2010/03/23 - PL. ÚS 8/07: RIGHT TO ADEQUATE MATERIAL SECURITY

HEADNOTES

A defining element of social rights is the fact that they are not unconditional in nature, and can be exercised only within the bounds of the laws (Art. 41 par. 1 of the Charter). This provision gives the legislature the right to set specific conditions for implementing social rights. The statutory implementation may not conflict with constitutional principles; in other words, the statutes may not deny or annul constitutionally guaranteed social rights. In implementing the constitutional framework enshrined in the Charter, the legislature must be governed by Art. 4 par. 4 of the Charter, under which, in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved.

The Charter of Fundamental Rights and Freedoms guarantees all participants of pension insurance adequate material security. Adequacy [proportionality] must be understood as an indefinite legal concept. The proportionality of material security in relation to individual participants in pension insurance must be understood in relation to satisfying an individual's living needs, in relation to the widest possible circle of persons, but also in relation to the insured person as a payer who co-creates the financial resources from which the material security will be provided.

The pension system is an instrument of state social policy, through which the (basic) functions of social policy are fulfilled, i.e. the functions of protection, distribution and redistribution and the stimulation. In all existing social security systems the principles of solidarity and equivalence are represented in varying degrees. Every system of social security carries advantages or disadvantages for certain social groups, depending on whether it gives preference to the viewpoint of solidarity or the equivalence principle. This regulation is reserved to the legislature, which cannot act arbitrarily.

The Constitutional Court interprets in its case law the constitutional principle of equality in terms of accessory and non-accessory equality. Thus, a particular legal framework that gives an advantage to one group or category of persons over others may not, without anything further, be described as violation of the principle of equality. The legislature has a certain discretion to deliberate whether to establish such preferential treatment. It must see to it that the approach that grants an advantage is based on objective and reasonable grounds (a legitimate legislative aim) and that there is a proportional relationship between that aim and the means used to achieve it.

It is the obligation of the legislature to transparently express the ratio of the components of solidarity and equivalence in the social insurance system (including pension insurance); it also stated that this division may not be arbitrary. In the opposite case, i.e. in the absence of the element of

equivalence, the reviewed institution would lose its legal nature, it would cease to be insurance, and acquire the character of a tax. Thus, the Charter gives rise to a fundamental right for the insured person to a component of equivalence in public health insurance transparently determined by the legislature, and in such an extent as preserves the nature of the legal institution of insurance and does not change it into a tax.

Constitutional review of the proportionality connection between income level, pension insurance contribution and pension level includes evaluating the observance of safeguards arising from the constitutional principle of equality, both non-accessory (Art. 1 of the Charter), i.e., arising from the requirement of ruling out arbitrariness when distinguishing subjects and rights, and accessory, in the scope defined in Art. 3 par. 1 of the Charter.

The legal framework implemented by the contested § 15 of Act no. 155/1995 Coll. (in particularly establishing reduction limits) creates a situation where a participant in the pension system who contributes three times more than a participant who contributes an amount calculated from an average wage is allocated a pension of – relatively – less than half. Yet, statistical date show that ca. 30% of insured parties, in the calculation of pension benefits, will cross the second reduction limit (ca. 95% of insured persons cross the first reduction limit). Thus, it is evident that the legal framework, in the attempt to ensure adequate material security to all participants in pension insurance, does not ensure for some insured persons a proportionate material security that reflects, in a recognizable degree, the principle of a merit basis, i.e. fulfilling the stimulation function of social policy.

The construction in § 15 of Act no. 155/1995 Coll., establishing two reduction limits at the present levels, given the existence of a system of contributions to pension insurance without an effective "ceiling," establishes marked disproportionality between the level of contributions to the insurance system, income levels, and the level of allocated pension benefits for some insured persons, whereby it violates Art. 1 and Art. 3 par. 1 of the Charter.

The criterion for constitutionality is the "proportionality" of the consequences of the selected calculation, where on the one hand the limiting corrective for the merit principle is the imperative of (accessory and non-accessory) equality, and on the other hand that corrective is the "proportionality" of minimum material security, not only in the sense of eliminating poverty, but also securing a dignified living standard for low-income insured persons.

Given the existence of a range of pension systems and methods for calculating pension benefits, it is necessary to choose an alternative that will reflect all the principles of social policy, as well as a system of pension insurance that will thoroughly respect constitutional principles and meet Art. 30 par. 1, Art. 1 and Art. 3 par. 1 of the Charter, and at the same time, preserve the essence of these fundamental rights under Art. 4 par. 4 of the Charter.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

The Plenum of the Constitutional Court, consisting of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká (judge rapporteur), Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, decided, without a hearing, with the consent of the parties, in the matter of a petition from the Regional Court in Ostrava, represented by judge JUDr. Bohuslava Drahošová, seeking the annulment of § 15 of Act no. 155/1995 Coll., on Pension Insurance, with the participation of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic, as parties to the proceedings, as follows:

The provision of § 15 of Act no. 155/1995 Coll., on Pension Insurance, is annulled as of 30 September 2011.

REASONING

I.
Recapitulation of the Petition and the Petitioner's Arguments

1. On 13 April 2007 the Constitutional Court received a petition in which the Regional Court in Ostrava (the "petitioner" or the "Regional Court"), in accordance with Art. 95 par. 2 of the Constitution of the Czech Republic (the "Constitution") sought the annulment of part of § 15, second sentence, of Act no. 155/1995 Coll., on Pension Insurance, in the version in effect on 29 May 2006, expressed by the words "to CZK 21,800" and the words "and from the amount of the personal assessment base over CZK 21,800, 10% is counted"; the petitioner proposed as an alternative the annulment of § 15 of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations.

2. In the petition to open proceedings the petitioner stated that, in the matter of K. S., a decision of 29 May 2006 (number 480 506 088) the plaintiff was granted, as of 1 February 2006, a full disability pension under § 39 par. l let. a) of Act no. 155/1995 Coll., in the amount of CZK 13,346 per month, with the reasoning that the pension consists of a basic assessment element of CZK1,470 per month and a percentage assessment element of CZK 11,876. This percentage assessment was calculated from the personal assessment base, determined for the years 1986 to 2005 in the amount of CZK 68,635Kč.

3. The plaintiff contested the amount of the pension granted before the Regional Court in Ostrava, knowing that the amount was set in accordance with § 15 et seq.

and § 41 of Act no. 155/1995 Coll., and pointed to the fact that the total amount of his pension is only 19% of his income (which he does not consider to be adequate material security). As the average level of pension in 2004 was 44% of average gross income (or. 57% of average net income), the plaintiff believed that the pension granted to him established absolute inequality between him and other beneficiaries of the pension system. In the complaint filed with the Regional Court the petitioner alleged that § 15 of Act no. 155/1995 Coll. was inconsistent with Art. 30 par. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter"), because the reduction in income for calculating the pension percentage assessment element set forth in that provision disadvantages him and places him in an unequal position.

4. The petitioner considers the decision contested before the Regional Court to be correct, as far as the method of calculation of pension and recording of years worked is concerned. Nonetheless, the petitioner concluded that § 15 of the Pension Insurance Act cannot stand, as it is unconstitutional, because this provision damages insured parties with higher incomes, i.e. those persons whose income exceeds the basic set amount of the personal assessment base. Moreover, no maximum limit has been set for the assessment base for employees, unlike for self-employed persons.

5. The petitioner points out that the name of the Act indicates that it involves insurance, i.e. a legal institution that has its settled content in every law-based state. The insured party transfers his risk, for payment, to another entity, which accepts the risk and, in a certain situation, is bound to provide the specified performance. Therefore, the contributions paid must be treated like insurance premiums, not like taxes. According to the petitioner, as regards the contributions, the relationship between the contributions paid and the performance should be clear and proportionate. The petitioner emphasizes that applying, in particular, the second reduction limit, leads to a substantial decrease in the calculation base, without any apparent deliberation by the legislature about the legitimate aim and purpose of that legal framework. The de facto result of applying the specified reductions is that the higher the amount of insurance premiums paid, the lower, relatively, the pension paid out.

6. According to the petitioner, the contested § 15 of Act no. 155/1995 Coll. is not a provision that removes inequalities, but, on the contrary, one that obviously establishes flagrant inequality between insured persons. Under no circumstances can it be consider to create a proportionate relationship. Therefore, in the petitioner's opinion, it is necessary to review whether the grounds for such steps are objective, and whether the means used are proportionate (appropriate). The petitioner believes that one cannot overlook that the criterion of the appropriateness of the means chosen (the reduction level) is completely absent from this legal framework, and the provided reduction limits and percentages bear the marks of pure legislative arbitrariness. The reduction should be the same for all insured persons; a law-based state cannot declare itself to be an insurance provider and at the same distribute the funds collected in such a manner that it often does not guarantee those who contributed most to the system even 20% of their original monthly income, from which the insurance was collected.

7. The petitioner also states that the principle of solidarity is not a specific legal

institution that would give rise to certain rights and obligations. Solidarity means a feeling of belonging to a certain whole, cohesion, community, a willingness for mutual assistance and support. It is undoubtedly a completely acceptable ethical principle that, however, is not in and of itself sufficient for the justification and acceptance of the abovementioned differential treatment. Solidarity is expressed adequately and markedly in the fact that insurance payments are consistently based on the level of pay. The system also adequately ensures general inter-generational solidarity, and even goes so far as to require that those who can basically not expect any new performance from it (working retirees) also contribute to it.

8. In the conclusion of the petition, the petitioner states that, in its opinion, § 15 of Act no. 155/1995 Coll., on Pension Insurance, is inconsistent with Article 1 par. 1 of the Constitution and with Article 1 of the Charter, because it discriminates against a considerable group of the insured persons in an obviously disproportionate manner.

II.
Briefs from the Parties to the Proceeding

9. In accordance with § 42 par. 3, 4 and § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the Constitutional Court sent the petition to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic for their responses, and also requested a written statement from the Ministry of Labor and Social Affairs (under § 48 par. 1, 2 of the Act on the Constitutional Court).

10. In its brief, the Chamber of Deputies of the Parliament of the Czech Republic first pointed to the fact that, during the legislative process in the lower house, no substantive objections were raised to § 15 of Act no. 155/1995 Coll. On 29 June 1995, during general debate on Chamber of Deputies publication no. 1574, two amending proposals were made (by Dalibor Štambera and Jaroslav Štrait) concerning the wording of § 15, both of which concerned only the level of individual reduction limits, not their percentages. Chamber of Deputies publication no. 1574 was then approved together with the amending proposal of Deputy Dalibor Štambera. In the conclusion of its statement the Chamber of Deputies states that Act no. 155/1995 Coll. was adopted after a properly conducted legislative process, was signed by the appropriate constitutional authorities, and promulgated in the Collection of Laws.

11. In its brief, the Senate of the Parliament of the Czech Republic pointed out that Act no. 155/1995 Coll. was adopted by the Chamber of Deputies before the Senate was constituted, but pointed to the fact that the Act has been amended many times (almost forty amendments), but no amendment concerned the contested § 15. Concerning the petitioners objection that “for employees, unlike self-employed persons, no maximum limit for the assessment base is provided,” the Senate pointed out that after the petition was filed, Act no. 261/2007 Coll., on Stabilization of the State Budget, with effect as of 1 January 2008, a maximum limit for the insurance base was set (also) for employees in § 15a of Act no.

589/1992 Coll., on Contributions to Social Security and Contributions to State Employment Policy.

