article 1 para. 1 and Article 2 para. 3 of, the Constitution) and due to the violation of the principle of the protection of the minority in political decision-making (Article 6 of the Constitution).

28. Nor do we agree with that part of the statement of judgment which rejected on the merits the petition to annul § 6 para. 4, the first sentence, § 6 paras. 13 and 14, § 7 para. 8, the first sentence, and § 38h para. 1, lit. b) of Act No. 586/1992 Sb., on Income Tax, as amended by Act No. 261/2007 Sb.

29. One cannot but agree with the petitioner that the legislature made arbitrary use (institute of „super-gross salary") of the categories of the tax object and the tax base and, in consequence thereof, the given Act puts in place a tax, the actual object of which is not only income from independent activity and job perquisites, but also levies on sickness insurance, pension insurance, state employment policy, and public health insurance.

30. Such a statutory framework, which abandons the traditional conceptual delimitation of income tax, is in conflict with the constitutional order. On the grounds of indefiniteness and lack of clarity, it is in conflict with the principle of the substantive law-based state under Article 1 para. 1 of the Constitution of the CR. Accordingly, the contested provisions should have been annulled.

Brno, 1 February 2008

The Dissenting Opinion of Justice František Duchoň

1. In contrast to the majority of my colleagues, I am of the view that the manner in which Act No. 261/2007 Sb. was adopted, in both chambers of the Parliament of the Czech Republic, cannot be regarded merely as a lack of political culture, as is

asserted in the reasoning of the Judgment, rather it reaches such a constitutional dimension that it would make annulment by the Constitutional Court entirely in order. In comparison with the conclusions of Judgment No. Pl. ÚS 77/06, to which I make reference, this represents a clear step backwards. Accordingly, I join the dissenting opinion of Justice Jan Musil, and I am, in essence, in accord with his constitutional arguments.

2. In my view, the adoption of Act No. 261/2007 Sb. represented the high-water mark in a trend in the practice of the adoption of statutes, which has dragged on (and been criticized) already for several electoral terms. In particular, the introduction of proposed amendments that lack any close relation to the content of the amended statute, has already occurred several times and continues to occur, resulting in such an inroad into the legal order of the Czech Republic as to make it lacking in quality and totally non-transparent.

3. In the last two electoral terms, a further trend can be added to that long-term negative trend, and this one can only be characterized as the „forceful“ or „athletic“ adoption of statutes. What else should we call the approach of the Assembly of Deputies of the Parliament of the CR , when it declined to grant the opposition's motion to extend the period for the consideration of the mentioned Act, or decision-making on a number of proposed amendments submitted by a Deputy – Prime Minister (or the Prime Minister - Deputy) on 15 August 2007. The same can be asserted even about the manner in which this Act went through the Senate.

4. Throughout the entire period of its existence, human society has formed rules making possible a bearable life for individuals. These rules, among others, always contained also the means to resolve conflicts such that the continuing reasonable functioning of the society was ensured. The democratic ordering of modern democratic states of the European-Atlantic civilization can be regarded as the culmination of this effort. One of the fundamental roles of the modern state, founded on the principle of the „rule of law“ is that of setting reasonable rules, acceptable for the majority of society, their observance and the thorough imposition of sanctions for their violation. If the state itself, through its supreme organs, violate these rules, it thus debases their significance and, in essence, provides an example or inducement for proceeding in a similar manner. The law suffers thereby, as it loses its internal morality, justice suffers, and the legal consciousness of individuals is naturally also weakened. All of this causes the lives of the decent majority to be more troublesome and needlessly complicated.

5. It remains only to point out that a game played without rules has its own „quality“, so that it is not a game which can be watched. Law adopted without rules also has a similar quality. In a conflict conducted according to rules, the defeated usually recognizes the victor‘s predominance. In a conflict conducted without rules or rules adapted by the victors , the defeated awaits merely the opportunity, later to pay his competitor in kind. It seems that this second trend will prevail in the long run and we can now „only look forward“ to what the future brings us in this respect.
4 February 2008

The Dissenting Opinion of Justice Eliška Wagnerová

I can concur neither with the statement of judgment nor with the reasoning given in this Judgment, for the following reasons:

A Missed Opportunity

1. The decision in this matter could have contributed to the elaboration of the conception of democracy in the Czech constitutional order; however, that did not occur, in part with the explicit reference to restraint (see „As to b)“ in Part X/a of the reasoning to the Judgment), in part because that restraint flows implicitly from the reasoning to the Judgment. Does it truly concern though restraint in relation to legal rules, which without doubt packs a powerful political punch, from which then results, throughout the diverse grasp of individual political streams, even the manner of expert resolution projecting into the adopted conception of „the stabilization of public budgets“, moreover in a situation where the Constitutional Court has nearly abandonned its role in the supervision of the process for, and the manner of, the formation of the norm under review and shifts the response to questions tied to supervision into the field of a normative system other than law?

