CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

HEADNOTES

The Court formulated two requirements which result from the expression "prescribed by law". First, such a legal arrangement must be adequately available so that people are capable of learning that the rule which said arrangement created covers a specific matter. The second requirement is that the norm cannot be considered to be (an act) "law", unless it is sufficiently precisely formulated in such a way that it makes it possible for people to adapt their behaviour. People must be able, being potentially equipped with proper expert advice, to anticipate consequences which may be caused by certain (their) behaviour, this with such a degree of certainty as is adequate to the circumstances. The consequences do not need to be predictable with absolute certainty, since experience proves that this is unattainable. In harmony with the above facts, many rules are necessarily formulated in such way which is more or less vague, and their interpretation and application are a matter of practice.

An act which restricts the fundamental rights must, pursuant to Article 4 paragraph 3 of the Charter, cover equally all cases which fulfil pre-defined conditions. In other words, the point is guarantee of equal restriction of rights, that is equal restriction of a situation of accessory equality set by law.

The notion of a democratic law-based state in the 20th century reflects the material concept of democracy and, therefore, only to a certain degree accepts both a certain degree of discretion applied in formulating sub-statutory norms, but always only as long as the purpose anticipated by the very act remains preserved, and the same requirement is posed for the decision-making of impartial and independent courts. In addition, the courts are required to make decisions, i.e. to interpret and apply law equally in equal cases, meaning in a way which is not arbitrary, i.e. random, in terms of selecting the cases under consideration, or in a way which fails to adhere to the purpose of the act being applied, or in a way which has no sense. The above named aspects must be considered ones of fair trial, understood firstly as an individual right and secondly also as a principle contained in objective (positive) constitutional law. It is also an expression of the attained level of materially conceived law-based statehood. The provisions of Article 2 paragraph 2 of the Charter represent a constitutional-law expression of the principle of the general ban on the exercise of arbitrariness in the execution of the state (public) power.

The fundamental reason for which the system of remedies has been established in the wider sense is related, on one hand, to the effort to enhance the provision of individual justice in a form of finding as appropriate judicial decisions as possible; on the other hand, it is the institutional assurance of the unity of the legal order through unification of case law, including unification of judicial formation of law. The point is that the unity of legal order is endangered at the very core if an analogical subjective claim (right) is adjudicated on differently.

There is no reference model for a remedy which would be binding for normative expression of procedural means. Therefore, in the instance the legislature decides to establish a specific procedural means, the same has a wide space for discretion, both for decision-making on the accessibility to an instance court, and in relation to the formation of proceedings on such a remedy, into which the legislature projects its ideas about the purpose of this remedy. When selecting any of the above-outlined modalities, the legislature is however obliged to respect certain requirements resulting from the constitutional order, which are applied always when exercise of the judiciary organised by the state is to be regulated. These are the safeguards of

independence of the judiciary and justices, as well as respect for the basic aspects of a fair trial to such scope which complies with the nature of the remedy. The framework requiring respect is further formed by requirements which are deduced from the principle of a law-based state, fundamental rights and the principle of equality.

Through the very existence of the judiciary, the ban on arbitrary violence applied in solving legal cases as well as the power monopoly of the state are manifested. These aspects make clear the vital significance of rules regulating access to the courts, as well as rules regulating procedural steps and the form of remedies for protection of the legal order. This is the point from which also the imperative may be derived, pursuant to which the rules on access to higher court instances must be defined as highly specifically as possible so that the same are as clear as possible for individual persons. This is due to the fact that these rules define within which limits and in which way the given person should claim their rights. The requirement for the definiteness of these rules is increased by the fact that the parties to the proceedings suffer, on their way to enforcement of their legal claims, large human and financial burdens, among which belong also court fees and costs of legal representation of the parties, but also compensation for the costs of the other party in the case of an ineffectively used remedy.