III.
Brief from the Ministry of Labor and Social Affairs

12. In the opening of its extensive brief the Ministry emphasized that the calculation base in the Pension Insurance Act is a key element, without which the Act is basically inapplicable. Two elements are essential for setting the calculation base, the personal assessment base and the reduction limit. The government sets the reduction limit by a decree based on § 107 par. 2 of the Pension Insurance Act; the Act does not require increases in these limits ("the government may increase"), not does it set any limiting conditions for setting them. According to the Ministry, the existence of the reduction limits and their level at which they are set cannot be reviewed without taking into account all the circumstances and connections to other elements of the construction for the calculation of pensions, i.e., in particular, the indexation of the assessment bases actually reached in the decisive period, from which income for calculation of pensions is determined.

13. The Ministry also recapitulated the historical developments and pointed out that reduction limits were not introduced in Czech pension insurance for the first time by the Pension Insurance Act, but existed almost 50 years before the Act went into effect, beginning with Act no. 99/1948 Coll. of Laws and Directives, on National Insurance. Therefore, it must be noted that the legal regulation from 1995 for the first time removes one of the previous limiting measures, consisting of the fact that income above a certain level was basically not taken into account at all. In this regard, the Ministry emphasizes that the legal regulations in effect before 1 January 1996 contained a number of other limitations on pension levels, both through a fixed amount and through the highest percentage assessment, which the Pension Insurance Act did not adopt. Therefore, according to the Ministry, the existence of reduction limits is the only "limiting" element in the present system of calculating pensions.

14. In its brief, the Ministry also made international comparisons, where it pointed both to countries with a high level of correspondence between allocated pensions and income before retirement (e.g., Italy, Finland, the Netherlands, Estonia and Croatia) and to countries with a low level of correspondence (e.g., Great Britain, Ireland, Denmark, Belgium, Switzerland).

15. The Ministry also paid attention to the question of the nature of pension insurance, and pointed to the fact that social and private insurance are generally recognized to be of a different nature. The main differences between "social insurance" (as social systems can be called) and "commercial insurance" (as other kinds of insurance can be called) are: a) social insurance is established primarily by statute, whereas commercial insurance arises based on contract; b) social insurance is basically mandatory under conditions set forth by law, while commercial insurance is primarily voluntary; c) performance in social insurance is determined by parameters (not individually) by statute (often a different statute than the one that sets the rules for payment of contributions), while insurance

performance in commercial insurance is determined in a particular individual contract, or at least follows from it; d) payments of contributions in social insurance are made not only by the insured persons but also by their employers; e) performance by the state (through payers of pensions) generally is not dependent on payment of contributions, because insured persons who are participants in pension insurance through employment are payers of these contributions, but not the "de facto payers,"; f) a number of social and protective elements are applied in social insurance that markedly modify the relationship between the income achieved (contributions paid) and the level of benefit payments and the conditions for entitlement to payments (pensions); this involves, in particular, the institutions of replacement insurance periods (when no premiums are paid), excluded periods in the calculation of the personal assessment base, supplemental periods for entitlement to disability pensions and the guaranteed minimum level of pensions. For these reasons, the Ministry concludes that it cannot agree with the claim that contributions paid must be treated as insurance premiums, and not as taxes. Payment of contributions [or insurance premiums] has a completely different significance and effect in social insurance than in commercial insurance.

16. In the next part of its brief, the Ministry considered the principle of solidarity. As regards "inter-generational" solidarity, the Ministry states that, although the retirement age has been raised in recent years, and has reached approximately the rate of increase in life expectancy, nevertheless, every year more old-age pensions are paid out, which affects the expenditures for pension insurance. Thus, the amount paid out for old-age pensions in recent years grew faster than the number of old-age pensions. As regards solidarity within a (given) generation, the Ministry states that solidarity of economically active citizens with the economically non-active ones is manifested primarily through replacement insurance periods. These are periods that are taken into account for purposes of pension insurance even though no contributions or any other payments are made for them. Related to replacement insurance periods are "excluded periods"; these are basically replacement insurance periods that fall within the decisive period, from which income is determined for purposes of calculating pensions.

17. According to the Ministry, an important element of solidarity within a generation is "income solidarity," which leads to a higher level of replacement of pre-retirement income for persons with long-term low income, with the provision that the replacement level decreases as income increases. Applying the principle of solidarity in pension insurance makes it possible to prevent the social exclusion of certain groups of citizens and their being threatened by poverty. In this regard the Ministry emphasizes that, in view of the general income level in the Czech Republic, and in view of the aims of preventing social exclusion, maintaining pensioners' standard of living and supporting solidarity within a generation and between generations, the situation of pensioners is adequate [proportionate]. The Czech Republic is among countries that have very low levels of poverty.

18. Income solidarity is manifested in the entire construction of pension calculation. Income levels for calculation of pensions are not determined for the entire period of economic activity, but only from a certain part, not including the period at the beginning, when incomes are usually lower. Another expression of solidarity is the fact that, for calculating the percentage assessment element of a

pension, actual assessment bases (gross income) achieved, from which contributions were paid, are not used, but instead “annual calculation bases” are used, basically the actual calculation bases achieved multiplied by a coefficient of the growth of the general assessment base; this ensures that the level of income achieved in a particular calendar year in the decisive period in relation to the year when a pension is allocated is maintained.

19. According to the Ministry, an important expression of solidarity within the calculation of pensions are precisely these reduction limits, which are used to determine, from the personal assessment base, the calculation base for setting the percentage assessment element of a pension. The Ministry also points out that basic pension insurance plays an important role in reducing the poverty of the older generation, which is also one of its fundamental aims. Annulling the reduction limits would considerably worsen this present situation, because the reduction limits are an element that fundamentally affects the level of solidarity in basic pension insurance. With reference to the Constitutional Court’s judgment file no. Pl. ÚS 12/94, the Ministry concludes that it is up to the legislature whether the pension systém gives priority to equivalence or solidarity.

20. In the next part of its brief, the Ministry addressed the question of the replacement ratio, and pointed out that decreasing the replacement ratio was not among the so-called stabilization measures. Therefore, the question of increasing this ratio must also be reviewed in view of the overall future development of the balance of the pension system. In every country the replacement ratio depends on a number of factors. These are the balance of income and expenses of the pension system (including prognoses), rates of contributions for pension insurance, the overall level of the tax and withholding burden on the population and employers, the extent of support for supplemental pension systems, the historic development of the pension system, the number of insured persons and the circle of payers of pension insurance contributions, the importance of pension insurance income for the financial security of the population, and the overall role of the pension system in society (including the degree of solidarity). In view of these factors, the Ministry concludes that in the Czech Republic the existing structure of the level of pensions and the replacement ratio correspond to the socio-economic and political reality, and that they are not an expression of “pure arbitrariness by the legislature,” which simply does not want to provide higher pensions to groups of insured persons with higher incomes.

21. Thus, according to the Ministry, reducing the calculation base through reduction limits, i.e., calculating pensions not from the one hundred percent average of income determined for the decisive period, but from a reduced average, comes from the overall concept of the Czech pension system, which is based on a wider understanding of solidarity in the system, and the mutual interconnection and balancing of individual elements of the system, in particular the scope of including individual replacement periods, the manner of determining average income for the decisive period (including indexation and reduction), a percentage (1.5%) of the calculation basis for each year of the insurance period, age at retirement, and the institution of a supplemental period. It must also be emphasized that the extent of solidarity in the pension system is recognized throughout society, and is also requested by the majority of the society, and that

any marked limitation of this solidarity would be seen negatively by the majority of society.

22. In the conclusion of its brief the Ministry addresses the question of annulling the first and second reduction limit. According to the Ministry, annulling both reduction limits for reduction of the personal assessment base when calculating a pension under § 15 of the Pension Insurance Act would immediately be reflected in the level of newly allocated pensions, in a jump in their average relative level vis-à-vis wages, from the present ca. 45% to almost 80%. Annulling reduction limits would be reflected gradual in the overall level of pensions, because it will affect only newly allocated pensions. Nonetheless, long-term the average level of old-age pensions paid out would increase (measured by the ratio of the average old-age pension to the average wage) to almost 65% of the average wage). This fact would have a negative effect on the total expenditures for pensions and the sustainability of the entire system.

23. According to the Ministry, annulling the second reduction limit for reducing the personal assessment base for calculating pensions under § 15 of the Pension Insurance Act would be reflected in the level of newly allocated pensions; nonetheless, this increase would change the average relative level of these pensions vis-à-vis wages by only ca. 5%, from the present 45% to something over 47%. The relatively small increase in the level of newly allocated pensions is given by the fact that fewer than 30% of person to whom a pension is allocated have a personal assessment base above the second reduction limit, and the shift is only from 10% to 30%. If the reduction limits were fundamentally changed or annulled, it would be necessary to analyze the level of all other elements in the structure for calculating pensions, the percentages for the period of insurance until reaching retirement age, and in the period after reaching retirement age and the reduction of the percentage assessment element or pensions for early retirement. It would also be necessary to reevaluate the position, or level of inclusion of “replacement periods” of insurance that are taken into account for purposes of pension insurance even though no contributions or other payments are made during them.

24. Canceling the reduction limits for reducing the personal measurement basis for calculation of pensions would be reflected in the level of newly allocated pension by raising the pension calculated from the personal measurement basis in excess of the reduction limits, and if it were not connected with changes of other parameters influencing the level of pension, it would thus lead to increasing the expenditures for pensions. Changes in the reduction limits would establish inequality between individual groups of insured persons, because they would affect only the pensions allocated when these changes were in effect, and from an economic viewpoint it would not be realistic to remove these inequalities. The consequence of annulling § 15 of the Pension Insurance Act would be that it would not be possible to allocate pensions, or all direct pensions would be allocated only at the minimum guaranteed level, because this would cancel the definition of a key element for calculating the percentage assessment element of pensions (and § 16 to 18 would thus become practically inapplicable, and so obsolete), and adopting a new framework would be very difficult, and a certain reduction would have to be adopted again anyway, because otherwise the replacement ratio (the ratio of the pension to net wages) would be more than 90% (91 to 97%), which is financially

completely unrealistic.

25. In addition, the Ministry points out that the actual wording of § 15 of the Pension Insurance Act is not an obstacle to raising the reduction limits so that the personal assessment base would be taken into account in a greater degree for calculating pensions, because the government sets these limits by decree, and the Pension Insurance Act does not provide any criteria for setting the limits. However, these criteria are given in practice by the financial possibilities of the system (including balancing, or adjusting to balance the amount of already allocated pensions so that there would not be differences between pensions allocated in different periods), and by the role of reduction limits in the concept of the Czech pension system, and therefore no marked changes were made, or could be made, in the level of the reduction limits (theoretically it would be possible for the government to set a second reduction limit of, e.g., CZK 60,000).

26. In the conclusion of its brief the Ministry states that the petition from the Regional Court in Ostrava to annul the words "up to CZK 21,800" and the words "and from the amount of the personal assessment base over CZK 21,800, 10% is counted" in § 15, second sentence, of the Pension Insurance Act, cannot be implemented, because these words do not appear in the current wording of the Pension Insurance Act. The provision of § 15 of the Pension Insurance Act still contains the amounts CZK 5,000 and CZK 10,000, and these amounts were not changed by any other statutes; these amounts were increased by government decree, but a government decree is not directly an amendment of a statute. It also objects that the amount of CZK 21,800 is not valid in 2009, because for 2009 the second reduction limit is CZK 27,000, based on government decree no. 365/2008 Coll.; even if we accept that the government decree directly amends the Act, there is an obstacle under § 66 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court, because the contested wording, i.e. the amount of CZK 21,800, has already ceased to be in effect (see government decree no. 414/2005 Coll., government decree no. 462/2006 Coll., government decree no. 257/2007 Coll. and government decree no. 365/2008 Coll.).