2. I cannot accept the manner in which the majority proceeded because it is not transparent; it is formalistic, and paradoxically I regard it as, in its consequences, not self-restrained. I see the lack of transparency in the fact that the majority did not define where it sees the boundary between the genuine democratic adoption of a parliamentary decision and the mere exploitation of an advantage in votes very fleetingly held by the Government and its parliamentary majority, since it is not politically founded, thus subject to change following the next election with the return to the contrary legal arrangements in basic areas affecting every person living in this state; the person thereby becomes an instrumentalized object, through which is run a battle for the effectuation of particular conception of the „good administration“ of public affairs, which is unfair, as it entirely disregards opposition views. This deficiency can serve as an indicia of the fact that the majority is in agreement with the content of the reform, naturally making it an approach which, in actuality, is very far from self-restrained. I then see formalism in the fact that, without regard to the political nature and the problematic complexity objected to in the statutory arrangements under adjudication, the majority is satisfied with such an interpretation of the constitutional procedural institutes as would correspond to the procedure for the adoption of a standard mono-thematic legal framework; that is, in interpreting the procedural institutes, it did not react either to the unusual voluminousness of formally-compiled legal arrangements or to further circumstances accompanying the adoption of the contested Act (see below). The majority has then entirely excluded from constitutional procedural considerations the value requirements in the guise of at least a minimal claim to the presence of „fairness“ in parliamentary processes.

3. I am thus of the view that in cases such as the case presently under adjudication, the Constitution Court may, or even must, very carefully scrutinize precisely the procedure for the adoption of reform statutes. In those case, moreso than in the case of other statutes, the requirement of a wider consensus comes to the forefront, namely in the interests of fulfilling the democratic principle (see

below). Beyond that, victory may never be had by a mere fragile and problematically generated numerical force, underpinned by the asserted „claim to truth“, which cannot, without more, be a simple constitutional criterion. This is due to the fact that the purpose of this requirement is to gain the actual political majority's agreement with the adopted legal arrangement, as only in this way can a politically motivated amendment to it be prevented in the future.

4. History demonstrates that the displacement of democratic discussion from the foundation of democracy has never paid off. Up until 1989, we experienced deep in our bones, from positions of extremely-conceived leftistism, the fruition of the „better since more scientific“ opinion of the avant-garde (testimony to which is the pre-revolutionary wording of Art. 4 of the Constitution of the CSSR), which thus rationalized a „self-sustaining“ monistically conceived power. However, the reduction of political discussion in favor, at that time, "solely“ of expert opinions belongs, for ex., both among the requirements of contemporary neo-conservatism, and into the concept of „the third way of the new left“. However, our constitutional system rests on the respect for, and actual fruition of, the pluralism of political forces and their admittance to the solution of problems. Therefore, great importance must be ascribed to the principle of pluralism, which is at the very foundation of our democracy (just as it is at the foundation of the conception of democracy in the other democratic states in Europe) and thus forms one of the essential attributes of a democratic law-based state in the sense of Art. 9 (2) of the Constitution of the CR, thus at the same time one of the fundamental values of our constitutional order. The Czech constitutional order simply gives priority, not to the search for unique „correct solutions“, rather to a system which is founded on a rigorous confrontation of the proffered solutions, in a fair discourse involving all political actors.

5. This conclusion is confirmed also by the conception of Art. 22 of the Charter, according to which any statutory provisions relating to political rights and freedoms, as well as the interpretation and application of them, shall make possible and protect the free competition among political forces in a democratic society. There is no reason for this normative directive, naturally originally intended for the assessment of the exercise of individual fundamental rights, not to be applied also as an interpretive rule in the interpretation of objective law governing the processes within constitutional institutions, in which the competition of political forces continues, albeit already transformed into institutional form. As Ernst Fraenkel states (Strukturdefekte der Demokratie und deren Überwindung) the observance of the principle of fair play in applying the rules governing the process of the formation of political will belongs among the generally acceptable code of irrevocable values (which corresponds to the character of the values protected by Art. 9(2) of the Constitution of the CR). Otherwise, for ex., in the FRG the issue of the curtailment of rights which, according to their interpretation, result for Members of Parliament from their constitutional law status (typically of opposition members of parliament) were resolved in conflicts of competence, as is demonstrated by many decisions of the Federal Constitutional Court on the given issue. Finally, Pl. ÚS 77/06 has already drawn attention, through rich reference to Czech and foreign literature which, accordingly, is no longer necessary to repeat, to the necessity of fairness of the parliamentary process.