The contested provision is an uncertain or vague legal norm to such extent that the same does not represent, in real circumstances i.e. within the possibilities of general justice, predictable law; thus it becomes inconsistent with the requirements resulting from the principle of a law-based state (Article 1 paragraph 1 of the Constitution), from which the requirement for predictability of law may be deduced.

The Constitutional Court wishes to respect the free will of the legislature, which they will incorporate in the new arrangement of an appeal on a point of law; nevertheless the Constitutional Court notes that such an arrangement must be predictable to such scope that admissibility of an appeal on a point of law must be obvious to any potential appellant even before they utilise a remedy in the form of an appeal on a point of law.

VERDICT

On 21 February 2012, under file No. Pl. ÚS 29/11, the Constitutional Court decided in a Plenum composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová (Justice Rapporteur) and Michaela Židlická on a petition by the Second Panel of the Constitutional Court seeking annulment of § 237 paragraph 1, clause c) of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, with participation by the Chamber of Deputies and the Senate of the Parliament of the Czech Republic as parties to the proceedings, as follows:

Provisions of § 237 paragraph 1, clause c) of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, shall be annulled upon expiry of the day of 31 December 2012.

REASONING

I.
Description of the case and recapitulation of the petition

1. Through a constitutional complaint registered under file No. II. ÚS 2371/11, complainant VY.PO. 2010, s. r. o., requested, among other points, that the judgment by the Supreme Court dated 22 December 2009 file No. 29 Cdo 101/2007, be annulled, as the complainant believes that as a result of such a decision the ordinary courts violated its fundamental right guaranteed in Article 36 paragraph 1 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter referred to only as the

"Charter") and the right to act in accordance with the principle of liberty of contract pursuant to Article 2 paragraph 4 of the Constitution of the Czech Republic (hereinafter referred to also as the "Constitution") and pursuant to Article 2 paragraph 3 of the Charter.

2. Through a resolution dated 13 September 2011 file No. II. ÚS 2371/11, the Second Panel interrupted the proceedings on the above-mentioned constitutional complaint and proposed to the plenum, pursuant to § 64 paragraph 1, clause c) of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (hereinafter referred to only as the "Act on the Constitutional Court"), that § 237 paragraph 1, clause c) of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, (hereinafter referred to only as the "the Civil Procedure Code") be annulled due to its contradiction with the constitutional order.

3. The Second Panel of the Constitutional Court was motivated to apply the above-outlined course of action by the finding that the contested decision of the Supreme Court completely lacked reasoning regarding the admissibility of appeal on a point of law in terms of interpreting deliberations which made the Supreme Court arrive at a conclusion on the vital significance of issues dealt with by the same court, this under the situation when it was clear that interpretation of the controversial provision of "conditions", made by ordinary courts, was a unique issue which *prima facie* does not have (and, due to the very nature of the matter, cannot have) any overlap which would particularly influence subsequent case law in terms of its unification. In other words, the given decision of the Supreme Court did not make it clear which of the possibilities specified in § 237 paragraph 3 of the Civil Procedure Code constituted justification, in the given case, for the opinion that the decision of the court of appeal being reviewed was of vital significance in terms of law.

4. The Second Panel of the Constitutional Court did not find it constitutionally conforming when the contested provisions of the Civil Procedure Code permit the Supreme Court leeway for an unpredictable consideration concerning whether the issue presented by the party filing the appeal on a point of law (hereinafter referred to only as the "appellant") in their filing would be considered an issue of vital significance in terms of law. A non-exhaustive enumeration of characteristic features of decisions made by the court of appeal (§ 237 paragraph 3 of the Civil Procedure Code), which make them decisions which are to have a vital significance in terms of law, is being unpredictably extended by the case law of the Supreme Court here, and unpredictably restricted by the same elsewhere.