IV.
The text of the contested provision

27. The provision of § 15 of Act no. 155/1995 Coll. reads: "The calculation base is the personal assessment base (§ 16), if it does not exceed CZK 5,000. If the personal assessment base exceeds CZK 5,000, the calculation base is determined as follows: the amount of CZK 5,000 is counted in full, from the amount of the personal assessment base over CZK 5,000 to CZK 10,000 30% is counted, and from the part of the personal assessment base over CZK 10,000 10% is counted."

V.
Conditions for the petitioner's active standing, permissibility of the petition

28. The Regional Court in Ostrava filed the petition in connection with a proceeding taking place before it, and the provision of the Pension Insurance Act proposed to be annulled is one of those that the court must apply in the

proceeding. Thus, its active standing is based on § 64 par. 3 of the Act on the Constitutional Court.

29. The Constitutional Court considered whether the provision cited in the petition can become the subject of a proceeding under § 64 et seq. of the Act on the Constitutional Court in a situation where a government decree raised the "second reduction limit" (which the Ministry of Labor and Social Affairs referred to in its brief).

30. In the first alternative in the petition, the petitioner proposes annulment of § 15 second sentence of the Pension Insurance Act, the words "up to CZK 21,800" and the words "and from the part of the personal calculation basis over CZK 21,800, 10% is counted." Thus, the Constitutional Court is asked to annul parts of a statutory provision in which Act no. 155/1995 Coll. set financial amounts that were later progressively increased by government decrees under § 107 par. 2 of the Act.

31. The Constitutional Court nonetheless had to consider the consequences of the steps taken by the government under the cited authorization provision, that is, the question whether, under § 67 par. 1 of the Act on the Constitutional Court, conditions for discontinuance of proceedings have been met, or whether the petition is admissible under § 66 par. 1 of the Act on the Constitutional Court. The petitioner made an alternative proposal in its submission to the Constitutional Court, and in the second alternative it proposed annulment of the (entire) provision of § 15 of Act no. 155/1995 Coll.; therefore, the Constitutional Court did not find that there were grounds to stop the proceeding, and it considers the petition admissible.

VI.
Constitutional conformity of the legislative process

32. The Constitutional Court also, in accordance with § 68 par. 2 of the Act on the Constitutional Court, reviewed whether the statute whose provision the petitioner considers unconstitutional was adopted and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner.

33. The Constitutional Court determined from the briefs from the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, as well as the relevant Chamber of Deputies publications and voting records, that the Chamber of Deputies approved the draft of the Pension Insurance Act at its 32nd session on 30 June 1995, i.e. before the Senate was established. The votes were 100 deputies in favor and 76 against. The Act was signed by the constitutional authorities and promulgated on 4 August 1995 in the Collection of Laws, part 41, as number 155/1995 Coll. Thus, the Pension Insurance Act was adopted in a constitutionally prescribed manner and within the bounds of constitutionally provided jurisdiction, observing the rules set forth in Article 39 par. 1 and 2 of the Constitution.

VII.
The Review

34. Thus, as the narrative part of the reasoning indicates, the Constitutional Court has the task of reviewing the constitutionality of the contested § 15 of Act no. 155/1995 Coll., on Pension Insurance. The subject matter for the Constitutional Court's review is primarily the question of whether the ratio between the level of income, pension insurance contributions, and the level of pension under the existing legal framework meets the constitutional requirement of "proportionality" of material security in old age (or during incapacity to work or loss of provider) and does not establish the claimed inequality between participants in pension insurance. Thus, evaluating the justification of the petition to annul § 15 cannot consist only of evaluating the constitutionality of the actual implementation of the right to adequate material security enshrined in Art. 30 par. 1 of the Charter, but also in terms of meeting the principle of equality enshrined in Art. 1 of the Charter.

Brief description of pension systems and the Czech legal framework

35. The contested § 15 of Act no. 155/1995 Coll., based on which pensions are calculated, cannot be reviewed in isolation – e.g., only through the prism of that legal regulation – but in the wider context of the pension system as one of the components of the state's social policy.

36. The pension system is an instrument of state social policy, through which the (basic) functions of social policy are fulfilled. Laws governing social security, including the area of pension systems, are generally a reflection of state social policy, which always comes from a collection of social and economic factors. The pension system fulfills primarily the following functions. The primary (historically oldest) is the function of protection, the aim of which is to protect an individual or social groups. The pension system also has functions of distribution and redistribution, and the function of redistribution is tied to mitigating the differences and inequalities between individuals and social groups. Another function of social policy is the homogenization function, which aims to mitigate social differences and unjustified differences, but its aim is not, under any circumstances, to level everything. The functions of social policy also include stimulation, supporting economic policy by motivating individuals (see Gregorová, Zdeňka: Důchodové systémy [Pension Systmes], Brno: Masarykova univerzita [Masaryk University], 1998, pp. 45-47).

37. Pension systems should ensure the provision of material security upon certain social events. Providing material security is possible at three levels (the so-called three pillars). The first (general) pillar is the pension systems provided by the state, the second pillar is based on employee (pension) systems, and the third (like the second, supplemental) pillar rests on the principle of personal savings (so-called "supplemental pension insurance").

38. In terms of the possibilities for financial pensions systems that are not directly financed by the state budget, there are two basic "insurance" systems of financing

– the “pay as you go” system, and the fund system. The basic difference is that in the pay as you go system the contributions collected from economically active persons – insurance payers – is used to pay pensions to existing pensioners. In a fund system the contributions paid are invested in individual accounts for purposes of financing the future pension entitlements of the persons who pay the premiums.

39. In order to function, the pay as you go system basically requires complete inter-generational solidarity, which means basically equal revenues and expenditures in the pension system each year. In other words, if basic pension insurance is based on the pay as you go system, that means that already allocated amounts are paid out of the currently collected contributions. Funds are not accumulated with the aim of investing them. Thus, the economically active generation directly pays pension amounts to the economically inactive generation. A financial balance in pay as you go systems can be achieved only if revenues are the same as expenditures.

40. In contrast, the fund system is not characterized by such inter-generational solidarity, because it is aimed at individualized coverage of an individual’s social risk in future through saving his resources. The revenue of the fund system is determined from the gross revenue from assets achieved on the financial markets, consistent with conditions defined by the regulator and supervision, and the level of administrative expenses.

41. The fund system undoubtedly suits the general private law idea of “insurance” much more than the pay as you go system; however, that does not mean that the pay as you go system would fundamentally not be considered an insurance system in the theory of social insurance. The insurance nature basically arises from these elements: in the pay as you go system as well the aggregate of collected premiums is intended to cover entitlements in the system and its level has no direct effect, in particular in defined payment systems, on the amount of the payment made; it has at most an indirect effect, because participation in insurance is a fundamental condition for an entitlement to future performance from the system, and the calculation of the amount of payments always in some manner takes into account at least the length of time that contributions were made to the system.

42. In pay as you go systems, a direct connection between the amount of contributions paid and the level of payment received in future is not necessarily required. If the payment received in future is always in some way dependent on the contributions paid in the past, then it is the length of time that contributions were paid that can be a variable in the benefit formula partly affecting the level of benefit payments. However, the amount of benefit payment fundamentally mostly depends on the amount of contributions paid by the future generation. Thus, in pay as you go systems the merit basis of the allocated payment fundamentally cannot be derived directly from the amount of contributions paid in the past without regard to the contributions paid by the younger generation at the time the payment is allocated, because there would be a risk of deficit in system financing. However, depending on the construction of payment calculation chosen, even in a pay as you go system the degree of equivalence between the allocated payment and previous income when a person was economically active can be higher or lower.

43. In both systems there are two basic kinds of calculation of benefit payments in terms of the benefit payment amount being tied to the level of previous earnings (or premiums paid). These are the defined contribution systems and defined benefit systems. Defined benefit systems are, by the nature of the matter, more typical of pay as you go systems, and contribution systems are more typical of fund systems, although various combinations may appear in practice.

44. In a defined contribution system the contribution rate at which the insured party pays into the system is defined. The amount of a person's pension depends directly proportionately on the number of contributions paid and their valuation, and indirectly proportionately on the life expectancy of his generation at the time the insured person retires. Thus, the amount of pension is not "guaranteed" in advance by the system, or is not predictable. It is obvious that this method of calculating the payment is suitable particularly for fund systems, even though there are also structures that implant a defined contribution system into a pay as you go system.

45. In contrast, in a defined payment system there is a precise formula for calculating pensions. After accepting certain simplifications [the expected period of insurance, level of income (or assessment base), etc.] an insured person should have an approximate idea of the amount of his pension several years before actual retirement. Of course, the credibility of the level of commitment to a given individual is strongly conditioned on the assumption that the key parameters of the pension system will not change in time.

46. The structure that makes payments dependent on previous payment of premiums is, among other things, an important factor influencing the labor market and employment, which comes to the forefront in connection with the long-term unsustainability of pension systems in one of the pure forms, and the present structure of parameters. Pension systems should not provide incentives for people to leave the labor market early. In both systems, staying in the labor market longer and having a longer insurance period ensure a fundamentally higher pension, which helps limit the risk of poverty in the post-productive age. However, the degree of influence on the behavior of individuals in the labor market is different in the two systems. Defined contribution systems are, in their pure form, mathematically neutral. In other words, the insurance premiums paid for an additional year in the labor market is fully reflected in the level of pension. Thus, a pure defined contribution system does not give an individual an incentive to leave the labor market early, nor does it "punish" him for retiring later. In a defined benefit system it is, in practice, virtually impossible to achieve this neutrality. The system gives advantages, or, on the contrary, "penalizes" various generations, sexes, or income groups in relation to their decisions to stay in the labor market, and it is thus possible to give an individual greater incentives to stay in the labor market longer.

47. On the other hand, however, both systems differ in the degree of merit basis in the opposite ratio to advantageousness. Defined contribution systems are, in their pure forms, also fully merit based, i.e. a pension depends completely on a given individual's income (or contributions paid). Thus, they provide all insured persons

the same degree of replacement of their pre-retirement income, regardless of the absolute level of that income. In contrast, defined payment systems generally contain a hidden inter-generational income solidarity. The degree of replacement of pre-retirement income is thus relatively higher for persons with lower income than for those with high earnings. A system with high income solidarity (i.e., typically, a defined payment system) is supposed to be an instrument for reducing the poverty of post-productive generations, but excessive income solidarity creates obstacles in the pension system. Contribution payments are perceived more like a tax, so the motivation to pay into the system decreases, which, in they end, supports the gray economy. A fully merit based system does not create negative incentives in the labor market, but in its pure form there is a risk that some pensioners will have inadequate pensions. The income of people in these risky categories must then be supported by other social systems.

48. Both in terms of financing, and in terms of the benefit calculation, each system has its advantages and disadvantages. A defined payment system permits ensuring the necessary solidarity, but if its weight in the pension system is too great, it can have negative effects on individuals' motivation to stay in the labor market. In contrast, the defined contribution system does not affect the labor market, but can also lead to poverty in part of the population. Pay as you go financing is vulnerable to demographic changes and is sometimes politically misused to create inter-generational unfairness. In contrast, fund financing is sensitive to developments on the financial markets, the quality of regulation, and the level of administrative expenses.

