2009/04/28 - PL. ÚS-ST 27/09: RENT CONTROL

HEADNOTES

I. The general courts may decide on an increase in rent for a period of time from the bringing of the action until 31 December 2006. General courts may not increase rent for the period prior to the bringing of the action, as the same is prevented by the nature of the decision with constitutive effects; an increase in rent for a period from 1 January 2007 may not be granted due to the fact that since that date a unilateral increase in rent is allowed by § 3 para. 2 of Act No. 107/2006 Coll. on Unilateral Increase in Rent for Apartments, and on Alteration to Act No. 40/1964 Coll., the Civil Code, as amended by later regulations.

II. Actions by landlords (owners of apartments) against the state for compensation for loss [supported by Act No. 82/1998 Coll. on Liability for Loss Caused by Execution of Public Power by a Decision or Incorrect Official Procedure and on Alteration to the Act of the Czech National Council No. 358/1992 Coll. on Notaries Public and their Operations (Notary Rules)] which allegedly occurred as a result of long-term unconstitutional inactivity by Parliament, consisting of its failing to adopt a special legal regulation defining cases in which a landlord is entitled to unilaterally increase rent, payment for services relating to use of an apartment and to alter other conditions of a lease contract (Judgment of the Constitutional Court dated 28 February 2006, file No. Pl. ÚS 20/05), must be evaluated by the general courts from the viewpoint of their right to compensation for mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms, and, in such a sense, the general courts must provide the parties to the proceedings with procedural room for them to state their opinions on the above-specified alteration to legal evaluation. A claim against the state for compensation for mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms is of a subsidiary nature to the claim by the landlord of an apartment against the tenant for an increase in rent only for a period beginning on the date on which the action was brought. For the period of time preceding such a date, the landlord of an apartment may exercise their claim to compensation for mandatory limitation upon property rights directly against the state.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court Plenum, composed of Pavel Rychetský, the Chairman of the Court, and Justices Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová, and

Michaela Židlická, adopted, on 28 April 2009, in accordance with § 23 of Act No. 182/1993 Coll. on the Constitutional Court, in the case of a legal opinion of the First Panel of the Constitutional Court in the case registered under file No. I. ÚS 2220/08, which deviates from legal opinions of the Constitutional Court declared in a Judgment dated 9 September 2008, file No. IV. ÚS 175/08, and a Judgment dated 4 December 2008, file No. III. ÚS 3158/07, the following opinion:

I. The ordinary courts may decide on an increase in rent for a period of time from the bringing of the action until 31 December 2006. Ordinary courts may not increase rent for the period prior to the bringing of the action, as the same is prevented by the nature of the decision with constitutive effects; an increase in rent for a period from 1 January 2007 may not be granted due to the fact that since that date a unilateral increase in rent is allowed by § 3 para. 2 of Act No. 107/2006 Coll. on Unilateral Increase in Rent for Apartments, and on Alteration to Act No. 40/1964 Coll., the Civil Code, as amended by later regulations.
II. Actions by landlords (owners of apartments) against the state for compensation for loss [supported by Act No. 82/1998 Coll. on Liability for Loss Caused by Execution of Public Power by a Decision or Incorrect Official Procedure and on Alteration to the Act of the Czech National Council No. 358/1992 Coll. on Notaries Public and their Operations (Notary Rules)] which allegedly occurred as a result of long-term unconstitutional inactivity by Parliament, consisting of its failing to adopt a special legal regulation defining cases in which a landlord is entitled to unilaterally increase rent, payment for services relating to use of an apartment and to alter other conditions of a lease contract (Judgment of the Constitutional Court dated 28 February 2006, file No. Pl. ÚS 20/05), must be evaluated by the ordinary courts from the viewpoint of their right to compensation for mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms, and, in such a sense, the ordinary courts must provide the parties to the proceedings with procedural room for them to state their opinions on the above-specified alteration to legal evaluation. A claim against the state for compensation for mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms is of a subsidiary nature to the claim by the landlord of an apartment against the tenant for an increase in rent only for a period beginning on the date on which the action was brought. For the period of time preceding such a date, the landlord of an apartment may exercise their claim to compensation for mandatory limitation upon property rights directly against the state.

REASONING

I.

1. By the constitutional complaint filed, the petitioner contested a resolution of the Supreme Court dated 11 March 2008, file No. 25 Cdo 2864/2006-82, a judgment of the Municipal Court in Prague dated 1 June 2006, file No. 20 Co 135/2006-71, and a judgment of the District Court for Prague 1, dated 25 January 2006, file No.

24 C 169/2005-48. According to the work schedule, the case was assigned to the First Panel and is registered under file No. I. ÚS 2220/08; Ivana Janů is the Justice Rapporteur.

II.

2. File of the District Court No. 24 C 169/2005 specifies that the petitioner, by an action dated 13 July 2005 against the Czech Republic, claimed compensation for loss caused by incorrect official procedure, of the amount of CZK 4,627,970 with ancillary rights, which allegedly accrued to the petitioner as a loss resulting from unlawful and unconstitutional control of rent, this for a period of time from 2002 to 2004. The court of first instance dismissed the action, the court of appeal confirmed this court's decision, and the Supreme Court denied an appeal on a point of law, as the Supreme Court concluded that none of the legal issues brought by the petitioner are of significant legal importance. For the sake of completeness, it must be added that cases identical in principle are also being solved by the Constitutional Court under file No. I. ÚS 566/05 and file No. I. ÚS 1109/08.

III.

3. When dealing with the constitutional complaint, the First Panel of the Constitutional Court reached the following legal opinions:
- the landlord may demand an increase in rent from the tenant only with effectiveness from the filing of the action;
- the landlord has, in relation to the period of time specified by the action, the right against the state for compensation for mandatory limitation upon property rights under Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter referred to only as the "Charter"), which is not subsidiary in relation to the exercise of the action for the increase in rent against the tenant, since the petitioner could not claim such an increase for a period of time prior to filing this action.
With respect to the fact that the First Panel, by such conclusions, intended to deviate from legal opinions declared in other Judgments of the Constitutional Court (see below for details), the Panel submitted the case, in accordance with § 23 of Act No. 182/1993 Coll. on the Constitutional Court, to the Constitutional Court Plenum. In this, the Panel was guided by the following considerations.

4. The Constitutional Court has dealt with the issues covered by the constitutional complaint several times in the past. In a Judgment dated 28 February 2006, file No. Pl. ÚS 20/05 (N 47/40 SbNU [Collection of Judgments and Rulings] 389, 252/2006 Coll.*) – in which the Constitutional Court also refers to previous case law history – the Court concluded that "The text itself of § 696 par. 1 of the Civil Code, which merely expects the passage of new regulations, is not unconstitutional; what is unconstitutional is the long-term inactivity of the legislature, which has led to the constitutionally unacceptable inequality, and whose final result is the violation of constitutional principles; … under certain conditions the consequences of a gap (a missing legal regulation) are unconstitutional, in particular when the legislature decides that it will regulate a particular area, states that intention in law, but does

not pass the envisaged regulations. The same conclusion applies to the case where Parliament passed the declared regulations, but they were annulled because they did not meet constitutional criteria, and the legislature did not pass a constitutional replacement, although the Constitutional Court gave it a sufficient period of time to do so (18 months)" With respect to the fact that the long-term inactivity of the state (the legislature as a representative of one branch of public power of the state) which did not adopt any arrangement for a unilateral increase in rent, is in conflict with the constitutional order, the Constitutional Court concluded that the ordinary courts may not dismiss the actions by landlords, on the contrary, they must decide on the increase in rent. The amount of rent should correspond to local conditions in such a way that no discrimination takes place between the landlords (as well as the tenants) of apartments with controlled rent and the landlords (tenants) of apartments with "market" rent.

5. In a Judgment dated 6 April 2006, file No. I. ÚS 489/05 (N 80/41 SbNU [Collection of Judgments and Rulings] 59) – the basis of which consisted of the fact that the petitioner as the plaintiff demanded that the difference between the controlled and "market" rent (not an increase in rent or compensation for loss) be paid – the Constitutional Court further developed the ideas declared in the Judgment of the Plenum quoted above. The Constitutional Court pointed out that making a decision to increase rent is a sensitive matter socially and further stated that "by decision making on the amount of rent, the ordinary court, by a constitutive decision (pro futuro), will refine objective law (in this context, the premise of the District Court is correct that it is not possible to claim payment for the difference between standard and controlled rent for a past period of time). With respect to the extraordinary nature of this procedure established by verdict (I.) of Judgment file No. Pl. ÚS 20/05, the Court must grant the parties sufficient room for familiarisation with the principles of the law refined by the Court, and for utilisation of adequate instruments, including possible alteration to the proposed judgment, and the option to reach a compromise. In this respect, the plaintiff must receive from the ordinary court appropriate instructions, this even beyond the scope of the general obligation to give instructions established by § 5 of the Civil Procedure Code". With respect to the liability of the state for material detriment caused by not adopting the anticipated legal arrangement, emphasised in verdict (I.) of Judgment file No. Pl. ÚS 20/05, the Constitutional Court in Judgment file No. I. ÚS 489/05 inferred that "if a landlord's justified claim is not met to the full extent, the landlord will have no other way left but to exercise against the state a demand for compensation for loss".

6. The obligation of the courts to take pro futuro decisions, in a constitutive manner, on an increase in rent was further specified by the Constitutional Court in a Judgment dated 9 September 2008, file No. IV. ÚS 175/08. In this, the Court stated that "if such a condition is to make reasonable sense, the commencement of the term for decision making on an increase in controlled rent from apartments must be determined as the moment of filing the action to a ordinary court". The above-quoted decision then derives, from Judgment file No. I. ÚS 489/05, a requirement for subsidiarity of compensation for the loss against the state once effective procedural means aimed against the tenants for protection of the right have been exhausted.

7. The notion of subsidiarity of a claim to compensation for loss against the state is generally correct, however, in Judgment file No. I. ÚS 489/05 it was formulated for facts of a case other than as is understood by Judgment file No. IV. ÚS 175/08. Here it is necessary to note that a case administered under file No. IV. ÚS 175/08 included a dispute on compensation for loss in accordance with Act No. 82/1998 Coll. on Liability for Loss Caused by the Execution of Public Power by a Decision or Incorrect Official Procedure, and on Alteration to the Act of the Czech National Council No. 358/1992 Coll. on Notaries Public and their Operations (the Notarial Code), as amended by later regulations, consisting of the difference between controlled and standard rent. By an action filed in February 2006, the petitioner demanded compensation for loss for a period from July 2002 to November 2005, i.e. for a period of time prior to filing the action. When the Constitutional Court, under these circumstances, considered the obligation to exhaust effective remedies against the tenant, it suggests the Court proceeded from the opinion that the landlord also had a claim against the tenant for a period prior to filing the action. This opinion was then explicitly expressed by a Judgment dated 4 December 2008, file No. III. ÚS 3158/07: "…the requirement addressed to the ordinary courts in key Judgment file No. Pl. ÚS 20/05, i.e. that 'in spite of an absence of an arrangement anticipated by § 696 para. 1 of the Civil Code, they must take a decision on an increase in rent, this depending on local conditions and in such a way that various groups of legal entities are not discriminated against', cannot be diminished merely to 'future' legal relationships, or, there is no reason not to connect this with claims whereby landlords demanded 'rent' beyond the scope of the rent stipulated in the lease contract, for a specified past period of time."

IV.

8. However, the First Panel did not identify itself with the legal opinion described in the previous paragraph and submitted the case to the Plenum so that the same may form an opinion; and the Plenum, by a required majority of votes, did so. The subject of the assessment by the Plenum consisted of two closely related issues: a) from which time the landlord may be granted increased rent; b) existence of the claim to compensation for mandatory limitation upon property rights and its subsidiarity.

9. According to the conviction of the Constitutional Court, the landlord has no claim against the tenant for payment of the difference between controlled and standard rent for the period of time prior to bringing the action. Support for this opinion may in no way be sought in Judgment file No. I. ÚS 489/05 (see above), which, on the contrary, specifically states that "the premise of the District Court is correct that it is not possible to claim payment for the difference between standard and controlled rent for a past period of time."

10. Firstly, legal opinion allowing the possibility to demand that the tenant pays the difference between controlled and standard rent for the past period of time, that is prior to filing the action, does not properly consider the nature of the decision to increase rent. A judgment on an increase in rent is a constitutive decision, which is also explicitly acknowledged by Judgment file No. Pl. ÚS 20/05 (see above). Naturally, the ordinary courts do not refine objective law in such a

sense that court judgments in individual cases become a source of generally binding rules of behaviour; however, they do alter the substantive-law lease relationship between a specific landlord and a specific tenant, depending on specific local conditions. The nature of the constitutive decision implies that the same may affect the substantive law relationships only with respect to the future, i.e. from the moment when the same becomes legally binding, unless the law expressly determines otherwise. Substantive law relates an origination, an alteration, or termination of a relationship of substantive law with the legal fact consisting of such a decision itself; that is why it is logical that an alteration to the substantive law relationships may occur only from the time when such a legal fact originates and begins to produce effects which are related to the same.