5. The vague nature of the contested provisions, which makes it possible for the Supreme Court to apply unpredictable decision-making on admissibility of an appeal on a point of law, contravenes, in the opinion of the Second Panel of the Constitutional Court, requirements which the normative principle of a law-based state (Article 1 of the Constitution) imposes on the acts, and also fails to meet requirements for the quality of an act restricting the fundamental rights (Article 4 paragraph 2 of the Charter), as the contested provision must be considered a formal act restricting the fundamental right to access to a court (Article 36 paragraph 1 of the Charter). However, if the act is to be proper in terms of material aspects, then it must be identifiable to the party to the proceedings (following expert consultation with an attorney at law whose presence is obligatory in proceedings on an appeal on a point of law) that the statutory rule applies also to their case. On the contrary, such an arrangement which, due to its vague nature and uncertainty does not make it possible for a party to the proceedings to adapt their behaviour (to decide on filing or not filing an appeal on a point of law) to the act, as its content is not cognisable, cannot be considered to be an act in terms of material aspects.

II.
Statements by the parties to the proceedings and other parties

6. Pursuant to § 42 paragraph 4, and § 69 of the Act on the Constitutional Court, the Constitutional Court sent the given petition for annulment of the contested provisions to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic.

7. In its statement, the Chamber of Deputies of the Parliament of the Czech Republic, through its Chairperson Miroslava Němcová, recapitulated the process applied when adopting the bill of Act No. 30/2000 Coll. which modifies Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, and some other acts, which also included the contested provision. She referred to the fact that the Explanatory Report explicitly stated that the bill of the act is in accordance with the constitutional order of the Czech Republic. She emphasised that the Chamber of Deputies acted in the conviction that also the contested provision is in accordance with the constitutional order, and left the evaluation of the same to the decision-making of the Constitutional Court. At the same time, the Chairperson of the Chamber of Deputies specified that, pursuant to § 44 paragraph 2 of the Act on the Constitutional Court, she agreed that an oral hearing may be forgone.

8. In its statement, the Senate of the Parliament of the Czech Republic, through its President, Milan Štěch, specified that the contested provisions were incorporated in the Civil Procedure Code as part of a "major amendment" to the same, contained in clause 315 of Act No. 30/2000 Coll. This amendment has been functioning in the legal order with effectiveness since 1 January 2001 in an unaltered form until present. Furthermore, he recapitulated the process of adopting the bill in the Senate and concluded that the Senate "had proceeded within the limits of competences defined by the Constitution and in a manner prescribed by the Constitution". Having quoted words by the then Chairperson of the Committee on Legal and Constitutional Affairs of the Senate, J. Vyvadil, who described the "major amendment" to the Civil Procedure Code as "the most essential change since the inception of the existence of the Civil Procedure Code", and the words of the then Minister of Justice, O. Motejl, who defined the amendment of the Civil Procedure Code being then submitted as a "system change to civil procedure", or as the first legislative step towards a project to reform the judiciary, as well as a statement of Z. Klausner, a member of the Senate, according to which the "amendment has been very carefully prepared and discussed over a period of 10 years"; he concluded that in the case of material which represents a revision of civil procedure, the Senate does not consider it to the detail, but only pays attention to conceptual/system issues, possibly issues which are problematic or controversial. During the plenary debate, no considerable disapproval was noticed regarding the aspect of contents of the bill under consideration. According to the statement, with respect to the institute of appeal on a point of law, the then Vice-President of the Senate, J. Musial, said within the debate: "In this connection I must appreciate the establishment of the institute of appeal on a point of law, which represents a great contribution to the amendment and is, in my opinion, processed to a high level." Additionally, the statement by the President of the Senate points out the connection between the contested provisions and § 237 paragraph 3, and § 239 paragraph 1, and indirectly also § 238a paragraph 2, and § 239 paragraph 3, the last sentence, of the Civil Procedure Code. Finally, the President of the Senate stated: "I submit this statement knowing that it is utterly up to the Constitutional Court to examine, pursuant to the Constitution and the Act on the Constitutional Court, the constitutionality of § 237 paragraph 1, clause c) of the Civil Procedure Code".