The present Czech pension insurance system

49. The present Czech pension insurance system is a two-pillar system; the first pillar is the basic system, and the second (third, in terms of general theory) pillar is statutory voluntary supplemental pension insurance with a state contribution. The first pillar of the system is general (it applies to the entire population), uniform (it should not establish unjustified differences), mandatory (it imposes an obligation to participate financially in the creation of resources) and demonstrates social solidarity. The structure of benefit payments from the pension system is built on the following principles, which the legal framework must respect: merit basis, social need, security, guarantee and initiation, replacement and social integration, preserving acquired rights, indexation and removal of harshness (see Gregorová, Zdeňka: Důchodové systémy [Pension Systems], Brno: Masarykova univerzita [Masaryk University], 1998,pp. 80-85).

50. A pension consists of two components, the basic assessment set as a fixed amount for all kinds of pensions regardless of the period of insurance and level of income, and a percentage assessment reflecting the insured person's previous earnings. Old-age pensions (full disability and partial disability pensions) are calculated using the relevant percentage based on the acquired length of pension insurance from the calculation base. Two elements are fundamental for setting the calculation base, the personal assessment base, and the reduction limit. When setting the calculation base one starts with the personal assessment base, i.e. the aggregate of the insured person's assessment bases in individual years in the

decisive period, which are then, using the coefficient for the growth of the general assessment base, adjusted to the wage level achieved in the year before the year when the pension is allocated. The aggregate of the insured person's assessment bases for the calendar year, multiplied by the relevant coefficient of the growth of the general assessment base, yields the insured person's annual assessment basis, and the monthly average of these annual assessment bases for the decisive period yields the personal assessment base. Reduction of the personal assessment base then gives the calculation base for calculating the percentage assessment of the pension.

51. In terms of financing, the Czech pension insurance system can be described as a pure system financed on a pay as you go basis, with defined payments. Thus, it is a system that required a high degree of inter-generational and intra-generational solidarity in order to function; the intra-generational solidarity also depends on demographic trends, and thus the increase in the number of pensioners compared to economically active persons, also an indirect manifestation of inter-generational solidarity, because it is constantly tied to the need for financial balance.

52. The allocated pension benefit is calculated as follows: first, the annual assessment bases are multiplied by the coefficient of growth of the general assessment base to determine the indexed annual assessment bases and the aggregate of them. At the same time, excluded periods are added up. The personal assessment base is then calculated by multiplying the aggregate of annual assessment bases for the decisive period by the coefficient under § 16 par. 1 of Act no. 155/1995 Coll., and the result is divided by the number of days in the decisive period (from which excluded periods are subtracted).

The calculation base is the personal assessment base, not exceeding a set amount that is included in full, and which, if exceeded, is reduced, first by 30%, and if the second reduction limit is exceeded, only 10% of the personal assessment base is counted.

53. On the basis of this system, on the basis of its principles, reflection of those principles in the legal framework, as well as the manner of financing the system, the Constitutional Court reviewed whether Act no. 155/1995 Coll., or the contested § 15, fulfills Art. 30 par. 1 of the Charter, which provides that "citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider." The Charter provides the fundamental parameters that define the social guarantees for dignified human existence. The aim of contemporary social security in the most general sense of the word is to regulate the citizen's responsibility for his future (mandatory insurance systems) and to set the degree and form of social solidarity between citizens (mandatory or voluntary transfer of funds through the tax system or sponsorship); see Klíma, Karel and collective of authors: Komentář k Ústavě a Listině, 2. vydání [Commentary on the Constitution and the Charter, 2nd ed.], Plzeň: Aleš Čeněk, Plzeň 2009, p. 1234.

54. The statutory framework, based on general principles, attempts to ensure adequate material security for all participants in pension insurance, with the maximum emphasis on the principle of solidarity, both inter-generational and intra-

generational (i.e. income). The Constitutional Court addressed the concept of solidarity in judgment file no. Pl. ÚS 2/08: “The degree of recognition of the solidarity principle depends on the level of ethical understanding of cohabitation in society, its level of sophistication, but also the individual’s feeling for justice and cohesiveness with others and sharing their destiny in a particular place and time. From the individual’s viewpoint, solidarity can be seen as internal or external. Internal solidarity comes from the emotional closeness of a relationship to others; it is spontaneous, and exists primarily in the family and other social partnerships. The state generally does not interfere in this relationship, or only to a very limited extent (see family law relationships regulated by the Act on the Family). External solidarity lacks this emotional closeness, and therefore the individual is more reluctant to consent to apply it. This includes, for example, solidarity of the rich with the poor, the capable with the less capable, the healthy with the ill. In this area the state exercises its sovereign-power function very actively. Redistribution, i.e. transferring resources from one group to another – the needy group – is exercised through the solidarity principle. Solidarity has its limits. It cannot be so extreme that those whom it affects would feel it to be disproportionate or even unjust, and withdraw their tacit consent. The state may, in the name of solidarity, affect only such part of the property of a capable person as will not at the same time destroy the person’s activity and go beyond the constitutional limit of protection of property.”

55. The Constitutional Court does not in any way question the principle of inter-generational solidarity in relation to the pension system, because the system is, as a pay as you go system, built on that principle. Nonetheless, we must review income solidarity (intra-generational), reflected in the single percentage rate for premiums paid by economically active persons; high-income groups of the population thus pay into the system each year for payments of pension benefits considerably higher amounts than low-income groups. The principle of income solidarity is manifested in the fact that, in the construction for the calculation of pensions under the current legal framework, the pension system does not provide all insured persons equivalent performance, because – as stated above – it fulfills, among other things, the protective and redistributive function of social policy.

56. However, in implementing this protective and redistributive function of social policy, the legislature, when constructing the pension system, or constructing the calculation of pension benefits, should not repress other essential functions of social policy, including the stimulation function, which should affect the economic behavior of insured persons in a desirable manner, and as a result lead to an increase in the total revenues of the system.

The pension system as a public insurance system

57. The Czech Republic first addressed construction of public social insurance as a basic system of insurance for old age, disability, or death of a provider on 1 January 1996, in Act no. 155/1995 Coll., on Pension Insurance, (the foundation for insurance was already laid by Act no. 589/1992 Coll., on Insurance Contributions, which functioned during the transition period as an instrument for the gradual direction of collected contributions into the state budget). This is a system of

public insurance whose function and principles are different from commercial (private law) insurance, which is repeatedly set forth in theoretical writings (which the Ministry of Labor and Social Affairs mentioned in its brief). For example, J. Vostatek (Sociální a soukromé pojištění [Social and Private Insurance], Codex Bohemia, 1996, p. 65) states: "The statutory obligation for insurance is a key element of social insurance, whereby it differs from the typical contractual insurance. Mandatory insurance can be used to overcome the obstacle of insurability of risks that is typical in private insurance – e.g., the risk of unemployment is considered uninsurable or difficult to insure in the private insurance sector, and 'market failure' is a typical event. Social insurance is generally financed through contributions paid by employees and employers, sometimes with state subsidies."

58. Pre-war specialized literature already pointed out the different nature of social insurance and contractual insurance. Reference is made primarily to the five-part Slovník veřejného práva československého [Dictionary of Czechoslovak Public Law], specifically the entries "Private insurance (contractual)" in volume III, Brno 1934, p. 147 et seq. and "Social Insurance" in volume IV, Brno 1938, p. 343 et seq.; these entries state, e.g.: "The name private insurance means all kinds of insurance based on a private law contractual relationship between the parties, as distinguished from so-called social insurance. … In contrast to private insurance, however, social insurance has certain different typical characteristics. … The most important conceptual difference between private and social insurance is that private insurance is based on the free decision of the insured party and the insurer, whereas social insurance is based on a statutory order: anyone who falls within the circle of persons whom the law includes in social insurance must be insured, whether he wishes to or not, and the insurer assigned thereto by law, must accept the insurance, even if it knows in advance that the risk connected to this insured party is too great to be covered by individual insurance premiums."

59. Even respecting the difference between commercial and public insurance, which cannot be based on the principle of pure equivalence (the level of performance fully reflects the level of premiums), the relationship between the amount of contributions paid and the amount of pension allocated must reflect a certain degree of proportionality for individual participants in order to constitutionally fulfill Art. 30 par. 1 of the Charter.

60. The background report to Act no. 155/1995 Coll. (publication 1574, the Chamber of Deputies of the Parliament of the Czech Republic, I. term of office) states that "the level of rates and conditions for contributions for social security are conceived so that the contributions will cover expenditures for pension and sickness insurance benefits that are derived from the income of economically active citizens under the current legal framework; these are pensions for old-age, widows, widowers, orphans, disability, partial disability, service, sickness insurance, support when taking care of a family member, financial assistance in maternity, an equalization contribution for pregnancy and maternity. … The contributions collected will be a specially tracked income of the state budget, in accordance with budget rules, which will be used to pay all expenditures for social security and employment [policy] through the budget of the Ministry of Labor and Social Affairs of the Czech Republic."

61. Thus, premiums and their level (a total of 28%, of which the employee pays 6.5% and the employer 21.5%) are set only on the basis of economic calculations so that pensions paid in a given year are fully covered by the payments collected from insured persons in that year.

62. Thus, in this structure, the income side fundamentally reflects the solidarity principle, because an insured person pays into the system amounts that are directly proportional to his (taxed) income, and only the protective and re-distributive function of social policy is implemented. This conclusion is not changed by the fact that Act no. 261/2007 Coll. "capped" payments into the pension system (the maximum payment for premiums in 2010 is seventy two times the average wage).

Material security – replacement ratio

63. The Charter of Fundamental Rights and Freedoms guarantees all participants of pension insurance adequate material security. Adequacy [proportionality] must be understood as an indefinite legal concept. The proportionality of material security in relation to individual participants in pension insurance must be understood in relation to satisfying an individual's living needs, in relation to the widest possible circle of persons, but also in relation to the insured person as a payer who co-creates the financial resources from which the material security will be provided. Proportionality as a legal (constitutional) category, however, is often aimed rather at reviewing whether a particular system of pension (or generally social) insurance is capable, in the event of defined social events, of providing the affected person an amount of funds that will provide for his life, while observing the category of dignity in his social context.

64. An expression of the criterion of proportionality is the internationally used comparison measure of the "individual replacement ratio of the typical income individual." A typical example of the use of this comparison criterion as a basic legal criterion for the proportionality of the system is, for example, the European Social Security Code (promulgated as no. 90/2001 Coll. of International Treaties). Art. 25 requires each signatory to ensure the provision of benefits in old age to protected persons according to the criteria provided. It then sets the criteria for retirement age and criteria for the minimum scope of covered persons. As regards the level of benefits, Art. 28 states that a benefit is a regularly repeating payment. Art. 65 defines a typical benefits recipient, who is defined in terms of income as a typical qualified laborer, and defines a desirable replacement ratio. A typical recipient of benefits in old age (and thus a referential object of the proportionality of the system) is a man, a qualified laborer, of retirement age, with a wife, who is guaranteed a replacement ratio of 40%. A somewhat stricter, but analogously constructed criterion of proportionality is found in International Labour Organization Convention no. 128 on Invalidity, Old-Age, and Survivors' Benefits (published as no. 416/1991 Coll.), which requires a replacement ratio of 45% for a typical income individual.