11. The decision on an increase in rent constitutively affects an existing legal relationship between a tenant and a landlord by changing the contents of the same in terms of the amount of rent. From this viewpoint, increasing rent "back into the past" (that is retroactively) is a clear contradiction in terms, not corresponding to the nature of a constitutive decision; in addition to this, it would also represent genuine retroactivity which is not acceptable in a law-based state, as the court would retroactively transform the contents of the legal relationship between a landlord and a tenant, and impose on the tenant an obligation to pay higher rent additionally for such a period of time in which the tenant had no such obligation.

12. The only theoretically consistent approach would then be a conclusion that the alteration to the contents of the lease relationship (the change in the amount of rent) occurs only as late as when the judgment that pronounces an increase in rent for the future becomes legally binding (from the date of filing the action). With respect to the fact that increasing rent by way of judicial decision was a completely extraordinary remedy, the applicability of which was preconditioned by the Constitutional Court by the impossibility of increasing rent pursuant to a special legal arrangement, it would mean that actions on the increase in rent which have yet to be decided upon, would have to be denied as, since 1 January 2007, rent may be increased in accordance with Act No. 107/2006 Coll. on Unilateral Increase in Rent for Apartments and on Alteration to Act No. 40/1964 Coll., the Civil Code, as amended by later regulations. However, such a conclusion would also mean that not even an action on an increase in rent would be an effective remedy for rectifying the unconstitutional condition which was established by the legislature (the state) by its long-term inactivity. Therefore, it is possible to approve Judgment file No. IV. ÚS 175/08 insofar that the moment of increase in rent is related to the date of filing the action; this solution is also acceptable from the viewpoint of the tenant, who can, from the given moment in time, take the given increase in rent into account. It is also possible to fully agree with a dissenting opinion given by Professor Musil concerning Judgment file No. III. ÚS 3158/07, this being that only since that moment may the tenant realistically react to factual and legal arguments exercised by the landlord within the given action whereby increase in rent is requested; connection of the commencement of the possibility to increase rent with the filing of the action takes into account the autonomous interests of both parties and complies with the principle of proportionality. That is why an exception from the effects of a constitutive decision may be accepted, justified by constitutional aspects, such an exception being otherwise possible only on the basis of express statutory arrangement; such

different regulation results from Judgment of the Constitutional Court file No. Pl. ÚS 20/05 (see above), which, with its effects erga omnes – under the extraordinary circumstances described – actually fulfils the function of an act. However, no reasons can be found for an increase in rent prior to the date of filing the action; such reasons do not even result from constitutional argumentation or from the nature of constitutive decisions. This issue may thus be closed in such a manner that the ordinary courts may decide on an increase in rent for the period of time from filing the action until 31 December 2006. Rent for the period of time prior to the action being filed may not be increased by the ordinary courts, since this is prevented by the very nature of the constitutive decision; an increase in rent for the period of time after 1 January 2007 is also not possible, since unilaterally increasing rent from this date was made possible by § 3 para. 2 of Act No. 107/2006 Coll.

13. In relation to the second clause of the Opinion, the Constitutional Court declares their approval to override the legal opinion specified in Judgment file No. IV. ÚS 175/08. Even though the Constitutional Court declared, in Judgment file No. Pl. ÚS 20/05, the unconstitutionality of long-term inactivity by the legislature, consisting of non-adoption of the statutory arrangement to make a unilateral increase in rent possible, no claim to compensation for loss against the state may be inferred from this given decision. From the viewpoint of evaluating the fundamental right to compensation for loss against the state, it is necessary to proceed from Article 36 para. 3 of the Charter. This provision guarantees the right to compensation for loss caused to the given party by an unlawful decision of the court of justice, another body of the state, or public administration body or incorrect official procedure. However, from this standpoint, Parliament cannot be considered to be a public administration body, court of justice or any other comparable body of the state. In particular, this is true in the case when Parliament exercises its legislative powers. Liability for the exercise of such powers is firstly of a political nature. The boundaries of free discretion of the legislature are determined by the constitutional order, however, the result of exceeding the same amounts to a possibility to annul an act or declare its unconstitutionality by the Constitutional Court. Such intervention by the Constitutional Court may, under certain conditions, influence the rights of individuals which were infringed as a result of such an act or a gap in an act (such as non-applicability of an act in the given case), however, it does not establish an individual's claim to compensation for loss.

14. Thus, when the Constitutional Court stated a possible claim to compensation for loss against the state in Judgment file No. I. ÚS 489/05 and likewise in Judgment file No. IV. ÚS 175/08 (for both, see above), the Constitutional Court aimed such a claim in relation to a lapse by the ordinary courts which would not provide protection to the fundamental right of the landlords concerned, by dismissing their justified claims to an increase in rent. A claim so conceived to compensation for loss in no way deviates from the wording of Article 36 para. 3 of the Charter, or a claim to compensation for loss, as is defined by Act No. 82/1998 Coll. If then the relevant body annuls a legally binding decision of a court, as a result of which such a court did not comply with their obligation to decide on the increase in rent as specified by Judgment file No. Pl. ÚS 20/05, the landlord may claim against the state for compensation for the loss they incurred as a result of

such an unlawful decision. Yet, the Constitutional Court believes that, in relation to the specified period of time prior to filing the action, the landlord has a different legal title, this being the right to compensation for mandatory limitation upon property rights under Article 11 para. 4 of the Charter.

15. Boundaries of admissibility of limitation of property right must be understood within the context of origination and development of the lease relationships in question. As long ago as in a Judgment dated 22 March 1994, file No. Pl. ÚS 37/93 (N 9/1 SbNU [Collection of Judgments and Rulings] 61; 86/1994 Coll.), the Constitutional Court found that transformation of the right of personal use of an apartment into a lease relationship under § 871 of the Civil Code is constitutionally conforming. In this connection, the Constitutional Court referred to the fact that, at the time when legal effects under the specified provisions took place, there was public interest in transforming former user relationships to apartments to the institute of protected leases, which would form an acceptable condition of legal certainty for all hitherto legal relationships to apartments that were established on the existence of a right of personal use of an apartment. Evaluating the existence of public interest, however, requires its time aspect be taken into account. Even though it is not possible to find a specific limit from which it was not possible to consider a limitation of property right as a result of control of rent as constitutionally conforming, the case law of the Constitutional Court from past to present, with respect to derogative Judgments dated 21 June 2000, file No. Pl. ÚS 3/2000 (N 93/18 SbNU [Collection of Judgments and Rulings] 287, 231/2000 Coll.), dated 20 November 2002, file No. Pl. ÚS 8/02 (N 142/28 SbNU [Collection of Judgments and Rulings] 237, 528/2002 Coll.), and dated 19 March 2003, file No. Pl. ÚS 2/03 (N 41/29 SbNU [Collection of Judgments and Rulings] 371, 84/2003 Coll.), as well as Judgment file No. Pl. ÚS 20/05, indicates that such a conclusion was not possible to accept as far back as the year 2000. For this reason, the Constitutional Court addressed the issue of whether or not the limitation of property rights as a result of control of rent reached (within the period of time to which the petitioner relates their claim) such intensity that it must be considered as a mandatory limitation upon property rights as specified by Article 11 para. 4 of the Charter.

16. In accordance with Article 11 para. 4 of the Charter, mandatory limitation upon property rights is permitted in the public interest, on the basis of law and for compensation. The above-specified Article must not be understood as a fundamental right to compensation for any limitation of property rights determined by law. The contents of the constitutionally guaranteed right to own property as specified by Article 11 of the Charter, as well as the right to peaceful enjoyment of possessions in accordance with Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, are not boundless and are subject to numerous limitations which may be considered, from the viewpoint of constitutional guarantees, to be immanent to its constitutional and statutory definition. This means that the law may generally specify limits to property rights, without such limitation being related to the right to compensation. Mandatory limitation upon property rights, as well as expropriation under Article 11 para. 4 of the Charter, must then be related only to certain qualified cases of limitation.

17. Without the Constitutional Court considering it necessary to define the attributes of such qualified limitation in a full and exhaustive manner, it may be

generally inferred that one of these attributes consists of limitation of property rights beyond the scope of the obligations generally imposed by law for all subjects of property rights under compliance with the principle of equality. Mandatory limitation upon property rights under Article 11 para. 4 of the Charter represents limitation of property rights of a specific owner beyond the scope of the limitations resulting generally for subjects of property rights, or which fall only on some owners; however, this unequal position is in accordance with the principle of equality as a result of the existence of circumstances sufficiently justifying such inequality. The above may be demonstrated using the example of "legal easements", when the obligation to tolerate, for example, the building of a pole for power transmission on one's land, must be viewed as a limitation beyond the scope of general limitation of property rights implied by the law, which affects only some owners who are not able to influence their "disadvantageous position" by expression of their own will. The fact that in their very case limitation takes place is not given immanently, but as a result of a specific evaluation of the relevant body of public power, on the basis of which such a limitation takes place.

18. The second precondition admitted by the Constitutional Court in connection with this is the intensity of the limitation of property rights, which may be defined by several factors, particularly by the scope of the limitation as such, and by the term of such a limitation, that is whether such a limitation is temporary or permanent. The Constitutional Court, in Judgments file No. Pl. ÚS 3/2000 and file No. Pl. ÚS 8/02, referred to unconstitutionality of the unequal position of two groups of owners, when one group of owners is obliged to bear the costs of a social policy of the state in the field of housing. This inequality has a rational basis from the viewpoint of determination of the landlords concerned, as it is related to the lease relationships originating from transformation of the right of private use of an apartment. However, no reasonable cause may be found in relation to the obligation of the owners to bear the cost of housing the tenants. While this cause was given at the time of transformation of the right of private use of an apartment into a lease relationship, it cannot be found at the time when the Constitutional Court stated, and this repeatedly, that the control of rent in accordance with Decree No. 176/1993 Coll. on Rent for Apartments and Payment for Services Relating to Use of an Apartment, as amended by later regulations, is unconstitutional; in this connection, possible violation of property rights of a number of landlords was pointed out by the Constitutional Court as well. Limitation of the property rights of this group of owners restricted the constitutionally guaranteed property rights of some landlords in a considerable way beyond the scope of limitation of the property rights determined for all owners. Yet, with respect to the scope of the costs incurred by individual landlords, without such landlords being able to gain any benefit from such costs, and to the long-term nature of this status particularly caused by the long-term unconstitutional inactivity by Parliament, which adopted an act allowing a unilateral increase in controlled rent only as late as four years after the expiry of the term granted by the Constitutional Court pursuant to Judgment file No. Pl. ÚS 3/2000, such a limitation must be viewed as intense to such a degree that the same must be subsumed under Article 11 para. 4 of the Charter.

19. Article 11 para. 4 of the Charter in itself does not contain any more detailed arrangement of a number of practical issues, such as with which state body it is

necessary to exercise the claim, in which terms, etc. Consequently, it is necessary to proceed in analogy pursuant to a regulation which is, in terms of its contents and purpose, the closest, that being Act No. 82/1998 Coll. on Liability for Loss Caused by Execution of Public Power by a Decision or Incorrect Official Procedure and on Alteration to the Act of the Czech National Council No. 358/1992 Coll. on Notaries Public and their Operations (Notary Rules).

20. The Constitutional Court adds that in the case of a claim to compensation for mandatory limitation upon property rights under Article 11 para. 4 of the Charter, the issue of its subsidiarity must be examined. Subsidiarity of one claim towards another comes into consideration only in such cases when two claims at least partially overlap (a typical example being when a claim to compensation for loss and claim to a release of unjustified enrichment are mutually competing). In the case administered as file No. IV. ÚS 175/08, however, no competition of claims was actually involved. In fact, the landlord could not require that the tenant pay the difference between the standard and controlled rent for the past period, but could require from the tenant merely the increase in rent from the date of filing the action. Compensation for loss, which was claimed by the petitioner in the proceedings before ordinary courts, was aimed against the state and related solely to the period of time from 2002 to 2005, which has expired. This clearly shows that the landlord had no competing claim to compensation against the tenant for such a period of time, and similarly did not have any right to an increase in rent for such a period of time. The claim to compensation for mandatory limitation upon property rights against the state is evidently related to a different entity and different legal title, and, therefore, the same can not be excluded with reference to subsidiarity of the claim to compensation for loss against claims which the landlord should allegedly have against the tenant.

21. The considerations specified above infer that it is necessary to consistently evaluate which claim is exercised by the landlord. If the claim consists of compensation for mandatory limitation upon property rights for a period of time prior to filing the action against the tenant – such as in the case addressed by the First Panel under file No. I. ÚS 2220/08, when the action against the state was filed on 13 July 2005, and the petitioner required compensation for the time from 2002 to 2004 – such a claim cannot be preconditioned by their obligation to first exercise effective remedies to protect the right against the tenant, since the landlord has no such claim against the tenant for the given period of time. The landlord has a right against the tenant for higher rent only on the basis of a decision of a court, the constitutive effects of which – with respect to the constitutional relations explained above – do not occur ex nunc, but are attached to the date of filing the action; however, in no case to the past, that is to the time prior to filing the action.