The Unimportance of the Senate in the Legislative Process?

6. The freedom of expression and the freedom of parliamentary debate is an essential attribute of each free legislature and must be considered as inherent to the very foundation of a parliament as such (Haxey‘s case (1397) – A petition to Parliament requesting the curtailment of expenditures of the royal household).

7. In one of its decisions (judgment of 21 July 2000, 2 BvH 3/91), the German Federal Constitutional Court asserted that it also regards the rules governing the legislative process, to the extent they are not contained in the Constitution itself, as a subject of a parliamentary chamber‘s self-regulation, as are the function of the composition of committees and the manner in which they work, further the realization of the right to exercise the legislative initiative, to information and supervision, as well as the creation and regulation of rights of political factions and the exercise of the parliamentary right of free expression and parliamentary debate. At the same time the court emphasized that this list containing the subjects of self-regulation and instruments of parliamentary autonomy is not final. That is the case because this list must be elaborated again and again in view of the changing political relations such as to make possible the adaptation to changed working conditions. Thus, in contrast to earlier constitutional epochs, parliamentary autonomy may gain new relevance through the circumstance that the Parliament and the Government no longer stand in opposition to each other, as is presupposed in classic theory, rather the boundary runs through the middle of the parliamentary plenum: the Government and the parliamentary majority supporting it form a political unity vis-a-vis the opposition. The Parliament must also react to the growing complexity of regulation needs. Therefore, if a modern parliament does not wish to lose its capacity to act, it must develop work strategies for apportioning interaction and coordination of the political formation of will.

8. Naturally, the regulatory power of Parliament relating to its own affairs is not boundless. It is subject to constitutional limitations, in particular the principle enshrined in the Constitution of representative democracy founded on the freedom of members of Parliament in carrying out their mandates, as well as on the equality of all members of Parliament as the representatives of all the people (Art. 15, Art. 23 (3) and Art. 26 of the Constitution of the CR). The requirements as to the form and interpretation, above all, of the standing orders of the parliamentary chambers follows from these constitutional requirements.

9. What I have already written should indicate the point of departure for my reasoning connected with the assessment of the process for adopting the contested Act, without my having dealt with its substantive content. The majority opinion adopts the view that both the rejection of the motions by opposition Deputies for the extension of the time limits for consideration of the Bill in the committees of the Assembly of Deputies, further the extent of the „proposed amendment“ to the Bill introduced by the Prime Minister in conjunction with the deadline which divides the second and third reading, and the manner in which the institute, „not to deal with a bill“, was employed by the Senate, constituted mere errors on the plane of political culture, alternatively a reflection of the level thereof. I cannot share this assessment, as I consider it as formal in the extreme. It does not take

into account the function of time limits and further legal institutes which, although seemingly serving „solely“ the self-regulation of parliamentary chambers, are yet possessed of meaningful potential in the form of influencing the final form of the adopted act, the legitimacy of which is then derived precisely from meticulous respect for fairly interpreted and fairly applied procedural rules. In my opinion, the majority assessment is thus the repudiation of parliamentarianism viewed in the substantive sense, that is, conceived as the institutionalized exchange of views between representatives of groupings with competing opinions present in society and with the aim to find such compromise as would satisfy the majority of a society originally fragmented in opinion.

10. The problematic nature of the majority opinion in assessing the Senate's approach to adopting the decision not to deal with the Bill manifestly comes to the forefront. One can wonder that the Judgment did not even contain a review of the situation which arose in the Senate Plenary after Senate Print No. 106, containing the Bill of the contested Act, should have been acted upon. In that situation, then, one cannot wonder that what has played out in the Senate was not (as it could not even have been) assessed in terms of a constitutionally-conforming interpretation of the Standing Orders of the Senate. In other words, the Judgment did not bring to light all factual circumstances accompanying the adoption of the decision not to deal with the Bill.

11. Evidently therefore the Judgment did not make an interpretation, in particular, of § 69 of the Standing Orders of the Senate, which governs the preferential right to speak enjoyed by the President of the Republic, members of the Government, the Chairperson and Deputy Chairpersons of the Senate and chairpersons of the Senate caucuses. The Judgment thus left open the issue of the phase in the process of the adoption of statutes at which this right is to be asserted, in particular, it did not resolve the question of whether the preferential right to speak can be asserted only after the start of debate and not before that. With the aid of a teleological interpretation of this provision, one can deduce that this right can reasonably be asserted only as of that phase of debate which, to begin with, all Senators may take part in, as a person with preferential rights should have the opportunity to react immediately to the views brought forward by them and thereby shape the ongoing flow of the discourse. On the other hand, no reason can be found justifying either the diminution in the assertion of the principles of a democracy founded on pluralism interpreted in light of the constitutionally-enshrined status of each Senator as the representative of all people and possessing a free mandate (Art. 23(3) and Art. 26 of the Constitution of the CR) or the practice of according the opportunity for discourse only to persons with preferential rights.