65. Thus, it is evident that a basic legal requirement for pension systems is to provide a certain replacement ratio, not to all persons covered by the system, but

to persons defined as the typical income individual, and this construction is aimed at a person with more or less average income. None of the international law instruments by which the Czech Republic is bound requires that the same relative value of the replacement ratio (as a percentage) be achieved for every insured person.

66. According to the Czech Republic's last report on fulfillment of the European Social Security Code (see Sixth Report on Fulfillment of the European Social Security Code, at http://www.mpsv.cz/files/clanky/6219/zprava_EZSZ_6.pdf) the replacement ratio for an income-typical individual in 2006 was 46.2 %, in 2007 45.1%, and in 2008 44.6 %. The general replacement ratio (the ratio between the average wage and the average pension) has declined similarly – in 2003 it was 42.2% (of gross wages), in 2007 40.6 %. This decline is caused by disproportionate wage growth, the pension formula used in a defined benefit system, and again, the attempt to maintain a financial balance in the system (the declining number of economically active insured persons in relation to the recipients of pension insurance benefits).

67. The foregoing indicates that the Czech pension insurance system meets the fundamental requirement of proportionality, as defined by international treaty instruments. Of course, it is able to meet it (given that it is a pay as you go defined benefit system) only at the price of a high degree of inter-generational and intra-generational solidarity. In order to maintain a payment balance and preserve the desirable replacement ratio for individuals with earnings approximately around the average wage, it is necessary to give up the analogous degree of individual replacement ratio for individuals whose incomes are at multiples of the average wage. The date in the following table can serve as an example:

Multiple of average wage	Old age pension allocated in the year				
	2003	2004	2005	2006	2007
0.7	55.6	53.6	55.4	55.7	55.2
1.0	44.3	42.9	44.2	44.4	44.0
1.5	32.1	31.2	32.2	32.3	32.0
2.0	25.6	24.9	25.6	25.7	25.5
2.5	21.7	21.1	21.7	21.8	21.6
3.0	19.1	18.6	19.1	19.1	19.0

68. It is evident from this overview that the system is capable of guaranteeing, in the long term, a satisfactory replacement ratio for individuals with incomes around the average wage, and provides an advantage to individuals with a below-average wage (which is seen as a justified advantage). It is able to do so only at the price of reducing the individual replacement ratio for persons with a twofold or higher multiple of the average wage – from a general viewpoint the system also guarantees them a benefit which, according to the legal framework, is a certain minimum for a dignified existence in old age, nonetheless it is a benefit that cannot guarantee preservation of the living standard that these persons were accustomed to in their time of economic activity.

Material security – reduction limit

69. The replacement ratio, i.e., the relationship between a wage and the pension benefit calculated from it, demonstrating a clearly regressive character, results from the structure of benefits in a pension system whose key element is a so-called reduction limit.

Year	2003	2004	2005	2006	2007	2008	2009
First reduction limit	7,400	7,500	8,400	9,100	9,600	10,000	10,500
in % of average wage	44.1	41.9	44.7	45.4	44.6	43.0	ca. 45
Second reduction limit	17,900	19,200	20,500	21,800	23,300	24,800	27,000
in % of average wage	106.7	107.4	109.0	108.7	108.2	106.6	ca.117.4

70. As a result of the reduction limits decisive for calculation of pensions, with increasing earnings the ratio of pension to those earnings declines. With the exception of 2005 and 2006, the first reduction limit was increased more slowly than the average wage, so that the band of earnings that are fully included in calculating pensions decreased (relative to the average wage). In the period 2003-2008 the second reduction limit grew somewhat faster (by 3.4 percent) than the first reduction limit. The result was that the band of earnings that are included by 30$ for calculating pensions increased more (absolutely and relatively as a percentage) than the band where earnings are fully included in calculating pension amounts, and which affect the level of all pensions. These trends were reflected in a reduction of the level of newly allocated pensions (their ratio to wages) until 2004 and again after 2006 (see the cited report from the Ministry of Labor and Social Affairs).

71. Thus, the Constitutional Court must state that the legal framework implemented by the contested § 15 of Act no. 155/1995 Coll. (in particularly establishing reduction limits) creates a situation where a participant in the pension system who contributes three times more than a participant who contributes an amount calculated from an average wage is allocated a pension of – relatively – less than half. Yet, statistical date show that ca. 30% of insured parties, in the calculation of pension benefits, will cross the second reduction limit (ca. 95% of insured persons cross the first reduction limit). Thus, it is evident that the legal framework, in the attempt to ensure adequate material security to all participants in pension insurance, does not ensure for some insured persons a proportionate material security that reflects, in a recognizable degree, the principle of a merit basis, i.e. fulfilling the stimulation function of social policy.

Replacement ratios – the principle of a merit basis

72. Despite considerable differences between pension systems in individual countries (in the method of financing and principles reflected in the construction of pensions), we can provide, at least for illustration, the replacement ratios in the

basic pension systems of selected European countries that were provided by the Ministry of Labor and Social Affairs.

Country	multiple of individual income					
	0.5	0.75	1	1.5	2	2.5
FINLAND	90.7	78.8	78.8	79.2	78.3	79.3
ITALY	9.3	88	88.8	88.4	89.1	89
CROATIA	66.7	63.1	61.6	59.7	59.6	58.9
ESTONIA	59.9	60.6	60.9	61.3	61.5	61.7
NETHERLANDS	82.5	88.2	84.1	85.8	83.8	82.8
BELGIUM	82.7	63.8	62.8	50.6	40.6	34.2
IRELAND	63	47	36.6	27.4	21.9	18.3
NORWAY	85.5	73.1	65.1	58.2	50.1	42.8
DENMARK	95.6	68	54.1	42.5	35.5	30.8
SWITZERLAND	71.4	68.9	67.3	53	41.4	34.3
GREAT BRITAIN	78.4	57.7	47.6	38.2	29.8	24.5

73. Although the replacement ratios in individual countries are different, in view of the nature of each system and in view of the degree of solidarity reflected in them, in recent years they share a trend that arises from European recommendations. Most countries are reducing, or heading toward reducing, contributions to the state pension system as the first pillar of a pension system, and are introducing or increasing contributions into the other pillars. In particular with the third pillar, this trend permits strengthening the merit principle in the pension system (i.e., to the benefit of high income groups). Among these countries we can name, for example, Germany, where in a (similarly conceived) pay as you go system, since 2002, part of the state insurance is also being redirected to the other pillars (state organized funds). The German model was followed by Slovakia, which comes from the same pension system foundations as the Czech Republic. One of the main motives for changes in the Slovak pension system was the attempt to strengthen the merit principle (cf. from the background report to the law: “The government draft of the Act on Social Insurance is a law on a proportionate degree of solidarity and a proportionate degree of merit, because these two principles must be balanced and also applied vis-à-vis all persons who contribute to the system.”). Besides that, we must emphasize that in a number of European Union countries there is, in addition to a general pension system, an independent legal framework for pension insurance for certain professional groups, which reflects not only the criteria of risk and difficulty of certain professions (employees working in conditions that are dangerous to health, members of security and armed forces), but also a requirement for independence in the exercise of a given profession (state administration employees, judges). In these legal frameworks, this form of applying the constitutional principle of equality (unequal things cannot be regulated equally) clearly reflects the merit principle in the pension system.

74. In reviewing the proportionality of all relevant components of the pension system (including the merit principle), the Constitutional Court also takes into consideration the opinions of experts who have studied this issue for a long time; in this regard it can point to the conclusions of the Bezděk Commission, which, in reviewing the degree of merit in the pension system, reached similar conclusions as those cited from the background report to the Slovak law: “Studies have confirmed

that the present system is unsustainable in the long term, and in the long term will generate annual deficits of 4 to 5% of GDP. This result corresponds to the conclusions of earlier studies. However, the present calculations also demonstrate that the present system is micro-economically inefficient. It is characterized by a strong income redistribution, which leads to high replacement ratios for low-income individuals and a low replacement ratio for individuals with above-average incomes. The insurance elements of the system are repressed, with a relatively high contribution rate. Thus, high redistribution can cause: (i) a significant decline in living standards for persons with above average income upon the transition from work activity to retirement, (ii) the transition can be painful, particularly for the middle class, whose incomes range only barely above the average wage level and which, in view of the high insurance rate, limiting the ability to save privately, could not provide for its old age from its own resources.

One of the things learned from studies of the alternatives for pension reform is the fact that there is insufficient scope to strengthen the merit factor in the state pension system. Measures relatively increasing the pension of high income individuals would lead to a dramatic increase in the pension system's expenses, and would thus increase the already strong tendencies toward deficits. An alternative possibility is to finance the relative increase of the replacement ratio of high income individuals by reducing the re-distribution within the pension system, i.e. adopting measures that would relatively reduce the level of newly allocated pensions for below average income persons.

The political decision should be in line with economic principles, and should take into account the starting condition of the Czech pension system. Today's system is not financial sustainable in the long term. It is characterized by a very high degree of income solidarity. Likewise, it is characterized by a very high volume of that solidarity as a result of a high contribution rate. The system is inter-generationally unfair and its financing is not diversified. The parameters of the pension system must be considerably adjusted. The degree of income solidarity in today's system is high. It can be left at this level, which eliminates the risk of poverty for endangered segments of the population. At the same time, of course, it will have a negative effect on the labor market and on the motivation for citizens to pay high contributions to an equalizing system. Therefore, we consider it appropriate to reduce the volume of income solidarity in the state pillar."

75. The Insurance Mathematical Report on Social Insurance from the Ministry of Labor and Social Affairs (http://www.mpsv.cz/files/clanky/5886/zprava_2008_cz.pdf) states: "It is appropriate to supplement parameter changes with reform aimed at diversifying the system, diversifying both the income and the expense sides of the system, which should lead to strengthening the certainty of appropriate income in old age. Thus, reform should lead to strengthening the differentiation of pensions for middle and higher income groups. Possible strengthening in the equivalence of pensions comes from the possibilities for reducing the level of pensions for lower income groups. Scope for differentiating pensions is given by the difference between the minimum allocated pension and the average pension. The possibilities for differentiating pensions also depend on the level of the contribution ceiling, which in its way determines to what degree differentiation is to be addressed in

the system of basic pension insurance. With a relatively low contribution ceiling, differentiation will be the role of supplemental schemes, and, in contrast, with a high ceiling or no ceiling, it must be addressed in the system of basic pension insurance.

Increasing equivalence while maintaining the level of total system expenses and the existing protection against the risk of poverty in old age should be achieved for the middle and higher income groups at the price of strengthening the leveling of pensions for lower income groups. This can be achieved, for example, by combining an equivalence system with a minimum pension, where part of the contributions is targeted at covering the minimum pension, and the rest goes into the equivalence scheme. Another possibility is a combination of a certain form of a flat pension with an equivalence scheme, where the entitlements in the equivalence scheme arise only after a certain income level. Up to that income level, contributions are made only into the flat pension scheme, and above that level part of the contributions is made into the equivalence scheme. Both possibilities would permit including an element of fund financing."

76. Of course, the experts also reviewed the degree of merit basis reflected in the pension system primarily through the prism of economic effects (i.e., particularly in terms of the long term sustainability of the system), which, of course, overlooks the constitutionally understood principle of equality. Nonetheless, the experts' conclusions clearly reveal signs of a violation of the principle of equality of individuals and groups as participants in pension insurance (which endangers the fulfillment of the basic functions of social policy as a whole, and also, as a result, the proper functioning of the pension system that is supposed to reflect these functions). Some experts indicate in their conclusions that the requirement of increasing the financial resources of the system need not be the only path to strengthening the merit principle.