22. The issue of whether a specific claim of the petitioner to compensation for mandatory limitation upon property rights under Article 11 para. 4 of the Charter was existent in the case in question remains to be dealt with by the ordinary court, which must evaluate the degree of infringement of their fundamental right to own property as a result of controlled rent, as well as whether the above-specified conditions for origination of the right to compensation were fulfilled in their case. The unconstitutionality of the legal arrangement of controlled rent alone did not

mean that a fundamental right of landlord (owner of an apartment) was violated in each individual case. It is also proper to point out that the amount of the claim to compensation for mandatory limitation upon property rights under Article 11 para. 4 of the Charter does not need to be identical to the difference between standard and controlled rent. Ordinary courts thus must not dismiss claims to compensation against the state a priori; on the contrary, they must respect the conclusions specified above and evaluate the particular individually exercised claims. In such a sense, the alleged claim of the landlord (owner of an apartment) must be correctly evaluated from the aspect of the right to compensation under Article 11 para. 4 of the Charter. In this sense, ordinary courts are obliged to create, as specified by § 118a of the Civil Procedure Code, sufficient procedural space so that both parties to the proceedings may give their opinions concerning the new legal evaluation, and possibly present new evidence or raise new objections.

23. The Constitutional Court also emphasises that in no case the Court considers the matter to be definitely resolved; on the contrary, the Constitutional Court raises a strong appeal to the legislature for them to deal – again and this time in a systematic manner – with the issue of controlled rent, and take into account the remedies which, for example, were adopted by the Polish legislature as a response to the decision of the European Court of Human Rights in the case of Hutten-Czapska, i.e. in a pilot case related to control of rent in Poland, which, for a long time, showed deficiencies in terms of constitutional law similar to the control of rent in the Czech Republic. In connection to this, Poland adopted, in 2006, a statute whereby it was made possible to increase rent at a greater pace up to such an amount that would be sufficient to cover maintenance costs, including achievement of return of invested capital and reasonable profit, and, furthermore, adapted the civil law liability of municipalities for loss incurred by an owner due to non-provision of a council flat to a tenant who, due to their low income, becomes entitled to a council flat provided by the municipality. From this standpoint, the intention of the Polish government of 2008 may be positively evaluated, the objective of which was to establish a system of compensation contributions provided to the owners of property subject to the system of controlled rent in the years from 1994 to 2005 [cf. judgment (amicable settlement) of the European Court of Human Rights, dated 28 April 2008, in the case of Hutten-Czapska v. Poland, No. 35014/97, clauses 14 to 26].

In accordance with § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, Justices Vlasta Formánková, Pavel Holländer, Vladimír Kůrka, Jiří Mucha and Jiří Nykodým took dissenting opinions to the Opinion of the Plenum; Justices Ivana Janů and Eliška Wagnerová took dissenting opinions merely in relation to the reasoning of the Opinion of the Plenum.

Dissenting Opinion of Justice Vlasta Formánková

Clause I of the majority Opinion is, as I am convinced, superfluous, since the same declares what is evident even without explicit formulation by the Constitutional Court.

In relation to inadmissibility of an increase in rent for the period prior to the filing of the action to a ordinary court, I would like to remark that this conclusion is based, in my opinion, with one exception, on the hitherto case law of the Constitutional Court, both from Judgment file No. Pl. ÚS 20/05 and from subsequent case law, which is, in terms of types of individual Judgments, represented by Judgments file No. I. ÚS 489/05, file No. IV. ÚS 111/06 (N 102/41 SbNU [Collection of Judgments and Rulings] 303) and others (such Judgments expressed decisions in cases in which the landlord sued the tenant for an increase in rent), and Judgments file No. IV. ÚS 175/08, file No. IV. ÚS 156/06, and others (such Judgments expressed decisions in cases in which the landlords sued the state for compensation for loss). This line of decision making is, to a certain degree (from the viewpoint of time for which higher rent, or an increase in rent, may be claimed), disturbed by Judgment file No. III. ÚS 3158/07, which also represents the above-mentioned exception; however, this was later provided (in light of Judgment file No. IV. ÚS 175/08) with an interpretative guideline by Judgment file No. IV. ÚS 2525/07.

I strictly disagree with clause II of the Opinion in question. As for non-existence of liability on the part of the state, I side with the conclusions expressed by dissenting Prof. Holländer.

In addition to this, I would like to add that, in my opinion, an effective remedy was in existence from 1 January 2002 to 31 December 2006, whereby the landlord could assert higher rent (an increase in rent). This remedy consisted of an action by the landlord against the tenant, and this beyond doubt even before the Constitutional Court repeatedly and explicitly declared such a fact, commencing with Judgment file No. Pl. ÚS 20/05. This conclusion is proven in particular by a Judgment of the Constitutional Court, file No. Pl. ÚS 2/03 dated 19 March 2003, in which the Constitutional Court declared that “unless constitutionally conforming control of rent is established in the Czech legal order, the Constitutional Court has no other option left but to discharge the obligations imposed on the Constitutional Court by the Constitution and, at least in individual cases, ensure the functioning of principles based on the constitutional order of the Czech Republic, and possibly relevant international treaties, even when such a solution is insufficient, non-systematic and, in principle, only provisional, when the only true answer is clearly to adopt a relevant legal regulation as implied by the previous Judgment of the Constitutional Court”. When the ordinary courts did not grant such actions by

landlords (against their tenants), the landlords had the possibility of asserting their claims by way of constitutional complaint. From the date of promulgation of Judgment file No. Pl. ÚS 20/05, there were surely no further lingering doubts whatsoever that such an action represents an effective remedy for an unconstitutional situation. This conclusion may be arrived at also from the viewpoint of paragraph 12 of the reasoning of the Opinion in question. For the reasons stated above I am convinced that prior to any liability claim being made against the state, it is necessary to insist that a claim must be exercised against a tenant. This is also suggested, in addition to the present case law of the Constitutional Court, by the fact that the relationship between the landlord and the tenant is an obligation relationship.

Under a circumstance when the majority Opinion frames the existence of a claim against the state to compensation for mandatory limitation upon property rights, I believe that any claim against the state for a period of time starting on the date of promulgation of Judgment file No. Pl. ÚS 20/05 must be preconditioned by filing an action against the tenant. Although the formulation of the Opinion in question does not exclude this condition, I believe that the Opinion in question should have explicitly contained the same, as the present formulation may lead to a conclusion that also claims to the period following promulgation of Judgment file No. Pl. ÚS 20/05, when the landlord failed to file an action against the tenant, may be exercised (directly) against the state. However, it is not at all possible to agree with the same, despite the fact that the Opinion in question does frame the claim of the landlord against the state.

For all these reasons, I cannot agree with Opinion of the Constitutional Court file No. Pl. ÚS-st. 27/09; I believe that the procedure expressed in Judgments of the Fourth Panel of the Constitutional Court file No. IV. ÚS 175/08 and file No. IV. ÚS 2525/07 is that which provides a just and constitutionally harmonic solution.

Dissenting Opinion of Justice Pavel Holländer

The Opinion in question establishes, at a general legal level, the liability of the state (legislature) for non-acceptance of a derogative Judgment of the Constitutional Court outside the constitutional and statutory framework; at a specific level, liability for non-acceptance of derogative Judgments of the Constitutional Court in the case of de-control of rent. The Opinion distinguishes between subsidiary and direct application of such liability. Subsidiary application is based on a fruitless application of the claim against the tenant for a period of time from the date of filing an action with a ordinary court, thus this establishes "a claim against the state for compensation for mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms". The title of the landlord for direct application of "the claim to compensation for material detriment against the state" for reason of the non-acceptance of legal opinion of the Constitutional Court expressed in the derogative Judgment, is then established by the Opinion for the period of time preceding the date of bringing the action against the tenant.

In the Czech legal order, Act No. 82/1998 Coll. on Liability for Loss Caused by Execution of Public Power by a Decision or Incorrect Official Procedure and on Alteration to the Act of the Czech National Council No. 358/1992 Coll. on Notaries Public and their Operations (Notary Rules), as amended by later regulations, regulates liability for loss caused by execution of public power by a decision or incorrect official procedure, that is for loss caused by an act of applying law, or by procedure by a body of public power, the purpose of which is application of the law, and which, as a principle, results in an act of applying the law. Application of legislative (law-forming) powers, however, does not constitute an official procedure – the result of the same is not an application or act of application of the law, but a statute (or a similar legal regulation). The procedure of adopting statutes, however it is subject to constitutional and legal procedure, is principally different from the procedure of applying the same. In the constitutional system of the Czech Republic, at the level of constitutional arrangement or at the level of statutory arrangement, the liability of the state (Parliament) for non-acceptance of legal opinion declared in the derogative Judgment of the Constitutional Court, and for detriment which was caused as a result of such a circumstance to a certain group of entities, is thus not anticipated.

The brief recapitulation given above clears the way for the following questions: the first is an issue of standard approach to the liability of the state in democratic countries, this being whether constitutional systems of democratic countries anticipate liability for detriment caused by legislature by not accepting case law of constitutional courts. Another issue is that of the competence of the Constitutional Court – in the case of absence of a constitutional and statutory arrangement – to establish such liability in terms of case law. The third issue is one of admissibility of the procedure analogous to the arrangement contained in Article 41 of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to only as the "Convention"), which establishes an institute of "just satisfaction" for the petitioner in the case of violation of the Convention by a decision or a measure by a judicial or any other body of the contracting party to the Convention, while such a violation may be constituted by either domestic law or application of the same. The final issue is the possibility of analogous

procedure by the European Court of Justice in the cases of liability of the state for violating an obligation to implement European law.

The usual approach of the constitutional or statutory arrangement for the liability of the state for loss caused by the operation of the state in the position of an entity of public law is based on two pillars. Historically, the first of them is the liability analogous to fiscal liability of a legal entity of public law, this irrespective of the unlawfulness of actions of its body (for example, liability with respect to financial supervision). The other consists of liability for a specific decision, or procedure of a specific executor of state power [footnote No. 1]. After the Federal Constitutional Court of the Federal Republic of Germany annulled, as a result of the absence of constitutionally established federal powers, a statutory arrangement for the liability of the state, the thus interpreted liability of the state in the Federal Republic of Germany is established through partial legal arrangements.

In accordance with the explicit arrangement in Article 23 of the Constitution of the Austrian Republic, the federation, countries, districts or municipalities and other corporations and institutes of public law are liable for loss caused through enforcement of law. As regards whether the law governing the liability of the state should be framed at the most general level, "apart from other points, whether it should be inferred additionally in cases of unconstitutional inactivity of the legislature, is a topic of open discussion" [footnote No. 2].

The author of this dissenting opinion has not found a constitutional or statutory arrangement of such liability of a state in any country of the European Union; from the viewpoint of a comparative method beyond the scope of Europe, the same may be found in the judicial practice of Argentina [footnote No. 3]. This doctrine is based on a system of diffuse control of constitutionality, within the scope of which – with effects inter partes – each Argentinean court may designate a statute as unconstitutional. In practice, it is employed despite the fact that the Federal Court designated the same as possible abuse of the relationship between the judicial and legislative powers, and referred to possible extensive negative consequences on the state's finances [footnote No. 4]. An illustration of practical application of the above-mentioned doctrine is a case concerning validity of an act which banned putting wine into bottles smaller than 930 cc and larger than 1,500 cc outside the place of origin of the wine; while in the first of the judicial decisions delivered, the action by the company filling bottles was dismissed on the grounds that the law does not prohibit filling bottles with wine, but merely carrying out this activity (sic!); in the second – modifying – decision the court granted the plaintiff compensation for loss [footnote No. 5].

Therefore, the first issue may be closed: at the level of constitutional and statutory arrangements, as well as in the doctrine, the European context allows no room for the existence of principle of liability of a state for "unconstitutional silence by the legislature", consisting of the liability to compensate for loss. The reason for this is differentiation of legal and political responsibility. If such – undesirable – condition occurs, in which the legislative authority does not accept, within the scope of legislative activity, a constitutional-law instruction declared by the Constitutional Court in a derogative decision, it is a basis for a reason for enforcing political

responsibility not only by parliamentary opposition, but also by voters in an election, civic society, and in an extreme case, by civil disobedience. At this point, Jasper's warning should be referred to, concerning the confusion of various types of liabilities (guilt) [footnote No. 6]. In addition to this basic argument, another one consists of unpredictable effects on public finances in the case of precedential operation of a legal opinion pronounced in the Opinion. In addition, the judicial power in a democratic parliamentary system is not there to restrict the process of democratic adoption of acts, an essential part of which is also formed by non-adoption of bills of acts (bills of the act governing the lease relationships were repeatedly submitted to Parliament of the Czech Republic, however, they were not adopted. These included a governmental bill of an act on rent proposed to the Chamber of Deputies on 20 March 2003, a bill by a group of members of Parliament dated 22 June 2004, another bill by the Government dated 26 July 2005 which was adopted by the Chamber of Deputies on 2 January 2006 and returned by the Senate on 3 February 2006, then adopted through repeated voting of the Chamber of Deputies on 14 March 2006 and promulgated in the Collection of Laws under No. 107/2006 Coll.). In this connection, it is impossible not to see the helplessness of the Opinion which (clause 15) states "it is not possible to find a specific limit from which it was not possible to consider a limitation of property right as a result of control of rent as constitutionally conforming". If the Constitutional Court is not able to identify such a limit, then how can the ordinary courts do it with respect to actions according to the last sentence of verdict (II.) of the Opinion? (If the majority of the Plenum anticipates that the institute of limitation – § 26 of Act No. 82/1998 Coll. – is used for the exercise of the specified "claim", commencement of the limitation period may be given solely by adopting an opinion.) In addition, the Opinion brings ambiguity and uncertainty into the decision making of the ordinary courts, by establishing a "claim" or "claims", in the absence of aspects of their specification, as well as procedural conditions for the exercise thereof.