12. In actual fact, however, the preferential right to speak was asserted in the phase prior to the start of debate, thus the persons listed in § 69 of the Standing Orders of the Senate were given the opportunity, for dozens of minutes even perhaps an hour, to express their views on the matter, whereas members of the chamber were compelled to listen to their speeches without being afforded the opportunity to react to them. As was asserted above, such an interpretation of the Standing Orders of the Senate draws an unfounded distinction between the individual members of the Senate, without addressing, by means of a constitutionally conforming interpretation, the issue of the purpose of the institute

of the preferential right to speak. In addition, to interpret the Standing Orders of the Senate in this manner results in an unreasonable increase in the influence of the executive power, moreover to the detriment of the legislative power itself and to the legislative process, and it brings to the forefront a deviation from the original theory of the separation of powers. Art. 38 (1) of the Constitution of the CR must also be interpreted only in a constitutional context established in this way. I cannot assess this error solely on the level of informal normative systems (political culture), as that would contravene the uncompromising assertion of the democratic principle founded on the plurality of opinion, as well as the claim to the fairness of the process, which are, as mentioned above, essential attributes of the democratic law-based state, if not its very essence.

13. I am also convinced of the unconstitutionality of the Senate's manner of selecting the bills for which it will employ the institutue „not dealing with a bill". An elementary requirement, even in a law-based state as merely formally conceived, is the exclusion of arbitrariness from public authorities' decision-making. In the exercise of its powers, even Parliament, that is, both of its chambers, is bound by the law, first and foremost by the Constitution and the standing orders interpreted in conformity therewith, by the settled practice of the parliamentary chambers and their bodies which, owing to long-term repetition, can be considered as an unwritten part of the legislative procedure, if they can be found to be in harmony with the higher values of law formation, of the democratic political system, etc. Adherence to the procedural rules contained in the mentioned sources of law must be demanded due to the fact that, although the addressees of these norms are not private persons, the non-observance of them may, in the final outcome, meaningfully affect fundamental rights of private persons. There is no doubt that the addressees of a legal norm have the right legitimately to expect that any limitation upon their fundamental rights carried out by law will be by a statute which is the result of a discourse conducted across the political spectrum, namely a discourse in which all participants had the opportunity elaborately to acquaint themselves with the matter under consideration and to give their informed view upon it. It is also proper that such a process make possible an open discussion between the proponents of competing views, including minority views. Therefore, those procedures enter into prominence which ensure, on the one hand, the hearing of the parties and, on the other, the formal quality of the legislative work. From this perspective, the legislative procedure becomes „the actual source of a statute's legitimacy".

14. The fact that the Standing Orders of the Senate do not contain more detailed rules for the selection of those bills which the Senate is not prepared to deal with cannot, in my view, excuse the inapposite assessment of the function of the second chamber in the legislative process, as the Judgment has done. Otherwise I have already, in my dissenting opinion to the judgment in matter Pl.ÚS 10/03, given my views on the diminution of the constitutional relevance of the second chamber, and I have no choice but once again to point out that the considerations cited in the Judgment do not enjoy support in the Constitution of the CR. Art. 15 para. 1 entrusts power to Parliament as the sole entity whose internal composition is envisaged in para. 2 of that constitutional provision. However, even were the status of the Senate capable of being assessed as actually (not constitutionally) weaker in terms of the assertion of its authority in the legislative process, it would

not be possible also to admit „actually weaker requirements on the conception and exercise of democracy“ in this parliamentary chamber. The constitutional requirements on the quality and exercise of democracy in the organs of the democratic law-based state cannot be inferred from their actual political power.

A New Era?