Constitutionality of the contested provision

77. In its case law, the Constitutional Court formulated viewpoints for review of the constitutionality of the legal framework for social security. In judgment file no. Pl. ÚS 12/94 it stated that "in all existing social security systems the principles of solidarity and equivalence are represented in varying degrees. Every system of social security carries advantages or disadvantages for certain social groups, depending on whether it gives preference to the viewpoint of solidarity or the equivalence principle. This regulation is reserved to the legislature, which cannot act arbitrarily, but, when setting the preference, must take into account the public values pursued. In the area subject to review, an area of economic legislation, the legislature has considerably wider discretion than in laws that directly affect the fundamental human rights and freedoms. … The Constitutional Court of the Czech Republic cannot agree with the petition's claim that contributions paid by beneficiaries of old age pensions do not bring 'counter-performance' in any group to which they contribute, and that it is therefore a hidden tax that is imposed on them in violation of valid regulations."

78. The Court confirmed these viewpoints in other judgments as well, in particular

the matters file no. Pl. ÚS 14/02, Pl. ÚS 1/08 (“In judgment file no. Pl. ÚS 12/94 – although it concerned the area of social security – the Constitutional Court stated that the question of whether to prefer the viewpoint of solidarity or the equivalence principle is reserved to the legislature, which cannot act arbitrarily, but, when setting the preference, must take into account the public values pursued.”), and II.ÚS 348/04 ("The Constitutional Court, in its judgment file no. Pl. ÚS 12/94, stated that in the area of social security as well, when applying contributions, this concerns the legal institution of insurance, because it reflects a legal situation in which the citizen transfers his risk, for payment, to another entity, and that entity accepts the risk and is obligated to a particular performance. Thus, it follows from the insurance relationship, even if it is a public law relationship, that fulfillment of conditions by the insured party, the resulting right to a pension corresponds to an obligation of the other party to provide that performance in pension insurance.”)

79. The Court also did not deviate from the line of thought thus laid out in judgment Pl. ÚS 2/08, in which it stated regarding social rights: “A defining element of these rights is the fact that they are not unconditional in nature, and can be exercised only within the bounds of the laws (Art. 41 par. 1 of the Charter). This provision gives the legislature the right to set specific conditions for implementing social rights. The statutory implementation may not conflict with constitutional principles; in other words, the statutes may not deny or annul constitutionally guaranteed social rights. In implementing the constitutional framework enshrined in the Charter, the legislature must be governed by Art. 4 par. 4 of the Charter, under which, in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. With social rights, we can say that a collective limitation on them is precisely the fact that they are not, unlike, for example, the fundamental rights and freedoms, directly enforceable on the basis of the Charter. The limitation of these rights consists of the need for a statutory implementation, which is also at the same time the condition for specific implementation of individual rights."

80. The dissenting judges Holländer, Malenovský, Cepl, Čermák, Güttler, Mucha and Procházka, in their dissenting opinion to judgment file no. Pl. ÚS 14/02, also subscribed to the thesis expressed in judgment Pl. ÚS 12/94, in which “the court stated that it is the obligation of the legislature to transparently express the ratio of the components of solidarity and equivalence in the social insurance system (including health insurance); it also stated that this division may not be arbitrary. In the opposite case, i.e. in the absence of the element of equivalence, the reviewed institution would lose its legal nature, it would cease to be insurance, and acquire the character of a tax.” They then drew the following consequence: “Thus, Art. 31 of the Charter, in conjunction with Art. 41 and Art. 4 par. 4 of the Charter, gives rise to a fundamental right for the insured person to a component of equivalence in public health insurance transparently determined by the legislature, and in such an extent as preserves the nature of the legal institution of insurance and does not change it into a tax.”

81. From this outline of the Constitutional Court’s case law, we can state the following general theses in relation to the constitutional enshrining of social rights:

The first is that there is narrower scope for review of the constitutionality of laws governing social rights than for fundamental rights under chapters two, three and five of the Charter, scope that is defined by Art. 41 par. 1 and Art. 4 par. 4 of the Charter. The second thesis is the ban (prohibition) on arbitrariness in regulating these rights (Art. 1 and Art. 3 par. 1 of the Charter), and the third thesis is the necessity of statutory regulation of social rights (Art. 41 par. 1 of the Charter). The combination of the first and second theses is the basic starting point for review of the constitutionality of § 15 of Act no. 155/1995 Coll., i.e., it is the maxim that Art. 31 of the Charter, in conjunction with Art. 41 and Art. 4 par. 4 of the Charter, as well as Art. 1 and Art. 3 par. 1 of the Charter, give rise to the insured person's fundamental right to a component of equivalence (proportionality), transparently determined by the legislature, in public pension, sickness and health insurance, in a degree that preserves the nature of the legal institution of insurance and does not change it into a tax.

82. The relationship between the individual and the whole (the society of which he is a member) is reflected in a democratic society in the "tension" between the values of justice and freedom. In addition, primarily in connection with the positing of the "social question" in the 19th and 20th centuries, the question arises of the relationship between social justice and the acceptable degree of institutional activities limiting freedom. In this regard the acceptability of individual burdens (detriment) at the expense of public values is fundamental. In the present matter this question is reflected in the determination of the degree of acceptability of inequality among subjects in view of the inequality of their incomes, pension insurance contributions, and the level of pensions.

83. An expression of the constitutional prohibition on arbitrariness in setting the rights and obligations of subjects is the constitutional principle of equality. A summary of the Constitutional Court's previous case law on the rights arising from it is found in judgment Pl. ÚS 6/05. In it, the Constitutional Court referred to its extensive and settled case law, in which it formulated the viewpoint of constitutional evaluation of the category of equality (see, especially judgments file no. Pl. ÚS 16/93, Pl. ÚS 36/93, Pl. ÚS 4/95, Pl. ÚS 5/95, Pl. ÚS 9/95, Pl. ÚS 33/96, Pl. ÚS 15/02, Pl. ÚS 33/03, and Pl. ÚS 47/04). In its understanding of the constitutional principle of equality it agreed particularly with the conclusion stated by the Constitutional Court of the Czech and Slovak Federal Republic ("CSFR") (judgment file no. Pl. ÚS 22/92, Collection of Decisions of the Constitutional Court of the CSFR, judgment no. 11, p. 37). In it, the Constitutional Court of the CSFR understood equality as a relative category that requires removing unjustified differences. Therefore, the principle of equality must be understood to mean that legal differentiation in the access to certain rights may not be an expression of arbitrariness; however, it does not follow that everyone must be granted every right. The Constitutional Court thus shifted the content of the principle of equality into the area of constitutional acceptability of aspects for differentiating subjects and rights. It sees the first aspect as ruling out arbitrariness. The second aspect in evaluating the constitutionality of a legal regulation that establishes inequality is the interference that it creates in one of the fundamental rights and freedoms. In other words, in its case law the Constitutional Court interprets the constitutional principle of equality in terms of accessory and non-accessory equality. Thus, a particular legal framework that gives an advantage to one group or category of

persons over others may not, without anything further, be described as violation of the principle of equality. The legislature has a certain discretion to deliberate whether to establish such preferential treatment. It must see to it that the approach that grants an advantage is based on objective and reasonable grounds (a legitimate legislative aim) and that there is a proportional relationship between that aim and the means used to achieve it (see, e.g., decisions of the European Court of Human Rights in the matters Abdulaziz, Cabales and Balkandali from 1985, § 72; Lithgow from 1986, § 177; Inze from 1987, § 41).

84. In the event of conflict between some public goods with fundamental rights, the Constitutional Court applied a different structure of the principle of proportionality (with which it also tested the conflict of fundamental rights arising from the principle of equality with other rights, or public goods), than the one represented by the imperative for optimalization (Pl. ÚS 4/94, Pl. ÚS 41/02). This alternative structure of the principle of proportionality could be called ruling out extreme disproportionality. This involved cases of review of the constitutionality of the legal framework of taxes, fees, or other similar statutorily imposed mandatory payments (also including mandatory insurance) as well as monetary penalties (Pl. ÚS 3/02, Pl. ÚS 12/03, and Pl. ÚS 7/03).

85. We can draw the following conclusions from the maxims formulated in the cited judgments for the constitutional review of the relationship between the level of income, the level of pension insurance contributions, and the level of pensions: The constitutional principle of the separation of powers (Art. 2 par. 1 of the Constitution), as well as the constitutional definition of the legislative power (Art. 15 par. 1 of the Constitution), gives rise to wide discretion for the legislature in decision-making on the relationship between the level of pension insurance contributions and the degree of solidarity, reflected in the degree of inequality between the level of income, insurance contributions, and pensions. The legislature bears political responsibility for the consequences of this decision-making. Although pension insurance contributions are a public law mandatory financial performance to the state, and thus interference in the property substratum, and thus also the property rights of the obligated subject, unless other conditions are met it does not interfere with constitutionally protected property rights under Art. 11 of the Charter and Art. 1 of the Protocol to the Convention (see also Pl. ÚS 12/94).

86. Constitutional review of the proportionality connection between income level, pension insurance contribution and pension level includes evaluating the observance of safeguards arising from the constitutional principle of equality, both non-accessory (Art. 1 of the Charter), i.e., arising from the requirement of ruling out arbitrariness when distinguishing subjects and rights, and accessory, in the scope defined in Art. 3 par. 1 of the Charter. Reviewing non-accessory equality is based on review of the connection between the legislative instrument chosen by the legislature and its intended aim. For the reviewed legal framework to be constitutional in terms of non-accessory inequality it is sufficient if the classification reviewed is in some rational relationship to the purpose of the law, i.e., whether it can affect the achieving of the aim in some way.

87. In judgment file no. Pl. ÚS 7/03 the Constitutional Court concluded, regarding

fulfillment of the conditions for non-accessory inequality: “If the purpose of different contribution rates is to ensure that it is fulfilled in accordance with the structure of insured events and if the data contained in the brief from the party to the proceedings indicate the most disadvantageous rates of damage in the mining field, we cannot do otherwise than describe the difference in insurance contribution rates set forth in appendix no. 2 to decree no. 125/1993 Coll., as amended by later regulations, as corresponding to the purpose of the legal framework as described by the party. Due to the foregoing we cannot agree to the petitioner’s objection concerning the unconstitutional inequality of the contested legal regulation.” A contrario the foregoing indicates that unconstitutionality of a legal framework consisting of non-accessory inequality is given by the lack of a connection between the legislative means and its declared (intended) aim.

88. According to the background report to the government draft of the Pension Insurance Act “the ratio of the average old age pension to the average net wage at present (i.e. in 1995) reaches 56%. Only after an increase in pensioners’ income from supplemental pension insurance in the perspective of 10 years or more can the differentiation of pensions, with regard to the possibility of more marked differentiation of income from supplemental pension insurance according to citizens’ individual expectations in the basic system, be gradually reduced according to earnings level and number of years worked.”

89. An illustrative calculation of the ratio of average earnings and the old-age pension achieved shows data that for an employee with an income of ca. 50% of the average wage the replacement ratio to gross income would be ca. 88 % (ca. CZK 9,000), for an employee with income of 100% of the average wage, ca. 42% (ca. CZK 10,000), for an employee with income of 200% of the average wage ca. 29% (ca. CZK 14,000), and for an employee with income of 300% of the average wage ca. 15% (ca. CZK 15,500).