The constitutional-law reasoning of the Opinion also raises doubts. Clause 13 of the same contains a thesis according to which "the unconstitutionality of long-term inactivity by the legislature" does not establish entitlement to "compensation for damage" as specified by Article 36 para. 3 of the Charter, and under clause 18, such inactivity establishes the above-specified consequence merely in the case of violation of the fundamental right under Article 11 para. 4 of the Charter. Through this, the majority of the Plenum selected, from the entire system of the fundamental rights and basic freedoms, merely a single fundamental right, i.e. property right, for the "claim" constituted by such a majority; as a result of this it would be true that the unconstitutionality of long-term inactivity by the legislature which would result in a violation of the fundamental right to life, personal liberty, human dignity, liberty of movement and the freedom of the choice of residence, freedom of thought, conscience, and religious conviction, freedom of expression etc., would not be capable of establishing the "claim" constituted by the Opinion.

From all that mentioned above, the answer to the second issue may be derived: the Opinion establishes an alteration to the constitutional order, creates a constitutional sanction against the legislature, an alteration which is not based on a democratic consensus anticipated by Article 39 para. 4 of the Constitution of the Czech Republic.

There is extraordinarily extensive expert literature concerning the "sanction mechanism" according to the Convention, as well as according to the case law of the European Court of Justice. The purpose of the former is to guarantee compliance with fundamental rights and basic freedoms, the purpose of the latter is compliance with European law by the member countries of the European Union, but both are of a supranational nature. This circumstance represents a basic argument against an analogous application in domestic law.

Even though I share with the majority of the Constitutional Court Plenum the critical viewpoint on Parliament of the Czech Republic in the case of non-compliance with the legal opinion declared in the derogative Judgments concerning the issue of de-control of rent, I believe, for reasons specified above, that the way of reaction chosen is contradictory to both the constitutional order and the Act on the Constitutional Court.

_____

1) See G. Brüggemeier, Haftungsrecht: Struktur, Prinzipien, Schutzbereich: Ein Beitrag zur Europäisierung des Privatrechts. Berlin-Heidelberg 2006, p. 164 et seq. Similarly, on liability of the state in Great Britain and France, see D. Fairgrieve, State liability in tort: a comparative law study. Oxford 2003.
2) W. Berka, Lehrbuch Verfassungsrecht. Vienna 2006, p. 222.
3) U. Junge, Staatshaftung in Argentinien. Tübingen 2002, p. 206 et seq.
4) Ibid, p. 207.
5) Ibid, p. 212.
6) K. Jaspers, Die Schuldfrage. Czech Translation: "Otázka viny". Prague 2006.

Dissenting Opinion of Justices Vladimír Kůrka, Jiří Mucha and Jiří Nykodým

I. Case law prior to the Opinion Pl. ÚS-st. 27/09 (hereinafter referred to only as the "Opinion")

1. With respect to forming opposition to the Opinion, it is relevant to turn attention primarily to what has been declared until now within the walls of the Constitutional Court, and supporting arguments.

2. Two types of proceedings administered before the ordinary courts, related to each other, are affected; firstly, disputes of landlords against the state for compensation for loss; secondly, disputes of landlords against tenants for special claim to consideration beyond the scope of the agreed (controlled) rent (hereinafter, for simplification, "for increase in rent").

3. As for the first area, the Constitutional Court has issued several Judgments (in particular by the Second Panel and Fourth Panel of the Constitutional Court) and several Resolutions (by the Third Panel of the Constitutional Court); the former are based on (and partly copied from) Judgment file No. IV. ÚS 175/08 (see, for example, file No. II. ÚS 1133/08, IV. ÚS 156/06), the latter on Resolution file No. III. ÚS 294/06 and III. ÚS 2319/08. Both groups include relatively numerous decisions; the form of a resolution in the Third Panel of the Constitutional Court has been chosen due to the fact that the first of them was issued following Judgment file No. IV. ÚS 175/08, and clearly unjustified nature of the constitutional complaint could be based on the fact that the alleged violation of constitutionally relevant rights had been (with a negative result) examined by the Constitutional Court earlier.

4. A leitmotif (and a decisive reason) for both groups of decisions is – in relation to the claims against the state – the application of the principle of their subsidiarity as a principle which generally reflects the relationship of priority of settling obligation relationships (instruments from the same), with the concept of compensation for loss being potentially applicable only consequently. The common attribute of both groups of decisions is then the conclusion that the landlord with their claim (reflecting their discontent in terms of finances in a lease relationship with merely controlled rent) must primarily turn to the tenant. The difference of procedural results between the Judgments and Resolutions is, within the matters under consideration, insignificant since the same does not relate to "decision making reasons" (i.e. conformity in enforcing the above-specified principle of subsidiarity of a claim to compensation), and is an expression – merely – of divergence in the procedural instruction to the petitioner as to how to proceed further; in the first case they are directed at the alteration in the person of the defendant (to the benefit of the tenant) and the action as for its subject (within the scope of the present proceedings); in the second case, they are directed at filing another action against another entity (a tenant).

5. Since the application of the principle of subsidiarity for concepts of compensation for loss logically anticipates the existence of effective instruments for primary settlement of the actual relationship of obligation between a landlord

and tenant, it was inevitable to face an opinion of a corresponding requirement, addressed to ordinary courts, for "refinement of the law" in Judgment file No. Pl. ÚS 20/05, this in such a form which was later, beginning with Judgment file No. I. ÚS 489/05, expressed as refinement of the law by a "constitutive decision pro futuro". This need has arisen due to the fact that the specified opinion – when the same was interpreted by ordinary courts from verbal expression and in relationship to traditional institutes of procedural law – possessed essentially liquidating effects in all proceedings which were commenced against the tenants and in which the landlords sued for an "increase in rent" for a past period; however, considerable attention is logically turned to this in the enforcement of the principle of subsidiarity of claims to compensation for loss, since the possibility of administering the same is a precondition for the above-mentioned effectiveness of concepts other than those of compensation for loss [for example, Resolution dated 15 May 2008, file No. 28 Cdo 1342/2008-70 is illustrative, in which the Supreme Court explained that "it is not possible to affirm legal opinion of the court of appeal, that if there was no special legal regulation allowing unilateral increase in rent, the existence of which was presumed by the provisions of § 696 para. 1 of the Civil Code in the wording valid until 30 March 2006, the ordinary court was not entitled to determine the amount of rent", however "if the settled case law of the court of appeal on a point of law, as well as of the Constitutional Court, specifies that rent may be determined by a constitutive decision (pro futuro), but the increased rent cannot be claimed retroactively, which in the case under consideration was done by the plaintiff, then the contested judgment (note: a dismissive judgment) in its verdict is, in effect – from this viewpoint – correct in terms of the matter."].

6. In Judgment file No. IV. ÚS 175/08, this is conducted, against Judgment file No. I. ÚS 489/05, through a consideration that "if a condition pronounced therein is to have reasonable sense, it is necessary to determine the commencement of the period for decision making on the increase in controlled rent for apartments as the moment of filing the action to a ordinary court". A Judgment dated 4 December 2008, file No. III. ÚS 3158/07, issued in a dispute between a landlord and tenant on "increase in rent" for a past period of time, and which is connected – in the above-indicated correlation of both concerned types of proceedings – with dismissive decisions of the Third Panel of the Constitutional Court as for disputes on compensation for loss, presents an interpretation more effective insofar that it is admitted that a "requirement addressed to the ordinary courts in key Judgment file No. Pl. ÚS 20/05, i.e. that they, in spite of the absence of an arrangement presupposed in § 696 para. 1 of the Civil Code, must take decisions on increase in rent, this depending on local conditions and in such a way that no discrimination between various groups of legal entities takes place", cannot be reduced only to future legal relationships, or there is no reason not to connect this with claims whereby landlords claimed "rent" beyond the scope of the rent stipulated in the lease contract, for a defined past period of time (that is also prior to the filing of the action).

7. In this Judgment, the Third Panel of the Constitutional Court also noted that in all cases when the Constitutional Court proceeded to cassation of the dismissive decisions of ordinary courts, the subject of the proceedings consisted of "rent" for a past period of time, which is true also for the case examined by critical Judgment

file No. I. ÚS 489/05, as well as other cases (file No. II. ÚS 121/06, II. ÚS 361/06 and IV. ÚS 111/06). Strictly speaking, upon consistent enforcement of refinement of the law constitutively for the future, dismissive decisions of ordinary courts, be it for other reasons, would have to successfully pass before the Constitutional Court (just as in the above-mentioned resolution by the Supreme Court dated 15 May 2008, file No. 28 Cdo 1342/2008-70).

8. The above-specified understanding of Judgment file No. I. ÚS 489/05 (and Judgments based on the same) is conceived here merely as an interpretation, or shift in interpretation, be this in Judgment file No. IV. ÚS 175/08 or file No. III. ÚS 3158/07, therefore, it was not necessary here to resort to procedures according to § 23 of Act No. 182/1993 Coll. on the Constitutional Court. It seemed that the consequences of case decision file No. I. ÚS 489/05 have been replaced in the decision making practice of the Constitutional Court, and that the Constitutional Court no longer intends to rectify, within relationships between landlords and tenants, the ordinary courts regarding specification of the given claims, or that the originally exercised claims "for the past period of time", possibly also prior to the filing of the action, are again acceptable (cf. Judgment dated 2 March 2009, file No. IV. ÚS 2525/07). It is worth pointing out that, at the time of issuing the decisions opposed by the Opinion, which are those of the Third Panel of the Constitutional Court and the Fourth Panel of the Constitutional Court (in the second half of 2008), actions by the landlords (against the tenants) conceived by the same were still an effective remedy of protection of the same, this (at least relatively) even for "new" actions then possibly filed.

9. In the proposed Opinion presented, which was later adopted by the majority of the Plenum, the First Panel of the Constitutional Court, however, took a different view.

II. On the first sentence of the statement of law (I.) of the Opinion

10. The Opinion again (retrospectively) advocates the Judgment by the petitioners, file No. I. ÚS 489/05, even though it acknowledges now that the attribute of a constitutive decision (later a decision "with constitutive effects"), which is attached to a judicial decision in the nature of "refinement of the law", leads "theoretically" necessarily to the fact that the "modification in the contents of the lease relationship" established by the same might operate only as from the time when such a decision becomes finally legally binding. The Opinion also acknowledges that refinement in a "constitutive pro futuro" manner in accordance with Judgment file No. I. ÚS 489/05 could lead to practical difficulties, since actions which have not been decided upon until now would have to be dismissed after 1 January 2007 (see clause 12 of the Opinion). Therefore, it is newly presented that pro futuro may also apply to the past, which has also been admittedly considered in Judgment file No. IV. ÚS 175/08, as well as file No. III. ÚS 3158/07; however, a "future" application "to the past" is admitted only from the time of filing the action (by the landlord against the tenant), but not earlier, which favours such interpretation of Judgment file No. I. ÚS 489/05 that was submitted by the Fourth Panel of the Constitutional Court (in Judgment file No. IV. ÚS 175/08) and, on the contrary, opposes the interpretation of the Third Panel of the

Constitutional Court (in Judgment file No. III. ÚS 3158/07). However, it is neglected that the Judgment of the Fourth Panel of the Constitutional Court did not have any other ambitions than, for the purpose of the case examined by them and solution pursued by them, suppressing – the actual – otherwise obstructing effect of Judgment file No. I. ÚS 489/05, on the basis of which the ordinary courts, after having learnt of the existence of such a Judgment, following the usual proceedings taking several years and including expert opinions on the issue of the differences between "market" rent and controlled rent, were, in no time, dismissing actions from the landlords, reasoning that it is not possible to go back "to the past" (again see a resolution of the Supreme Court dated 15 May 2008, file No. 28 Cdo 1342/2008-70 or a judgment of the Regional Court in Hradec Králové – Pardubice branch dated 23 January 2007, file No. 23 Co 68/2006-139, which was the subject of the constitutional complaint in the case of Constitutional Court file No. Pl. ÚS 7/07).

11. However, the Opinion does not give any reasons why it should be so (that is why "pro futuro" admittedly also means "back to the past", but not further back than from the time of filing the action); it is not at all clear what is the reason for which – once a constitutive decision may be effective to the past – it is only and exactly from the commencement of the proceedings and not from any other moment in time, whether earlier or later. When it referred to the circumstance of otherwise ineffective actions, then it is necessary to say that (for the same reasons as are specified under clause 12 of the Opinion) the same will also apply to actions filed after 1 January 2007, and thus the chosen deviation from "constitutive nature pro futuro" does not bring any considerable effect to the reasoning of the same. Not even the reference to the dissenting opinion of Justice J. Musil to Judgment file No. III. ÚS 3158/07 that "as late as from this moment, the tenant may really respond to factual and legal arguments exercised by the landlord within their action", is convincing, be it for only that primitive reason that the tenant sued does not learn of these "arguments" as early as upon filing the action, but only as late as by delivering a copy of the same (that is "accidentally" later), however and on the contrary, usually earlier, from the predictable call prior to the proceedings by the landlord requesting voluntary payment of the "increased" rent. For that matter, the actually administered proceedings do not show that the tenant sued would ever "respond" in a manner other than precisely the defence that the ordinary courts must in no way interfere with a contractually effected lease relationship (note: similarly it is not known that a tenant, following the delivery of a copy of the action, would "respond" in such a way that the same would exchange an apartment with controlled rent for another one – logically – with non-controlled rent, i.e. a more expensive one). The "constitutional aspects", however being allegedly applied (clause 12 of the Opinion), appear in no place other than that specified above.