15. Before a year has passed, the Constitutional Court Plenum has decided to modify the point of departure, or the referential criteria, for assessing the regularity of a bill, or proposed amendments thereto, aimed at ensuring that the law is foreseeable and transparent, and that it is even possible to become acquainted with it, such as was laid down in Part III of Judgment No. Pl. ÚS 77/06. Today‘s judgment has reduced the principles laid out there to a mere scrutiny of the absence of a close relation between the proposed amendment and the bill and has trivialized the conclusions reached in last year‘s Judgment. Not only has it repudiated the condemnation made in the already-cited Judgment of „concealed legislation“ (point 54 of Judgment Pl. ÚS 77/06); on the contrary, it literally approved of the phenomenon of „concealed legislation“ by means of speculation, which, in my view, is unfounded, about shifting paradigms on which basis one must proceed in assessing a legal system. If the judgment from last year regarded the constitutional problem as residing in a person’s inability to acquaint herself with the law, because orientation in the law becomes impossible without the use of electronic information systems, and reasoned why it is unacceptable, without more, to put the addressees of the law in the situation of having to adapt to this deviation, today’s Judgment finds it to be sufficient that one can orient himself in the legal order with the assistance of computerized legal information systems, indeed it approves the situation where separate statutes (in the given case, there were four separate statutes) be published under a single numerical designation, ringed by amending provisions relating to dozens of further statutes. The Judgment evidently approves even of statutes concealed in this way, presumably even in terms of the requirement that the law be foreseeable, as it results from the principle of the law-based state (Art. 1 (1) of the Constitution of the CR) and from the principle of legal certainty derivable therefrom. Today’s Judgment considers this state of affairs as corresponding to the requirement of the transparency and definiteness of the law; it even introduces a new designation of such a statute as a „mixed statute“, even though, as is well known, this designation is reserved for those legal enactments which contain both legal norms of a substantive, as well as of a procedural, character (for ex., the Electoral Act).

16. The futuristic vision which today‘s Judgment ushers in is in conflict with the doctrinal conclusions of the theory of law as they were treated by legal theorists throughout the 20th Century (for all, V. Knapp: Theory of Law, C.H.Beck, 1995, pp. 114, 126 – 127). Even though the Judgment modestly asserts that its ambition is merely to make reference to the ongoing changes in the legal system, and further that it is even the expression of a restrained assessment (presumably of the contested statute), nonetheless one cannot overlook the fact that it contents itself with the mere analysis of the Czech legal order after 1990, and that, from the frequency of amendments, as well as amendments to amendments, it deduces some sort of lasting „change of period“. It does so without evaluating the undeniable fact that the evaluated era is a transitive era, because there was a

changeover from one political system to a new and fundamentally different political system, that neither the political elite nor the state administration were possessed of the needed knowledge and experience, which resulted in the adoption of a number of defective statutes, which had to be amended not due to a changing political consensus or the establishment of a new parliamentary majority, nor even due to social change; rather it was quite often a matter of the correction of banal errors which, however, were often fatal in their consequences. The Judgment also does not take into account the precipitate changes in the legal order of the CR effectuated in connection with the CR's accession to the EU. Thus, if we would seriously wish to consider whether the time has come for a change of paradigm for how law is regarded as a system, we would have to carry out an analysis of the legal orders of those states whom fate has allowed to undergo a calm evolution in recent decades. If we do not have available an analysis of the relevant factual data, then futuristic considerations of a „new era" modifying established claims to the legal system constitute nothing else than the utterances of a visionary, the implications of which we are, of course, not capable of envisioning.

17. For that matter, just in this way success in the endeavor evidently eluded the French revolutionaries who, after the royal couple's abortive attempt to flee the country and after their execution, replaced the first Sieyès Constitution of 1791 with the Rousseauian, egalitarian, democratic, Jacobin Constitution, adopted in 1793. History moved too quickly, however, and France found itself in a state of war with all European monarchies so that this constitution, or the exercise of power, had to be modified even before it could come into effect. At that time it was entirely suspended, and the Convention entrusted all power into the hands of the revolutionary government with a central body at its head – that is, into the hands of what later became the infamous Committee of Public Safety. The execution of Robespierre in 1794 concluded the Terror and brought about once again the need for a new constitution. Then in 1795 the „Directory" Constitution saw the light of day; however, the conflict between the Directory and the legislature led to its overthrow guided by Napolean, and the „Consul" Constitution was subsequently adopted in 1799. This historical excurcus illustrates that sometimes history literally hurtles about headlong. At the same time, however, the indicated French constitutional gallop attests to the fact that certain helter-skelter changes in paradigm, even if only declared yet not effectuated at that time, might have great attractive force even centuries later, notwithstanding the fact that they were, from the beginning, accomplished through the suffering of contemporaries.

18. The author of this dissent wishes to remain connected with the ground under her feet; she does not have the ambition of a reformer, therefore she has no option but to stick, in relation to the foreseeability, transparency, lucidity and consistency of the legal order, to the conclusions which are contained in the reasoning of Judgment Pl. ÚS 77/06.