90. If the second of the aims of the Pension Insurance Act was achieved, i.e., reducing the differentiation of pensions according to earnings level, the first aim, i.e. opening room for differentiation of pensions, was not achieved. According to information from the Czech Statistical Office concerning supplemental pension insurance: “there is still low awareness of the role that this form of old age security can play for a large part of the population. In 2004 people saved an average of just under CZK 397 per month, in 2001 it was CZK 348. Although their incomes are growing, they are not putting more into pension funds – they put only 2.2% of their average gross wage per month into supplemental pension insurance, and this ratio has even declined each year (in 1996 it was 3.2%).” (http://www.czso.cz/csu/csu.nsf/informace/ckta130905.doc)

91. The legislative instruments for achieving the second of the abovementioned aims of the statutory framework for social security, i.e. differentiation of pensions while ensuring social solidarity, are necessarily tied to the statutory framework of contributions for social security, specifically with the establishment of the maximum assessment bases for paying contributions by Act no. 217/2007 Coll., which amended § 15a of Act no. 589/1992 Coll., on Contributions to Social Security and the Contribution for State Employment Policy. Thus, 12 years after the Pension Insurance Act went into effect, legislative discretion was created for a proportional

accord between the purposes of social solidarity and differentiation in view of income level and level of contributions for pension insurance.

92. Act no. 362/2009 Coll., which Amends Certain Acts in Connection with the Draft act on the State Budget of the Czech Republic for 2010, reduced, or ultimately cancelled the cited legislative means removing the extreme disproportionality between the statutory framework and its purpose. According to the new provision it created, § 15b of Act no. 589/1992 Coll., for the period from 1 January 2010 to 31 December 2010 the maximum assessment base for paying contributions under § 15a par. 1 and 5 of the cited Act is an amount of seventy-two times the average wage. The background report (publication 917) states in this regard: "the increase of the maximum assessment base for insurance contributions for 2010 from forty-eight to seventy-two times the average wage … will be reflected in the collection of contributions for social security and contributions to state employment policy of CZK 4 billion … The aim of this draft is to increase the income of the state budget."

93. This outlined purpose of the new legal framework for the maximum measurement bases for paying contributions for pension insurance has two consequences. The first affects evaluation of the relevance of non-accessory inequality when reviewing the constitutionality of § 15 of the Pension Insurance Act. We can conclude form the recapitulation of the development of the law that in the period until 1 January 2008, as well as after 1 January 2010, it lacked a connection between the stated aim (leveling pensions under of the Pension Insurance Act and their actual differentiation in the supplemental pension insurance system) and the chosen legislative means (adjustment of the contribution rates and the maximum assessment base). The second consequence also affects evaluation of accessory inequality. If its subject matter is to evaluate the bounds beyond which public law mandatory financial contributions from an individual to the state are no longer pension insurance contributions but a tax, then this conclusion follows from the background report to the government draft Act amending certain Acts in connection with the draft Act on the state budget of the Czech Republic for 2010, in which the government, completely sincerely, considers reduction of the maximum assessment base to be a source for "increasing income for the state budget," which is the purpose of a tax. Moreover, this conclusion is also justified by the curve showing the relationship between the level of contribution for pension insurance and the level of old-age pension, where the connection between these two parameters diverges extremely disproportionately. In the absence of an even reducing the extreme disproportionality, which in accordance with foreign legal frameworks – see, e.g., the pension insurance laws in Germany – can be seen in the present maximum assessment base for paying contributions, we have no choice but to state that the contested legal framework also violates the principle of accessory inequality.

94. In evaluating the legal framework, i.e. the law implementing the fundamental right to adequate material security, the Constitutional Court concluded that the construction in § 15, establishing two reduction limits at the present levels, given the existence of a system of contributions to pension insurance without an effective "ceiling," establishes marked disproportionality between the level of contributions to the insurance system, income levels, and the level of allocated pension benefits for some insured persons, whereby it violates Art. 1 and Art. 3

par. 1 of the Charter. Moreover, this structure is affected by steps taken by the executive branch under § 107 par. 2 of Act no. 155/1995 Coll., based on which the government may (in a manner acceptable in terms of functionality) increase the "reduction" limits, but the legislature, in the current legal framework, transferred to the government the right to modify the level of the reduction limits without the necessary limits or criteria, which were present in the previous legal framework. The Constitutional Court also could not overlook the fact that the entire complicated structure of the pension system is sufficiently non-transparent that it is de facto completely incomprehensible to its users; thus, for the majority of insured persons the calculated level of pension benefits becomes unverifiable (cf. the dissenting opinion to Pl. ÚS 14/02).

95. In reviewing the problem of the pension system, to which the contested law belongs, the Constitutional Court took as its starting point the abovementioned case law, which is in line with the approach taken by foreign constitutional courts in the area of social rights, and thus focused directly on the level of constitutional rights. The Constitutional Court leaves the actual construction of the pension system fully on the legislature, which has wide discretion for implementing the social rights enshrined in the Charter; the Constitutional Court only defines negative limits that cannot be crossed, i.e., it cannot (positively) determine or anticipate any quantifiable amounts. The German Constitutional Court followed analogous methodology in reviewing the matter of social reform, the so-called "Hartz IV" law (decision of 9 February 2010); it also stated that the open field for the legislature's activity corresponds to restrained inspection and review of ordinary law.

96. The Constitutional Court states that it is not its role to evaluate the correctness (suitability) of the calculation of pension insurance benefits; however, it is its obligation to review whether the legal framework selected by the legislature successfully meets the safeguards enshrined in the Charter, in other words, whether the construction is constitutional. The criterion for constitutionality is the "proportionality" of the consequences of the selected calculation, where on the one hand the limiting corrective for the merit principle is the imperative of (accessory and non-accessory) equality, and on the other hand that corrective is the "proportionality" of minimum material security, not only in the sense of eliminating poverty, but also securing a dignified living standard for low-income insured persons.

97. It is not up to the Constitutional Court to evaluate the chosen pension system model from political or economic viewpoints (in the sense of de lege lata), or to model an optimal pension system (in the sense of de lege ferenda considerations). The selection and parameters of the system have for a number of years been the subject of political and specialized discussions in connection with (more or less consensually seen) the danger to long term sustainability of the existing system in view of demographic trends. In these specialized and political debates it will be necessary to consider all social and economic aspects of the legal regulation of the pension system, which, for the abovementioned reasons, the Constitutional Court could not take into account. Nonetheless, based on its review, the Constitutional Court emphasizes that, given the existence of a range of pension systems and methods for calculating pension benefits, it is necessary to choose an alternative

that will reflect all the principles of social policy, as well as a system of pension insurance that will thoroughly respect constitutional principles and meet Art. 30 par. 1, Art. 1 and Art. 3 par. 1 of the Charter, and at the same time, preserve the essence of these fundamental rights under Art. 4 par. 4 of the Charter.

98. For the foregoing reasons the Constitutional Court granted the petition for the Regional Court in Ostrava seeking annulment of § 15 of Act no. 155/1995 Coll., and annulled the provision.

99. In view of the complexity of the whole issue and the pension system reform being prepared, the Constitutional Court postponed the effective date of its decision until 30 September 2011, with the provision that the annulled provisions remain applicable until then.

Instruction: Judgments of the Constitutional Court cannot be appealed.

Dissenting Opinion of Judge Jiří Nykodým

The judgment gives a negative answer to the question posed, whether § 15 of Act no. 155/1995 Coll., especially the so-called second reduction limit, is consistent with the constitutional order; the judgment's reasoning, according to the conclusions reached, rests on the unconstitutional implementation of the right to adequate material security enshrined in Art. 30 par. 1 of the Charter, and on violation of the principle of equality enshrined in Art. 1 of the Charter. It concludes that "the criterion for constitutionality is the 'proportionality' of the consequences of the selected structure, where on the one hand the limiting corrective of the merit principle is the imperative of (accessory and non-accessory) equality, and on the other hand that corrective is the "proportionality" of minimum material security, not only in the sense of eliminating poverty, but also securing a dignified living standard for low-income insured persons.

In terms of financing, our pension insurance system is financed on a pay as you go basis, and therefore the level of benefits received is not directly dependent on the contributions paid. The level of benefits is basically based on the level of contributions paid by the future generation. This is a system that requires high inter-generational solidarity, because today's active population contributes to the pensions of today's pensioners, which, of course, it does in the belief that the next active generation will contribute to its pensions. As regards financial balance, this system depends on demographic trends, as well as the structure of the income of persons in the system. From this point of view the question of the degree of solidarity is not, in my opinion, primarily a constitutional law question, but an economic question, and thus primarily a political question. One can recognize that under certain circumstances it can also become a constitutional law question, but that would have to be a case of flagrant injustice. I doubt that we could describe as such a situation where the replacement ratio for high income groups reaches 20% and for low income groups ca. 46%. If we simply compare both numbers, that does appear to be an inequality. However, even if it were so, that inequality is justifiable, by preservation of social conciliation between "the rich and the poor,"

and by the system's limited resources; in any case, the Constitutional Court, in judgment file no. Pl. ÚS 2/08 (166/2008 Coll., N 73/49 SbNU 85) addressed the question of the nature of social rights and their difference from fundamental rights to the effect that they are specifically characterized by a close dependence on the state's economic situation.

The constitutional principle of equality expressed in Art. 1 of the Charter does not mean absolute equality, as the judgment itself recognizes. In judgment file no. Pl. ÚS 6/96 (published as no. 295/96 Coll., N 113/6 SbNU 313), to which other case law was connected, the Constitutional Court specifically expressed this as follows: "The constitutional principle of equality, enshrined in law in Art. l of the Charter, cannot be understood absolutely and equality understood as an abstract category. The Constitutional Court of the CSFR stated its understanding of equality, enshrined in the cited article, as relative equality, as intended by all democratic constitutions, requiring only the removal of unjustified differences (judgment of the Constitutional Court of the CSFR published as no. 11 in the Collection of Decisions of the Constitutional Court of the CSFR). Therefore, the principle of equal rights must be understood to mean that legal differentiation between legal subjects in the access to certain rights may not be an expression of arbitrariness; however, it does not follow that everyone must be granted every right."

The Constitutional Court generally interprets the principle of equality from two points of view (see, e.g., judgments file no. Pl. ÚS 16/93, file no. Pl. ÚS 36/93, file no. Pl. ÚS 5/95, file no. Pl. ÚS 9/95, file no. Pl. ÚS 33/96, and file no. Pl. 9/99, and others, published as no. 131/94 Coll., N 25/1 SbNU 189, no. 132/94 Coll., N 24/1 SbNU 175, no. 6/96 Coll., N 74/4 SbNU 205, no. 107/96 Coll., N 16/5 SbNU 107, no. 185/1997 Coll., N 67/8 SbNU 163, no. 289/99 Coll., and N 135/16 SbNU 9). The first comes from the requirement of ruling out arbitrariness in the legislature's actions when differentiating groups of subjects and their rights, the second from the requirement that the factors for differentiation be constitutionally acceptable, i.e. the impermissibility of affecting one of the fundamental rights and freedoms by differentiating subjects and rights on the part of the legislature. Although the postulate of equality does not give rise to a requirement that everyone be generally equal to everyone else, it does give rise to a requirement that the law not give an advantage or disadvantage to some persons over others without justification. Thus, the Constitutional Court accepts a statutorily established inequality, provided that there are constitutionally acceptable reasons for it. However, in my opinion, there are such reasons for the inequality found by the judgment. In any case, special provisions of the Charter related to pension insurance do not speak of equality, but proportionality, and they mean social proportionality, not maintenance of the previous standard of living. In my opinion it is difficult to require something like that from a basic pension system. Maintaining a standard of living is a question of additional, contractual insurance. Everyone must take care of that himself, using his own resources. The state cannot be asked to guarantee this. The state creates certain conditions for it, and supports supplemental pension insurance or savings, but, in my opinion, it cannot in a system of basic pension insurance, in addition to adequacy, also guarantee maintenance of a person's previous standard of living.