12. It is proper here to remark again what is noted under clause 7 above, that in cases when the Constitutional Court proceeded to cassation of dismissive decisions of the ordinary courts, the subject of the proceedings consisted of "rent" for a past period of time (see, for example, file No. IV. ÚS 611/05, file No. II. ÚS 121/06, II. ÚS 361/06 and IV. ÚS 111/06), and the Court, by opposing the conclusions of the ordinary courts that the "rent" (usually capitalised for a specific defined period of time prior to the filing of the action) may not be granted, implicitly demonstrated

(when they did not apply another opinion on the nature of a possible claim) that, on the contrary, such "rent" for the past period of time may successfully be sued for, and later plaintiffs were naturally inspired by this.

13. Besides, the key Judgment, file No. Pl. ÚS 20/05, is based on the same actual basis of the action by a landlord (against a tenant), provided that the subject of the same consisted of payment of the difference between standard" rent "according to expert opinion" and the rent paid (controlled) "for July 2003". A task for the ordinary courts – founded on this basis – that "in spite of absence of the arrangement anticipated in § 696 para. 1 of the Civil Code" they must decide "on an increase in rent", was pronounced by the Constitutional Court with the knowledge that a "proposal from the Government of the Czech Republic to pass a statute on unilateral increasing of apartment rent" was prepared, but also with a reminder that it may contain rules applicable only pro futuro; by this the Court indicated that the "judicial route" is directed – specifically – to the past.

14. As for the effects of judicial "refinement of objective law" (file No. I. ÚS 489/05) to the past, refused by the Opinion, it is also appropriate to refer finally to the fact that Judgment file No. Pl. ÚS 20/05 is not the first one whereby the Constitutional Court manifested a viewpoint similar to the same; the statement of law of this Judgment, amongst other points, refers to the fact that the Constitutional Court has already "opened the way … through its (note: previous) decisions" for the ordinary courts for "decision making" operations under the circumstance of the "non-existence of a relevant legal arrangement". In Judgment Pl. ÚS 2/03 dated 19 March 2003, it is indeed stated that "with respect to the above-stated unconstitutionality of the legal condition (and for the above-specified legal particulars of lease contracts with controlled rent), unless constitutionally conforming control of rent is established within the Czech legal order, the Constitutional Court shall have no other means left than to acquit its obligations resulting from the Constitution and, at least in individual cases, ensure the functioning of principles resulting from the constitutional order of the Czech Republic, and possibly relevant international treaties, even though such a solution is insufficient, unsystematic, and in principle only provisional, where evidently the only true basic point is adoption of the relevant legal regulation as specified by the previous Judgment of the Constitutional Court."

15. It is evident that the actions before the ordinary courts on "additional payment of rent" for the defined past period of time, that is prior to the filing of the action (see clauses 7 and 9 above), often for the period from 2003 to 2005, found support in the above-quoted Judgment (as in earlier Judgments, file No. Pl. ÚS 3/2000, file No. Pl. ÚS 8/02), or the plaintiffs were filing the same with such support, and the ordinary courts (for other reasons) dismissed the same. When the Constitutional Court – to the contrary – annulled such decisions, a signal completely different from that conveyed from the Opinion now adopted was sent.

16. Contemplations on what properly is "pro futuro" are based by the Opinion on the statement that judicial refinement of the law is expressed in a "constitutive" judicial decision (file No. I. ÚS 489/05); since the same is allegedly an expression of explicit acknowledgement by Judgment file No. Pl. ÚS 20/05, another argument to the benefit of the constitutive nature of the decision of the courts "on increase in

rent” is therefore not given. The truth is merely that the above-specified Judgment states that the Constitutional Court requires the ordinary courts to provide the landlords with proportional protection in such a manner that they will not dismiss their actions requiring “determination of increased rent”, which is, however, obviously a vague statement, without any ambition of procedural completeness; specifically, if the Judgment further states explicitly that the Constitutional Court “refrains from offering a specific decision-making procedure and thereby replacing the mission of the ordinary courts”. An attribute of the “constitutive nature” of judicial decisions is, therefore, not conveyed therefrom.

17. Restriction of the “pro futuro” effects to only certain “past periods” is thus justified by the Opinion by the “constitutive nature” of judicial intervention into the relationships of the landlord and the tenant; however, such a “constitutive nature” is not substantiated in any way, it is only proclaimed. Besides, it is clear at first sight that this attribute has neither place nor reason here. For illustration only: constitutive decisions include, for example, a decision on divorce, legal incapacity, cancellation and settlement of co-ownership, settlement of claims arising from unauthorised building, etc., and the question is thus asked whether the decision to which the ordinary courts are now guided in the relations presently examined may be compared to any of them.

18. Viewpoints that the solution adopted in Judgment file No. III. ÚS 3158/07 is unconstitutional due to its intervention in the past ignore the fact that intervention by way of a “constitutive nature” into a lease contract is visibly more invasive (by the judicial decision replacing one of its essential elements, i.e. agreement on the amount of rent), this in particular in the context of the emphasis which is otherwise placed by the Constitutional Court on “the parties' free will and freedom of contract”, which are granted a “constitutional dimension” (see Judgment file No. Pl. ÚS 20/05). One or the other is suppressed indubitably and more significantly by a direct impact to the contract than by imposing an external obligation to amend what is otherwise – as contents of the contract – protected.

19. Therefore, in Resolutions file No. Pl. ÚS 7/07, file No. III. ÚS 294/06, as well as in the criticised Judgment file No. III. ÚS 3158/07, the Constitutional Court attempted to establish (interpret) “the constitutive nature” of refinement of the law (pursuant to file No. I. ÚS 489/05), not in the traditional procedural sense, but in the sense of a declaration, possibly via ascertainment of a “new”, “further” monetary obligation (beyond the scope of the obligation resulting from the lease contract), related to the period of time defined by the action, or until the decision of the court.

20. The Opinion also fails to closely deal with how the proposed judgment by the landlord against the tenant (the acknowledging one) should actually look; it only says that something should be determined “from the bringing of an action”, this most likely as an “increase in rent”. However, it is not at all clear which procedurally anticipated action is concerned, while this very point is crucial for the plaintiff; the landlord may not fail to respect the provisions of § 80 clauses a) through c) of the Civil Procedure Code.

21. A decision on “increased rent” relating to the future can be conceived,

according to viewpoints in clauses 10 and 11 of the Opinion, either as "determination" that the rent amounts to a specific sum determined by the court, or as an imposition of an obligation to pay a "newly" determined sum for rent per month. In the first case, however, this would be an action which does not have any support in procedural law [here, determination of the right or legal relationship according to § 80 clause c) of the Civil Procedure Code is naturally not involved], and its basis is not given even from Judgment file No. Pl. ÚS 20/05 (see clause 16 above). The second version is preconditioned by the fact that the obligation to discharge the increased rent determined by the court is of the nature of "repetitive" discharge, that is one comparable with discharge of alimony, another allowance, etc.; however, this obligation is definitely not of such a nature.

22. On the contrary, actions anticipated by Judgment III. ÚS 3158/07, Resolution III. ÚS 294/06 and others are procedurally doubtless, since they have features of actions for discharge under § 80 clause b) of the Civil Procedure Code, and their substantive-law basis, is supported by Judgments of the Constitutional Court referred to by Pl. ÚS 20/05, specifically file No. Pl. ÚS 3/2000, file No. Pl. ÚS 8/02, or Pl. ÚS 2/03, if their leitmotif is ascertainment that the landlords are, by persistent control of the rent, unconstitutionally (by absence of regulations anticipated in the then § 696 para. 1 of the Civil Code) afflicted in terms of exercise of their property rights, and that something – later "in a judicial way" – must be done about it in the sense of adequate rectification (see clause 14 above).

23. As was mentioned in clause 19 above, in decisions of the Third Panel of the Constitutional Court, this claim is understood as a declaration of a "new", "other" monetary obligation (beyond the scope of that which results from the lease contract) related to the time specified by the action, or prior to the court making a decision. This is in the belief that it is not in collision with opinions applied in the previous Judgments of the Constitutional Court (enumerated in Judgment file No. III. ÚS 3158/07), specifically in a Judgment dated 8 February 2006, file No. IV. ÚS 611/06, dated 26 July 2007, file No. II. ÚS 361/06, or dated 8 June 2006, file No. II. ÚS 93/05. In the Judgment mentioned last, the Constitutional Court stated that the violation of the right to judicial protection – and in the final consequence also violation of the right to protection of property – was caused by the ordinary courts by their dismissing the petitioner's action, with reference to non-existence of a special legal regulation anticipated in § 696 para. 1 of the Civil Code, that is a regulation allowing unilateral increase in rent by a legal act by the landlord, even though their only possible defence was action against the tenant on capitalised monetary discharge for a past period (here, the Constitutional Court was even thinking about unjustified enrichment).

24. In order to understand how the Third Panel of the Constitutional Court conceived the contents of the potential claim of the landlord against the tenant, it is again enough to quote a section from Judgment III. ÚS 3158/07: "In the following proceedings, the ordinary courts will have to adopt such interpretative standpoints which will ensure the mutually balanced protection of both entities in the decisive legal relationships, as this requirement was treated in all previous (and above-mentioned) decisions of the Constitutional Court. They will also address how the petitioner reasoned the claim made; that they pursue a claim from obligation relationships (not unjustified enrichment) and that it is necessary, within the

intentions of Judgment file No. Pl. ÚS 20/05, under the condition of a legal gap (caused by the non-existence of a regulation pursuant to § 696 para. 1 of the Civil Code), to get an idea how this gap would be filled by the legislature, had the same not be inactive." But the Constitutional Court also stated that it would be up to the petitioner to prove how the action corresponds to such aspects, such an action being formed, as regards the amount of the exercised claim, on the basis of determining "market" rent "in the given location".

25. Since the Constitutional Court has always proceeded from the non-existence of regulations in accordance with the then valid § 696 para. 1 of the Civil Code (and from the need to "bridge" this gap with judicial engagement), then it is logical (and useful) to think about "old" claims – at least – in much the same way as about "new" claims which were established by regulations issued later (Act No. 107/2006 Coll.). Here, it may be instructive that the structure of the claims to "increased" rent is derived from a request given by the landlord, and if the tenant does not pay the higher rent, the landlord will sue the tenant for the payment of capitalised rent for the past period of time determined by them (from the lawful effectiveness of the request to the determined moment of "non-payment" prior to filing the action); in this case, the tenant has a defence that the landlord's request has no legal basis, or they will question the "validity" of the increase in rent by their own action (cf. § 3, 5 and 6 of Act No. 107/2006 Coll.)

26. The concept of "old" claims concerned by the Third Panel of the Constitutional Court evidently conforms with this; however, viewpoints declared by the Opinion definitively suppress this arrangement.

27. It is proper to summarise: the conclusion declared in the first sentence of statement of law (I.) of the Opinion is not only incorrect (its reasoning will not stand in law) but also purposeless; instead of pursuing a practical and balanced settlement of legal relationships in question, it, on the contrary, liquidates possibilities which existed and were appropriate to the same, this without any adequate reasoning. This is done so at the expense of a repeated (and crucial) turn in the case law of the Constitutional Court, which until now – so it seems – also brought about an alignment of decision making of the ordinary courts. From now on, all will be different again, which is malignant insofar that previously commenced proceedings of landlords against tenants are still in progress. The notion lingers that this was done only in order to open an avenue to claims against the state, which is established by the second sentence of the statement of law (II.) of the Opinion, and the Constitutional Court will with difficulty rid itself of a suspicion that this is a reaction primarily to the fact that Parliament did not respect the Constitutional Court's opinions expressed earlier.

III. On the second sentence of the statement of law (II.) of the Opinion

28. It was mentioned above (clause 2) that the dispute of landlords against tenants is related to disputes administered before the ordinary courts between the landlords against the state "on compensation for loss"; this was true until the adoption of the Opinion which – anew and totally originally – subsumes these disputes to the evaluation "from the viewpoint of their right to compensation for

mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms". With respect to evaluating the mutual relationship of these two disputes (claims), this is a minor alteration, and, therefore – in opposition to the Opinion – the essential facts which were pronounced by the Constitutional Court earlier (in Decisions of the Third Panel and Fourth Panel of the Constitutional Court, as well as the Second Panel of the Constitutional Court), will be applied by analogy.

29. Both Judgment file No. IV. ÚS 175/08 and Judgment file No. III. ÚS 3158/07 proceed from the principle of subsidiarity of concepts of compensation for loss towards the concepts of actual settlement of the obligation relationship in question. In the latter of the above-mentioned Judgments, this is done via discretion (see clause 4 above) that the general principle is thus reflected "that in order to rectify a defect in a legal relationship of obligation, it is necessary to primarily utilise such reparation instruments which are intrinsic to their contents and corresponding (obligation) legal instruments, and only then, if the same are not capable of ensuring complete rectification, is it possible to consider instruments external to such a relationship, including the institute of compensation for the loss if statutory conditions for the application of the same are fulfilled". The circumstance that future claims to compensation for loss should be assessed as compensation for mandatory limitation upon property rights obviously changes nothing; besides, the Opinion itself behaves equally (see clauses 5, 7 and 19 of the Opinion, or the second sentence of the second statement of law). Compensation for loss against the state is, in both such Judgments (as well as Resolutions file No. III. ÚS 294/06, file No. III. ÚS 2319/08 and others), considered only hypothetically, "if the same happens to come to consideration", without reflecting in whatever manner the existence and nature (title) of a possible claim.

30. The principle of subsidiarity of (compensatory) claims based on compensation for loss is a general principle which simply must be objectively known to each plaintiff, and has absolutely no connection whatsoever to specific difficulties as regards "refinement of the law" to the benefit of landlords in relation to the tenants. The landlords thus could (and should) have always known that primarily they are to pursue a reprisal on their partners in the decisive obligation relationship, since that is true according to general legal principles. The fact that the law is to be "refined" under the circumstance of non-existence of an otherwise anticipated legal norm, was (explicitly) proclaimed "publicly and for everyone" in a judgment of the Supreme Court dated 14 November 2002, file No. 21 Cdo 2104/2001 (No. 63/2003 of the Collection of Judicial Decisions and Opinions) and, as for specifically affected legal relations, the same is given at the latest by Judgment of the Constitutional Court file No. Pl. ÚS 2/03, dated 19 March 2003.

31. The Opinion, even though it acknowledges (clause 7) that "the notion of subsidiarity of a claim to compensation for loss against the state is generally correct", excludes utilisation of the same – and this merely – due to the fact that a specific landlord against a tenant (according to the opinion that they may be sued only pro futuro) had no action against the same any longer, wherefore case file No. IV. ÚS 175/08 professedly "involved no competition of claims". This, however, could stand only in the instance when there is objectively no legal instrument against the tenant, which is naturally not true here, because, even from the

viewpoint of the Opinion, there is surely no reason to believe that a landlord would have no claim against a tenant in the past; after all, a claim "for higher rent" which is "attached to… filing the action" is admitted (and even formed). The landlord then could bring such an action earlier, and, therefore, could also achieve settlement of their relation to the tenant from such an earlier date (still, actions were indeed brought by landlords against tenants after Judgments by the Constitutional Court dating from 2000 to 2003).

32. It is true that the structure based on subsidiarity of the concept of compensation for loss is matched by the existence of an effective primary legal remedy from the actual obligation relationship; it is, however, necessary to emphasise that this is valid generally, or in a general doctrinal sense, naturally not in such a meaning that in each specific situation when a landlord neglects their primary remedy of protection for their right, or otherwise causes that the same ceases to be effective, they may – exactly for this reason – call for subsidiary remedy. The argumentation of the Opinion, however, contradicts this. Upon reductio ad absurdum, it would have to be true that such landlords who in the past litigated (and still litigate) with tenants, could have saved themselves from such conduct (and not file the action), since other landlords could have sued the state directly for the very reason that they did not file an action against tenants, and – as is specified in the Opinion – after 1 January 2007, can no longer sue the tenants anyway.

33. When the Opinion (clause 20) implies that the claim of a landlord against the state cannot be preconditioned by the landlord firstly having to exercise effective remedies for the protection of the right against the tenant (as the landlord against the tenant for the past period has no such claim), then the Judgments of the Constitutional Court completely abandon the until now respected principle of subsidiarity of claims based on compensation for loss; if the landlord has always available an action against the state "for long-term inactivity of the legislature", then it is illusory to consider a situation according to the second and third sentences of the statement of law (II.), since the landlord does not have (and actually has never had) any logical reason for the action against the tenant. In other words, despite the fact that the Opinion intends to outwardly respect the principle of subsidiarity (clauses 7 and 20), they cause the application of this principle to be solely dependent on the will of the plaintiff, whether they bring or not a (primary) action from the original obligation relationship; if they decide not to file such an action, a "subsidiary" claim, not limited in time, against the state commences as a matter of course (while – oddly enough – if they did file an action, they would have such a claim against the state for a certain period of time only).

34. If, according to the second and third sentences of the statement of law (II.), "a claim against the state for compensation for mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms is of a subsidiary nature to the claim by the landlord of an apartment against the tenant for an increase in rent only for a period of time beginning on the date on which the action was brought" (note: according to the opinion of the majority of the Plenum, repeatedly expressed, this is an action against the tenant), and "for the period of time preceding such a date, the landlord of an apartment may exercise their claim to compensation for mandatory

limitation upon property rights directly against the state", then all that has been expressed above is manifested prominently in a logically connected question, that is what will happen when the landlord has (never) filed any action against the tenant… It is hard to comprehend what these two sentences in such case actually convey.

35. The Opinion also ignores the issue of whether the circumstance that a landlord has not filed any action against the tenant (which opens the way against the state "directly") even though the landlord could have done so (as other landlords in comparable situations have), has any effect on their claim against the state, whether such a claim is somehow weakened, for example, by such an amount which the landlord "failed to sue for otherwise."

36. Additionally, it is impossible not to raise objections to evaluation of claims by landlords for compensation for loss against the state "from the viewpoint of their right to compensation for mandatory limitation upon property rights in accordance with Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms" in relation to the loss "which allegedly occurred as a result of long-term unconstitutional inactivity by Parliament, consisting of its failing to adopt a special legal regulation defining cases in which a landlord is entitled to unilaterally increase rent", to which the Opinion calls. This due to the fact that establishment of liability by the state for "inactivity", i.e. "voting" or "not voting" in Parliament, is exposed to a clearly relevant objection that the Constitutional Court does not adequately distinguish between political responsibility in one respect and legal responsibility in another, as well as that the Court exceeds constitutional delimitation of relationships between the individual powers, specifically their own power against legislative power. Even though the Opinion evaded difficulties related to subsumption of "long-term unconstitutional inactivity by Parliament" to the facts of the case of the state's liability for loss, established in Act No. 82/1998 Coll., as amended by later regulations, such an open "constitutional" problem has not been lessened in any way by constructing liability for compensation under Article 11 para. 4 of the Charter of Fundamental Rights and Basic Freedoms.

37. In addition, the very point referred to by the Opinion, Article 11 para. 4 of the Charter, is, in terms of application, (more than) disputable, since the same is typically aimed at such "mandatory limitations" upon property rights which may be, in terms of their contents, compared to expropriation (which both it treats), wherefore the logical basis of the same consists of an active infringement of protected ownership by the operation of the state and its bodies, in particular executive bodies, this by way of their administrative acts. If this Article of the Charter is apparently also usable for declaring constitutional non-conformity of expropriation (nationalisation) norms (without compensation), this in no way indicates that it could provide support for the passivity ("inactivity") of Parliament, be it long-term and unconstitutional.

38. If the application of Article 11 para. 4 of the Charter does not stand, then attention is again turned only to such basis for considerations on liability of the state which are represented – and exclusively so – by the provisions of Article 36 para. 3 of the Charter which, however, establish merely the right to compensation for loss caused by an unlawful decision of a court, other state body, or public

administration body, or incorrect official procedure; beyond this, there is no room for liability of the state inferable from the constitutional order. Therefore, this does not affect the legislative assembly, since the same is naturally not comparable to the above-stated bodies; an act (or absence of the same), as a product of its activity (inactivity), may be in conflict with the Constitution, but liability of the state may not be connected with the same, since it is identified neither with the decision nor official procedure, and compliance with the condition of "unlawfulness" is not at all given (see also clause 36 above).

39. Besides, originality of legal evaluation of earlier claims by landlords for compensation for loss against the state (in the sense of claims to compensation in accordance with Article 11 para. 4 of the Charter) brings about non-negligible difficulties in terms of how to define these new claims with respect to contents of the same, or how they should be interpreted by the ordinary courts. The Opinion, in key clause 22, provides no comprehensible and guiding instruction for evaluating "the degree of infringement of their fundamental right to own property as a result of controlled rent…", or it remains unclear how the ordinary courts are to evaluate when the fundamental right to own property was already affected and when not, when it is at the same time acknowledged that the "unconstitutionality of the legal arrangement of controlled rent alone did not mean that a fundamental right" of the petitioner "was violated in each individual case" (at the same time, however, it is common knowledge that revenue from rent was considerably diminished by unconstitutional control of the same). When the Opinion points out that "the amount of the claim to compensation for mandatory limitation upon property rights under Article 11 para. 4 of the Charter does not need to be identical to the difference between standard and controlled rent", it is as if the same, on the other hand, suggested that it actually may be so. Clause 22 mentioned above does include that the ordinary courts will evaluate, in individual cases, whether "the above-specified conditions for origination of the right to compensation were fulfilled", but their enumeration usable in practice was not provided in a convincing manner, not even from the preceding clauses 17 and 18.

40. Naturally, it is possible to agree with the fact that the Constitutional Court may leave "sub-constitutional details" to ordinary courts; but when the Court, through its own discretion, established a claim which is completely original and previously not introduced, the Constitutional Court should exhibit, in a specific and understandable manner, what was actually meant.

41. Finally, it is not possible to overlook the potential (and dangerous) importance of the adopted Opinion as a precedent; when the liability of the state was connected with "unconstitutional inactivity" by Parliament, it may not be easy to separate this base from its "unconstitutional activity", specifically declared by the Constitutional Court in the derogated provisions of the act from which claims arose to the individual entities, such claims being later granted by unenforceable judicial decisions (cf. § 71 para. 2, sentence following the semicolon, of Act No. 182/1993 Coll. on the Constitutional Court).

42. For all these reasons, the second statement of law of the Opinion cannot be affirmed either.

Dissenting Opinion of Justice Ivana Janů concerning the Reasoning of the Opinion of the Plenum

1. I agree with the statements of law which were arrived at by the majority Opinion, as well as with the arguments relating to the statement of law (I.). However, I do not consider argumentation relating to the statement of law (II.) to be completely correct and exhaustive; I am convinced that the Constitutional Court should have accentuated more the liability of the state for loss which the state caused by its unconstitutional inactivity; in the same way, there is no reason for speaking about the "obligation to compensate for material detriment", when in fact this is nothing else than the liability of the state for loss caused by the state (besides, loss is consistently defined as a material detriment quantifiable in money). Also, I do not agree with the statement that the remark on the liability for loss in Judgment file No. I. ÚS 489/05 (possibly in other Judgments) was pronounced in relation to the lapse on the part of the ordinary courts. In closer detail, I wish to point out the following:

2. In accordance with Article 1 para. 1 of the Constitution, the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. The fundamental rights which are guaranteed at constitutional level and which enjoy the protection of judicial bodies (Article 4 of the Constitution) include, among other items, property rights (Article 11 of the Charter), or right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the Convention). If the protection of such rights is to be complete, the legal order must provide effective legal remedies in the case that the property domain of a person is infringed in an unlawful manner. In other words, if, as a result of unlawful conduct, material detriment occurred, the legal order must make it possible to rectify such a detriment, irrespective of who caused the same; if the legal order does not allow such rectification, it means that protection of property rights, or the right to peaceful enjoyment of possessions, is not complete, and is thus in conflict with Article 11 of the Charter and Article 1 of Protocol No. 1 in connection with Article 13 of the Convention.

3. The basic institute serving to remedy a material detriment which was caused to a party by unlawful conduct, is liability for loss. From this viewpoint it is necessary to deal with the question whether, in the case of detriment caused to the landlords of apartments with controlled rent by unconstitutional inactivity by the legislature, preconditions for liability for loss are fulfilled in such way as they have been consistently defined by legal theory for many years; if the answer to this question is positive, the legal order must allow rectification of such a situation, as was specified above.

4. At the level of theory, liability for loss is based on four basic preconditions:
a) unlawful conduct or a loss-incurring event defined by law;
b) loss;
c) causal nexus between a) and b);
d) culpability (if a subjective principle of liability is applied).

5. The existence of preconditions specified under b) and c) will perhaps not raise great doubts and, therefore, they may be left aside; this is also confirmed by the

majority Opinion, even thought the same evades speaking about “loss”, and replaces this term with the periphrastic term “material detriment”. Culpability as a precondition for liability by the state for loss shall not be applied; this is clear not only from Act No. 82/1998 Coll., but also from the very nature of the liability for loss which is caused by public power. The key issue then remains the fulfilment of the precondition under clause a), i.e. whether non-adoption of an act on unilateral increase in controlled rent is or is not unlawful conduct, this irrespectively of the legal category by which the liability should be governed.

6. In this sense – in my opinion – it may be believed that non-adoption of an act regulating a unilateral increase in rent for apartments with controlled rent truly constitutes unlawful conduct. This is clearly seen from the Judgments of the Constitutional Court which were quoted in the Opinion, in which the Constitutional Court stated that the inactivity by the legislature is unconstitutional; if the same is unconstitutional, then even more so it must be true that it is also unlawful, whereby the first precondition for the liability for loss is fulfilled. The conclusion on unconstitutionality, and thus also unlawfulness, is, in Judgment file No. Pl. ÚS 20/05, supported by two basic arguments: firstly, the state imposed on itself adoption of a special statutory arrangement of a unilateral increase in rent in § 696 of the Civil Code; secondly, by non-adoption of the above-mentioned statutory arrangement, the principle of equality and protection of property rights were violated.