Of course, in pension insurance it is a question whether it is even possible to thing

about equality this way in connection with equivalence of the insurance contributions and the allocated pensions (in contrast, it is a question whether granting the petition would not mean establishing impermissible inequality between pensioners whose pension was allocated in a reduced form under the existing rules and "new" pensioners). There is an unknown in the equality model that was completely overlook in the reasoning of the judgment. That is the fact that it is not, and cannot be, know in advance how long a particular pensioner will draw the allocated pension. The difference between the length of time that a pension is drawn could ultimately lead to completely reversing the equality thus understood. The "high income" persons who made contributions several times higher, could, even with the existence of reduction limits, as a result of drawing pensions for a long time, considerably over-draw their theoretical share based on their contributions to a pension account. And, in contrast, the "low income" persons, who draw their pension for only a short period of time, will receive from the system only a small part of what they were forced to contribute to it. Following the petitioner's thinking and the construction of the judgment, the present system for allocating pensions is then, in contrast, unfair to these insured persons.

Nonetheless, I consider considerations of the equality of "high income" and "low income" insured persons to be a conceptually defective category. It is the same as if a member of the generation of present contributors criticized the existing system of pension insurance on the grounds of inequality, stating that, as a result of a lower birth rate and increasing average age, he is forced to pay higher contributions (or pay a social tax) than his parents. The essence of the entire system is based on solidarity, as stated in the judgment. Nonetheless, it is not only solidarity of the poor with the rich and the young with the old, or the healthy or less ill with those more ill, but of everyone with everyone. In the case of pension insurance, as I stated above, it is never certain in advance to what extent a particular individual will burden the system. Therefore, as a result we can argue that under certain circumstances "high income" individuals can draw a pension only due to solidarity with the "low income" persons. Yet a petition from persons in this income category alleging inequality would be considered absurd.

I believe that the pension insurance system, especially if it is based on pay as you go financing and not a system of individual accounts stands and falls with this broadly conceived principle of solidarity of everyone with everyone (and I emphasize that). The system of health insurance and reimbursement of "drawn" health care is set up analogously. Everyone contributes to the system as much as he is able, how much he can, without being disproportionately burdened. And, in contrast, in case of need, he receives from the system only as much as he needs. It is clear in advance that there may not be, and probably will not be, a balance between the contribution and the drawing of benefits. Yet nobody would think of differentiating between the fundamental care provided so that it would be equivalent to the level of contributions made.

In addition, we cannot overlook the fact that the Constitutional Court, in its judgment file no. 12/94 (č. 92/95 Coll., N 20/3 SbNU 123), to which the Ministry of Labor and Social Affairs refers, when evaluating the petition from a group of deputies from the Chamber of Deputies of the Parliament of the Czech Republic seeking the annulment of certain provisions of Act no. 589/l992 Coll., on

contributions for social security and the contribution to state employment policy, as amended by later regulations, took as its starting point the position that in all existing social security systems the principles of solidarity and equivalence are represented in varying degrees. Every system of social security carries advantages or disadvantages for certain social groups, depending on whether it gives preference to the viewpoint of solidarity or the equivalence principle. This regulation is reserved to the legislature, which cannot act arbitrarily, but, when setting the preference, must take into account the public values pursued. In the area subject to review, an area of economic legislation, the legislature has considerably wider discretion than in laws that directly affect the fundamental human rights and freedoms. The essential thing is that the Constitutional Court has already adopted the position that the ratio of solidarity and equivalence in a social security system is reserved to the legislature. Of course, the judgment now adopted rejects that conclusion.

Our pension system objectively has no relevant reserves for fundamentally influencing the degree of the individual replacement ratio for persons with long term higher incomes. Any increase in pensions of one of the income groups must necessarily lead either to decreasing the pensions of other income groups, or to placing the system in debt, or to increasing social taxes, which, of course, would again affect primarily the high income groups. We can rule out in advance the possibility of reducing pensions, because a right once granted cannot be taken away (I am not taking into account a situation of impending or actual state bankruptcy). Long term indebtedness of the pension system is likewise not possible, because it would necessarily lead to disrupting the stability of the public finances, which follows from the abovementioned nature of our pension system, which is tied to the state budget. Thus, there is only economically realistic possibility for creating a material base for increasing pensions, and that is increasing contributions. However, such a step necessarily raises the question whether this will not simply replace the tension between economically active and inactive persons by tension between persons divided by income level (and contribution to the system). This could be a dangerous test for preserving a wide degree of inter-generational solidarity.

Dissenting Opinion of judge Jan Musil

I disagree with the verdicts and the reasoning of the judgment of the Plenum of the Constitutional Court of 23 March 2010, file no. Pl. ÚS 8/07, which annulled § 15 of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations.

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

1. By its decision in this matter the Constitutional Court violated the generally recognized principle of the constitutional judiciary, the principle of judicial self-restraint. This principle means that the Constitutional Court should fundamentally refrain “from ‘conducting politics,’ i.e., interfering in the constitutionally created and defined discretion for political formation, ... which the constitution

guaranteed for other constitutional bodies" (see, e.g., judgment of the German Constitutional Court BVerfGE 36, 1, 14).

2. I want to emphasize that I consider it possible in principle for the Constitutional Court to review whether the statutory framework of social rights guaranteed in Chapter Four of the Charter of Fundamental Rights and Freedoms (the "Charter"), is consistent with constitutional regulations. However, I maintain that this review of constitutionality in the area of social rights is limited, and characterized by a number of specific features. The Constitutional Court itself has repeatedly pointed to these specifics in its case law.

3. The following these appear in several Constitutional Court judgments (see, e.g., judgment file no. Pl. ÚS 2/08):

* a defining element of social rights "is the fact that they are not of an unconditional character and can be claimed solely within the bounds of statutory law (Art. 41 par. 1 of the Charter). This provision gives the legislature the authority to set forth specific conditions for the enjoyment of social rights" (point 52 of the cited judgment);

* social rights "are dependent in particularly on the state's economic situation. The level at which they are provided reflects not only the state's economic and social development, but also the relationship between the state and the citizen, founded on mutual responsibility and recognition of the principle of solidarity" (point 53 of the cited judgment);

* "benefits provided as part of social rights come from the state budget, and responsibility for them rests completely on the state. If it is the state that is and will be bound by social benefits, then it must also have the opportunity set specific conditions for such benefits" (point 54 of the cited judgment);

* "the Charter not only reserved to the legislature the implementation and determination of conditions for the abovementioned constitutional rights, but at the same time it delimited enjoyment of these rights in the constitutional text through the terms … 'adequate material security in old age' etc. In view of the fact that the Charter does not more closely specify the content of these terms, it is evident that delimiting them, like setting other details, is left up to the statutory framework" (point 55 [sic, 59] of the cited judgment);

* "the content of this state obligation is to secure for the subjects of these rights a certain minimum social standard, and not an adequate standard of living in accordance with their requirements, as these subjects sometimes erroneously believe and request" (point 60 of the cited judgment);

* "interference by the Constitutional Court in similar matters could come into consideration only in case of flagrant willfulness, arbitrariness, and lack of reasonableness by the legislature" (statement of law in judgment file no. Pl. ÚS 1/08).

The present judgment is in conflict with these previous valid legal opinions; thereby it also comes into conflict with Article 89 par. 2 of the Constitution of the CR, under which (previous) enforceable decisions of the Constitutional Court are binding on all bodies and persons (including the Constitutional Court itself).

4. Of course, I agree with the these stated in the present judgment (point 83), that the Constitutional Court has jurisdiction to review whether the legislature has respected Article 4 par. 4 of the Charter, under which, in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved; the legislature "may not deny or annul constitutionally guaranteed social rights."

5. The Constitutional Court may undoubtedly also review whether the legislature has respected the principle of equality enshrined in Article 1 and Article 3 par. 1 of the Charter.

6. I also want to add that I consider it possible for the Constitutional Court to review whether the legislature, in regulating social rights, did not violate the principle of human dignity enshrined in Article 1 of the Charter and in the Preamble to the Constitution of the CR. A problem like this was reviewed, e.g., by the German Constitutional Court, which, in its judgment "Hartz IV" (BVerfG, 1 BvL 1/09 of 9 February 2010), stated that the valid German legal framework for social benefits paid to unemployed persons and their minor children does not guarantee a dignified minimum standard of living and does not respect the principles of a social state, whereby it violates Article 1 par. 1 and Article 20 par. 1 of the German Constitution.

7. I believe that in the present case none of the cited reasons for which the Constitutional Court could annul the contested § 15 of Act no. 155/1995 Coll., on Pension Insurance, were met. I do not consider the conclusion stated in judgment Pl. ÚS 8/07, that this statutory provision violated the principle of equality enshrined in Article 1 and Article 3 par. 1 of the Charter, to be convincing.

8. By reviewing "whether the ratio between the level of income, premiums for pension insurance, and the level of pension under the existing legal framework meets the constitutional requirement of "proportionality" of material security in old age … and does not establish the claimed inequality between participants in pension insurance" (point 34 of the judgment), the Constitutional Court stepped into the territory of social policy, decisions on which are reserved only to the legislature. The reviewed level of the calculation base (including the "personal assessment base" and "reduction level") is an integral part of the entire system of mutually interconnected and balanced elements, which also includes, e.g., the extent of inclusion of individual replacement periods, method of determining average income for the decisive period, including indexation and reduction, the percentage rate from the measurement basis for each full year in the insurance period, retirement age, the institution of a supplemental period, etc. In this review, it is necessary to constantly keep in mind the total balance of income and expenditures of the pension system. It is completely impossible to evaluate all these questions without specialized knowledge of demographics, statistics,

insurance mathematics, etc., which, of course, the Constitutional Court does not have.

9. Regarding the basic principles of the entire social system, e.g. the degree of inter-generational solidarity, the widest possible social consensus must be achieved, created primarily in democratic political discussion.

10. It is obvious that if the old age pensions of citizens in the highest income group (i.e. the richest) are increased, and if a balance of income and expenses is to be maintained, then either the income of the pension system must be increased (e.g., by raising contributions or through increased subsidies from the state budget, which will lead to an increase in the state deficit), or the pensions of citizens in the lower income groups must be decreased. One must act exceptionally responsibly in such immensely sensitive questions, affecting the state budget policy and the problems of social stratification, otherwise there is a risk of heightening social conflicts.

11. I add that I also fully agree with the arguments presented in the dissenting opinion of judge Jiří Nykodým, and refer to it for the details

For all the foregoing reasons I believe that the contested provision of Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations, is not inconsistent with the constitutional order of the Czech Republic, and that the petition should have been denied under § 70 par. 2 of the Act on the Constitutional Court.