7. In support of this conclusion, other arguments may be given. These would also include ascertainment that by non-adoption of an act on unilateral increase in rent, the principle of legitimate expectation has been violated. If a valid and effective regulation was counting on the existence of a special arrangement which would regulate a unilateral increase in rent, then the landlords could indubitably rely on the fact that such an arrangement would be adopted and they would be able to proceed in accordance with the same. So established legitimate expectation does not rest on any speculation, but on explicit provisions of the law.

8. Non-adoption of the legal arrangement on a unilateral increase in rent is also in conflict with Article 1 of Protocol No. 1 to the Convention. Here it suffices to refer to case law of the European Court of Human Rights quoted in the reasoning of the majority Opinion.

9. It is possible to summarise that the conclusion on unconstitutionality, and thus also unlawfulness of the consequences of not adopting the act on a unilateral increase in rent, is based on the following arguments: the legislature imposed on themselves the obligation to regulate this issue directly within an act but failed to do so; their inactivity resulted in violation of the principle of equality and legitimate expectations. With respect to the fact that also other above-mentioned preconditions for liability for loss have been fulfilled, it is not possible to claim that the state bears merely political responsibility and not legal responsibility. It would be in strict conflict with the principles of a law-based state (Article 1 para. 1 of the Constitution) if the legal order did not make it possible to make good the material detriment caused to a party in their constitutionally protected property domain by unlawful conduct. Even more so, it is also true for the situation when unlawful conduct was committed by the state itself. It is not relevant which body

of the state has a greater share in the unconstitutional condition. Liability is borne by the state as a whole; the individual sections defined by the theory of separation of powers are not sections mutually divided by a deep abyss, but those between which public power is merely divided. The purpose of the separation of powers is not to exclude or limit the liability of the state as a whole, but only an effort to prevent the concentration of power, which may bring about attempts to abuse the same.

10. On the basis of the above considerations, I believe that it would be possible to extensively interpret Article 36 para. 3 of the Charter, and in accordance with this also § 13 of Act No. 82/1998 Coll., and thus to apply the above-specified regulation directly to the liability of the state for detriment caused. Through this, the fact that the state's duty is of a nature of liability, as well as the fact that not even the state's legislature may act in a completely arbitrary manner, would be better expressed.

11. Furthermore, I consider it necessary to emphasise that there is no need to worry that the obligation on the part of the state to provide compensation for material detriment could be used (overused) excessively or as a precedent in cases when somebody is convinced that Parliament should have adopted an act but failed to do so. The liability of the state for material detriment which the state caused by long-term unconstitutional inactivity, consisting of non-adoption of a legal arrangement anticipated by law, is an exceptional procedure which is applied merely under completely extraordinary circumstances and it cannot be mechanically related to other cases of non-adoption of a legal regulation. I am not sure whether the majority Opinion expresses this conclusion in an absolutely unambiguous way; in fact, it merely poses two limiting conditions, these being violation of equality and the intensity of limitation of property rights (given by the scope of limitation and the period of its existence). Therefore, I deem it necessary to bind the conclusion reached by the Constitutional Court with unique specific circumstances of this case. Its specific nature determined by control of rent results at least from the following circumstances: non-adoption of the legal arrangement was unconstitutional and thus also unlawful; the Constitutional Court repeatedly and over a long time declared, in its binding Judgments, the conclusion on unconstitutionality. In addition, adoption of a special statutory arrangement of a unilateral increase in rent, as was mentioned above, was imposed on the state by the state itself in § 696 of the Civil Code. Non-adoption of the above-specified statutory arrangement violated the principle of equality, principle of protection of property rights and principle of legitimate expectations.

12. Finally, the statement in clause 14 of the reasoning to the majority Opinion, according to which "thus, when the Constitutional Court stated a possible claim to compensation for loss against the state in Judgment file No. I. ÚS 489/05 and likewise in Judgment file No. IV. ÚS 175/08 … the Constitutional Court aimed such a claim in relation to a lapse by the ordinary courts which would not provide protection to the fundamental right of the landlords concerned, by dismissing their justified claims to an increase in rent" is, in my opinion, not particularly accurate. The legal opinion declared in file No. I. ÚS 489/05, according to which "if a landlord's justified claim is not satisfied to the fullest degree, the landlord shall have no option left other than to exercise their requirement for compensation for

loss against the state", may be interpreted only in the context of the remaining contents of the reasoning of this Judgment. In this, the Constitutional Court firstly explicitly excludes the existence of a claim to payment for the difference between market and controlled rent for a past period of time, and secondly, in connection with considerations on increasing rent in the future, refers to social sensitivity of this issue under the condition of non-existent social housing. Consequently, it follows that a situation when a tenant does not satisfy in full the justified claim of a landlord, does not mean a difference between the rent for a past period of time, but a case when the ordinary court decided on the increase in rent for the future, however, the court has not increased the rent, with respect to social reasons on the part of the tenant, to the level of justified claim of the landlord. It is surely not possible to see any lapse by the court in such a decision; to the contrary, its decision would be correct as (in the situation described above) it is not possible to request the landlord to bear the consequences of the poor social situation of the tenant. The only way to rectify the loss caused in such a situation is the possibility of the landlord to claim the remaining difference from the state, on the basis of its liability for materiál detriment suffered by the landlord.

13. In conclusion, I wish to add that nobody contests the sovereignty of Parliament, the importance and weight of their political responsibility as the elected representative of the people within a representative democracy, which manifests independently its political will by individual members voting on issues. However, it must not be ignored that it is during the very independent conception of this political will that members are bound by their oath to uphold the Constitution and laws and to carry out their mandate to the best of their knowledge and conscience (Article 23 of the Constitution). Allegiance by the Constitution and laws clearly shows that the responsibility of Parliament has clear legal aspects and does not consist solely of political responsibility (Article 1 para. 1 of the Constitution).

With respect to the issues now under consideration, this means that if the consequences of inactivity by Parliament in the long term interfere with the fundamental human right consisting of protection of property, in a law-based state there is no other way than that the state as a whole be held accountable, on the basis of an explicit decision by the Constitutional Court.

The Constitutional Court was called by constitutional legislature and incorporated into the constitutional structure of a democratic law-based state as a body responsible for the protection of constitutionality (Article 83 of the Constitution) and its enforceable decisions have effects erga omnes and are binding on all authorities and persons, i.e. also the legislature (Article 89 of the Constitution).

Dissenting Opinion of Justice Eliška Wagnerová concerning the Reasoning of the Opinion of the Plenum

I. Introduction

1. I do agree with the Opinion, I consider it to be a manifestation of the responsible approach of the Constitutional Court to the solution of a problem which has originated as a result of the perplexing inertia of politicians at the level of both Government and Parliament. In my Supplemental Dissenting Opinion I wish to express myself on the possible concept of the obligation of the state to compensate for loss caused by legislative power, which was not addressed by the reasoning of the Opinion of the Plenum in a completely clear fashion, for reasons of pursuing a consensus (which are reasons possible to respect).

2. In terms of positive law, this matter has not been regulated, since Act No. 82/1998 Coll. standardises liability for loss caused by executing public power by a decision or incorrect official procedure, while the provisions of § 5 of this Act then specify the definition of acts and procedures for which the state is to be liable, as follows: the state is liable under circumstances determined by this Act for loss which was caused a) by a decision which was issued in civil proceedings, in administrative proceedings, in proceedings under the Administrative Procedure Code or in criminal proceedings; b) by incorrect official procedure. The above-mentioned Act does not cover (or does not deal with) decisions of Parliament made in the form of an act. Hence, from the very absence of an explicit statutory arrangement, as well as from the allegedly historical "untouchability" of Parliament, some (the majority) infer the impossibility of conceiving the obligation of the state to compensate for loss caused by the state (be it via statutory acts or inactivity).

II. Historical fundaments of liability of the state for losses caused by legislative power

3. The liability of public power as such did not exist in historical eras when the state was not endowed with a legal personality, and when a ruler was conferred with sovereignty. The personality of the state makes it possible to perceive the relationships between an individual and the state as legal relationships; earlier, as Jhering stated, law appeared to be a policy of power, although, for example, Kelsen infers, from the legal personality of the state, a legal impossibility of the state's position of power against individuals, and all relations of superiority and subsidiarity are, according to Kelsen, only of a factual nature. Yet it was acknowledged that a ruler's sovereignty was also limited by the acquired rights of persons. In a "police state", characterised by authoritative care of good order and general welfare, the sovereign did not rule in their own interests and those of their dynasty, but in the interests of society as a whole. Therefore, at such a time in the past, borderlines in the form of acquired rights of individual persons were no longer in existence. The vassals did not oversee civil servants, they were only obliged to subject themselves to their orders. "Police" statutes, unlike "judicial" statutes, did not establish subjective rights for vassals, and, therefore, they were not enforceable through court; for they were mere internal instructions or orders for

civil servants in relation to their superiors, they were not determined for the vassals. The outlined structure of the exercise of power was not applied only in absolutist monarchies, but was to be observed also in post-revolutionary France. The sovereignty of the ruler was replaced by the sovereignty of the people, which, however, was to contain the same characteristics as their predecessor, meaning omnipotence and unaccountability. Even the Declaration of the Rights of Man and of the Citizen contained a principle of inviolability of ownership; each loss caused to an individual by the operation of the administration was to be compensated for. Yet, French legislature and case law were for a long time hesitant to make this principle real.

4. The further expansion of operations by the state, however, is bringing about ever more numerous and grave detriments to individuals related to such operations. At the same time, however, a sense of justice is growing. The provision of compensation for loss to those who have suffered the same as a result of operations of the state is beginning to be considered a matter of virtuousness and of social solidarity. The era of a law-based state, even though merely a formal one at that time, was coming. The state bound itself with law, the state's acts started to be reviewed as for their lawfulness, disputes between the state and the individual were decided on by courts. Theory on the liability of the state developed and was to find – if possible – a stable balance between collective and individual interests; respect to subjective rights and concerns of the individuals were to be achieved, and the necessary freedom for actions of the state in order to fulfil its tasks was to be ensured. The intensity of the problem was growing, as it was considered increasingly natural that the state should not be restricted only to protecting its citizens, to ensuring internal and external security, but that the state should and must include in its operations also the care of interests of its citizens in the field of culture, and in the economic and social spheres in particular. The central notion was that the state, in relation to individuals, was not to be a source of losses, at least unjust losses or losses disproportional to the benefits provided by the state to individuals.

5. The issue of the obligation of the state to provide compensation for loss caused by a legislative act may be identified with the issue of the relation between the state and the law. Ever since ancient times, there have been two schools of thought, one of them proposing that the state is a sovereign in relation to the law, the other declaring otherwise, inferring that power is subject to higher law which defines its limits. The concept of the contents of such higher law changed over the course of time, until eventually, in the 18th and early 19th centuries, stabilisation occurred with the contents including inherent rights of an individual (ius cognatum) resulting from their human nature, and the rights acquired by an individual (ius quaesitum), which originated in synergy with human activities. In this, it was true that the rights of the latter group (i.e. acquired rights) may be annulled or limited when in conflict with general well-being or good, but only for compensation.

6. Natural-law theories were abandoned during the 19th century, and replaced with legal positivism, which removed the above-outlined basis for the legislature being limited by "higher law". Until the end of World War I, the term "legal injustice" was considered a contradiction in terms, since the basis of the prevailing doctrine was inimitable sovereignty of the legislature. According to the prevailing

doctrine as well as practice, the acquired rights retained their meaning only for determining the retroactive effectiveness of law. Legislation makes no difference between individual rights, in terms of the possibilities of modifying or even annulling them, according to the current need; besides, the designation “acquired rights” has begun to disappear. Pragmatism, maybe the cynicism, of materially non-corrected positivism (in terms of values) is proven, for example, by the history behind Article 129 para. 1 of the Weimar Constitution, which stipulated that properly acquired rights of civil servants (Beamten) are inviolable. When defending this in the Constitutional Committee, Hugo Preuss, the author of the constitution, explained the purpose of this provision as a necessity of dissipating anxieties of professional officers about changes in the form of the state and the form of government, which, as they feared, could affect their status. Therefore, it was necessary to placate these indispensable experts. It must be added that there were also opponents in terms of doctrinal opinion, who, in relation to acquired rights, stated that even “when the law is tacit, it is necessary to presume legal acknowledgement of a claim to compensation for loss” [(Gierke – quoted according to J. Matějka, Povinnost státu k náhradě škody způsobené výkonem veřejné moci (podle práva československého, francouzského a německého) /Obligation of the State to Compensate for Loss Caused by the Execution of Public Power (According to Czechoslovakian, French and German Law)/, Prague, 1923, p. 24)], for this is what justice demands.

7. The same opinion was also originally held by the German Reich Court of Law, which, in a decision dated 13 January 1883, stated: “In the case of deprivation of properly acquired right through legislation, there is, according to general law, a private-law claim against the state for full compensation, unless such a claim is explicitly excluded by the legislature.” As the ideas of positivism advanced and consolidated, case law of the Reich Court of Law was changed. In a decision dated 26 October 1906, the Court stated: “The law may, due to its unique rule, ask also for sacrifice without recoupment; only when such a law itself prescribes compensation, the same may be claimed.” (quoted in a translation by the author, according to J. Matějka – see above, p. 24). On 4 November 1925, the Reich Court of Law reached the conviction on judicial power for supervising constitutionality in relation to statutes, whereby they considerably contributed to disruption of doctrine on the sovereignty of Parliament, but did not formulate liability for loss caused by unconstitutional statutes (see B. P. Wróblewski, Die Staatshaftung für legislatives Unrecht in Deutschland, Eine rechtshistorische, rechtsdogmatische und rechtsvergleichende Untersuchung, Nomos, Baden-Baden, 2005, p. 41).

8. French doctrine and case law of the 19th century took an invariable opinion under which it was not possible to claim compensation for loss due to activity (inactivity) by the legislature. A statute is considered to be an act of sovereignty; and a sign of sovereignty is that the same is binding upon anybody, without any claim to compensation. The Conseil d'État has also maintained the doctrine and allowed compensation only in the instance where the statute itself determined the same, in this referring particularly to the principle of separation of powers, or the separation of judicial power and legislative power (it is of interest that, on the contrary, the Conseil d'État, at the beginning of the 20th century, developed the liability of the state for loss caused by acts of the executive in a very inventive way, which, according to the author, is evidence of exaggerated adoration of a

democratically elected parliament, this being an attitude which also negatively influences the possibilities of developing a constitutional judiciary). However, this opinion was radically negated by Léon Duguit, today considered a personality who considerably influenced opinions on public law. Duguit believed that the base from which law grows consists of the fact that people are social beings, endowed with universal sense or even an instinct for solidarity and social interdependence. From these instincts, Duguit inferred acknowledgement of certain rules of behaviour, which are inevitable for mutual coexistence in society. The state does not represent sovereign power. The state is only an institution which originated merely as a result of the social needs of people. States, as well as individuals, are bound by legal rules which have their basis in social imperatives. The author himself refused to consider his concept of law to be one of natural law, he supported it with sociological points taken from Durkheim. However, he refused the concept of subjective public rights and attempted to replace rights with obligations. In his opinion, there is no other right than that to discharge one's obligation. Even property rights he understood only in relation to their social function, that is as a power of an individual finding themself in certain economic position to discharge an obligation having a social purpose, as is required by their social status. The term "law" is understood as independent of the term "state"; legal norms bind a state in the same way as they bind an individual. It is actually a norm which constantly undergoes change, depending on social development, and only becomes "legal norm" as late as when – slightly inaccurately defined – it is acknowledged by the individuals forming the community. Positive statute is, in his opinion, only one of the forms through which a legal norm is expressed. The function of law as a form is merely to facilitate understanding what actually a legal norm is. According to this scholar, if the legislature adopts an act, the application of which results in detriment to a certain group of citizens, they are at the same time legally obliged, if social solidarity so requires, to explicitly grant compensation to the aggrieved party. The same is also true in the case that the legislature fails to issue the act, in spite of the fact that they, on the basis of the development of social relationships, i.e. on the basis of objective law, were obliged to do the same. According to Duguit's opinions, courts are obliged to gratify the claims raised for compensation for loss also in instances when the law is tacit, in fact, even in the case when the law explicitly excludes compensation. This is a logical consequence of the opinion on the relation of law and statute. If a statute is in conflict with objective law (in Duguit's concept), the statute is not valid, irrespective of whether there is or is not a body to declare such invalidity. Each person is, according to the author of this theory, entitled to refuse to obey such a statute, whereby, naturally, not even courts are bound.

9. Duguit's European contemporaries rejected his opinions as introducing legal anarchism; his notions were frequently abused by the Marxist theory of the state and law (see, for example, the work of E. Pašukanis, the Soviet equivalent to C. Schmitt). The interwar period was characterised by a belief that, even when the contents of a statute do not correspond to the requirements of good manners and justice, they still remain law, unless altered or annulled in a prescribed manner by the relevant body. Law may establish and abolish new social orders, and albeit, for reasons of justice, the law should avoid causing detriment to individuals or groups of citizens without serious reasons, then if the same happens, it is a matter (or decision) not legal but political, whether or not law grants to the afflicted party a

claim to compensation for loss. Without explicit statutory authorisation, according to the views then held, granting compensation for loss would actually mean a possibility of implementing judicial inspection of legislative acts through ordinary courts. The task of courts was still, in Montesquieu's words, to be the mouth of the law; their (admitted) powers did not include modifying or amending acts. An act properly promulgated is binding upon courts even when the same does not adhere to constitutional requisites. If the constitution allows review of constitutionality of an act by a special court, as was the case pursuant to the Constitution of the First Czechoslovakian Republic, such an act is valid until the verdict of the Constitutional Court, as was stated, for example, by F. Weyr (Soustava československého práva státního /System of Czechoslovakian Political Law/, 1921, p. 74 et seq.). In this, the then existing legislation provides a sufficient number of examples of acts which refused to provide compensation or made it possible to provide only symbolic, insufficient compensation (see, for example, acts on land reform adopted in the period from 1919 to 1922). It was still presumed that the legislature was aware of their privileged position and that democratic legislature was guided simply by the pure idea of balancing private interests and general well-being. "The more powerful the legislature is – and such is, in particular, in a democratic form of state – the more they must be aware that the greatest significance of a legal order for a citizen dwells in legal certainty." (J. Matějka, see above, p. 35). Illusoriness of such premises was proven by the period of supremacy of National Socialism. Equipped with a positivistic approach to law, in Radbruch's words, the legal profession stood helpless facing horrors until then unsuspected.

III. Liability of the state for loss caused by the legislature in the light of the principle of a material law-based state

10. The most recent stage was ushered in with a post-war turn in constitutional-law doctrine. Professor Emeritus of the University in Bonn, who devoted many years to the issues of the state's liability for loss, wrote: "Rectification of state injustice (wrongs) is a fundamental requirement of a law-based state. A law-based state is, according to the order created by Basic Law, at least equal with the social state. Therefore, it is absolutely inconceivable, and ultimately a constitutional contradiction, when the social state redistributes billions in the form of welfare benefits, and the law-based state, to the contrary, preserves or leaves unresolved state injustices, due to the demand on public finances." (F. Ossenbühl, Neuere Entwicklungen im Staatshaftungsrecht, Berlin/New York, 1984, p. 28). The principle of a law-based state is a constitutional support for liability by the state for loss generally and for loss caused by activity (inactivity) by Parliament. Furthermore, a tendency is crystallising in literature which infers, from liability on the part of the state for respect to and protection of fundamental rights, that fundamental rights, when violated, represent a separate and essential legal basis and immediate support for an exercised claim [B. P. Wróblewski – see above, p. 49, see also Judgment of the Constitutional Court file No. I. ÚS 85/04 (N 136/42 SbNU [Collection of Judgments and Rulings] 91)].

11. The principle of a law-based state is also applied in specific situations for the resolution of which a special legal regulation is lacking. Specification of this

principle is implemented through a number of institutes and rules contained in the constitutional order itself, as well as through case law and doctrine. However, not every solution appearing to be “correct” and “just” may be justified by requirements inferable from the principle of a law-based state. The concept of legal liability of a law-based state for loss is based on the complementarity of actions and responsibility. The principle of a law-based state postulates compensation both for loss due to unlawful infringements by various state bodies, and for interference of state power which imposes on an individual, in accordance with law, special burdens to the benefit of satisfaction of public interest.

12. It is clear that the shift in constitutional-law thinking to the benefit of correctives of all law, natural-law in terms of their origin (in the form of the fundamental rights, and the idea of pursuit of justice), was brought about by experience with the fact that the state may also commit injustice under the semblance of law. The first plaidoyer on the liability for legislative activity (inactivity) was presented by F. Jeruzalem (SJZ 1950, p. 7). B. P. Wróblewski (see above, footnote 237, p. 58) collected remarkably long overview of statements by personages of German jurisprudence on the given issue, and consequently his statement (ibid) that the ruling doctrine pleads for liability for loss caused by legislation, and the basic point is seen in the above-mentioned principle of a law-based state, sounds convincing.

13. Three arguments are usually voiced against this opinion. The first, positivistic, argument claimed non-existence of a positive legal title. The other two are rather of a practical nature and relate to the issue of maintenance of functionality of the state. Firstly, the proposed liability for legislation has the potential to endanger the decision-making freedom of Parliament, which would thus be deprived of the necessary space for formulating a decision, and Parliament would be reduced to a role of a mere administrator of higher norms. Next, agreeing with liability for legislation would result in immeasurable financial consequences which could bring the state to a point of bankruptcy.

14. As for the first objection, it must be stated that the constitutional order itself, through establishment of a constitutional judiciary with the power of inspecting the constitutionality of acts with the sanction consisting of annulling an act if the same is found unconstitutional, furthermore, through protection provided to fundamental rights of individuals against acts by all branches of power, including legislative power (through accessory proposal for annulling acts filed together with a constitutional complaint), and finally through the principle of a material law-based state, which operates both structurally and materially, in itself reduced the arena for decision-making by the legislature. Naturally, the basic condition for placing responsibility must be the Judgment of the Constitutional Court on the unconstitutionality of the action by Parliament, which is of a normative nature. Such a Judgment in no way further places limits on Parliament, since the same only specifies the existing constitutional arrangement (a positive one). Such a Judgment, in certain cases, may only give a basis for a further consequence resulting from finding unconstitutionality of an action (omission) of legislation. The counterarguments specified above are also valid in relation to the second objection. As for the third, it suffices to say that in this very case it portends that the Czech Republic would be severely penalised by the European Court of Human

Rights, as is pointed out by the Opinion in clause 23.

IV. Conclusion

15. I am of the opinion that the very requirements resulting from the principle of a law-based state may not be ignored even when interpreting Article 36 para. 3 of the Charter, since the enforcement of the same is the actual purpose of this provision. Therefore, a grammatical and historical interpretation should not have been the only one to be employed; in my opinion, a teleological interpretation was to be applied so as to take into account all connections of the exercised claim resulting from the requirements of the principle of the law-based state. In such connections, it would not be possible to insist on problematic traditional ideas from the French Revolution; it was necessary to reach a conclusion that under the conditions of a material law-based state, it is not possible to exclude Parliament from potential sources causing loss attributable to the state. The inspiration for such an approach may be found in some commentaries on Basic Law of the Federal Republic of Germany, i.e. its Article 34 (von Danwitz, in Mangoldt/Klein/Starck (Hrsg.), Das Bonner Grundgesetz: Kommentar, Art. 34, p. 1081, RN. 40 ff. Article 34 protects the fundamental rights of citizens against violation by the executive, judiciary, as well as legislation), the very wording of which, evaluated in isolation, could also attract a limited interpretation, which is held as the truth by other commentators of Basic Law (such as Schmidt-Bleibtreu/Hofmann/Hopfauf) who stated that Parliament does not exercise official power against third parties, but acts solely in the interests of society as a whole, while, however, they do not doubt Parliament as an executor of “public office” as was, in other words, voiced by the Opinion.

16. Furthermore, I believe that the verdict in Judgment file No. Pl. ÚS 20/05 should have been understood as an additive verdict, which expanded legal reasons for compensation for loss specified in Act No. 82/1998 Coll. with the unconstitutional inactivity by Parliament declared by the Constitutional Court. Such inactivity lasted from the date of enforceability of the Judgment made in case file No. Pl. ÚS 3/2000, when Parliament did not respect or completely ignored the deadline provided to them by the Constitutional Court in the form of postponement of enforceability of the Judgment by a year and a half. In this way, they considerably limited or violated the property rights of owners of houses and apartments, and interfered with the right to undisturbed privacy of tenants, since Parliament, even after the expiry of the term determined by the Constitutional Court, exposed the tenants to uncertainty regarding their housing, which noticeably afflicted rights particularly of the most vulnerable groups of tenants, who had to tolerate actions being filed (albeit in the absolute majority of cases without success) by owners of apartments, this without any option to ask public power for help in the form of provision of social housing, which, however, has not been legally regulated until today. This in spite of the fact that in Judgment file No. Pl. ÚS 3/2000, the Constitutional Court explicitly stated that “de-control of rent, including charges for services relating to the use of the apartment, must be connected with the implementation of the overall concept of housing policy of the state.” The Constitutional Court, by specifying the constitutional order, then defined constitutional limits within which the statutory arrangement of the given

issue must range, if the same is to be concerned as constitutionally conforming. Not only did Parliament ignore the Judgment specified above, they also ignored an additional two Judgments issued on the same subject.

17. Hence, it is the very disregard of the three Judgments of the Constitutional Court issued concerning the matter of controlled rent, which I deem to be a sufficient reason for application of consequences from the declared unconstitutionality of Parliamentary inactivity by Judgment file No. Pl. ÚS 20/05. It is necessary to find a defence against such recklessly demonstrated marginalisation of one of the fundaments of a law-based state, consisting of non-compliance with the Constitution of the Czech Republic, whose Article 89 para. 2 determines that enforceable decisions of the Constitutional Court are binding on all authorities and persons, meaning also on Parliament. The point is that repeated non-compliance with the Judgments of the Constitutional Court means destruction of the functionality of relationships between the constitutional bodies established by the Constitution. For relationships between state power and citizens, this means the evocation of legal uncertainty, even though the acts themselves, as the most significant product of Parliamentary activities, are to be the source of their legal certainty. All these facts and circumstances necessarily lead me to the conclusion that Parliament, in this case, committed a grave violation of the very principle of a law-based state, to the adherence to which they, as a body of the Czech Republic, are bound by Article 1 para. 1 of the Constitution of the Czech Republic. Under these circumstances, attributing responsibility to the state appears to me to be completely adequate.