9. On 14 November 2011, the Constitutional Court received an unsolicited statement from the Supreme Court, acting through JUDr. Zdeněk Krčmář, chairman of panel 29 Cdo, who requested that said statement be appended to file No. Pl. ÚS 29/11 and distributed to all justices of the Constitutional Court. In said statement, the Supreme Court extensively discourses on the constitutional complaint administered under file No. II. ÚS 2371/11, or the inadmissibility of the same, and expresses reservations regarding procedural actions taken by the Second Panel of the Constitutional Court and its composition. With respect to the fact that the Supreme Court, or its panel 29 Cdo, according to § 69 of the Act on the Constitutional Court, is not a party to the proceedings pursuant to Article 87 paragraph 1, clause a) of the Constitution in connection with § 64 paragraph 1, clause c) of the Act on the Constitutional Court; and with respect to the fact that the chairman of panel 29 Cdo did not present, in relation to proceedings file No. Pl. ÚS 29/11, any relevant argumentation, it is not necessary, in the opinion of the Constitutional Court, to recapitulate their filing within the scope of the reasoning for this decision; the Constitutional Court is to deal with this argumentation in closer detail within the scope of proceedings file No. II. ÚS 2371/11, to which the Supreme Court, represented by the chairman of panel 29 Cdo (see § 28 paragraph 4 in connection with § 30 paragraph 4 of the Act on the Constitutional Court), is a party, these proceedings being at the moment interrupted (see clause 2).

This filing was available to justices of the Constitutional Court in an electronic version and forms part of the file.

10. The Constitutional Court requested the Office of the Government Representative for Representation of the Czech Republic before the European Court of Human Rights (hereinafter referred to also as the "ECHR") to indicate decisions by the ECHR in which the concept of a remedy in the system of ordinary courts of *a certiorari* type is positively evaluated or at least recognised. Having analysed several decisions by the ECHR relating to an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code (for example, Šroub vs. the Czech Republic dated 10 May 2005, complaint No. 5424/03; Holub vs. the Czech Republic dated 14 December 2010, complaint No. 24880/05, and others), the Office of the Government Representative specified that generally it is true that if a state decides to make it possible for the parties to proceedings to turn to an instance of the supreme court, then the state enjoys certain leeway in its own discretion in terms of determining conditions for admissibility of such a remedy and proceedings relating to the same. Within the spirit of such a principle, the ECHR constantly adjudicates that if national law makes it possible to reject a remedy for the reason of the same not raising any vital legal issue and lacks sufficient chance to succeed, then it may suffice that the given court only refers to the provisions of the act which make it possible for the court to proceed in such a way, without specifying more detailed arguments. Therefore, the ECHR dismissed as manifestly unfounded the objection of violation of the right to a fair trial, the violation of which supposedly occurred upon the Czech Supreme Court's rejection of an appeal on a point of law without any reasoning, which was at the given time permitted to the Court by § 243c paragraph 2 of the Civil Procedure Code, which was, in the meantime, annulled by the Constitutional Court as unconstitutional. The ECHR has naturally not doubted the legal opinion of the Constitutional Court in any manner, being aware of the fact that, pursuant to Article 53 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to also as the "Convention"), national bodies may provide a higher degree of protection than such provided by the Convention (Vokoun vs. the Czech Republic, a partial decision dated 20 March 2007, complaint No. 20728/05; Simon vs. Germany, a partial decision dated 6 July 1999, complaint No. 33681/96; Nersesyan vs. Armenia dated 19 January 2010, complaint No. 15371/07). According to the Office of the Government Representative, the above-mentioned overview of the ECHR's case law unambiguously shows that the concept of a remedy to a highest judicial instance of *a certiorari* type is not principally in contravention of Article 6 paragraph 1 of the Convention. Such a conclusion was arrived at by the ECHR both in relation to the given § 237 paragraph 1, clause c) of the Civil Procedure Code, and in relation to the previous § 239 paragraph 2 of the Civil Procedure Code., violation of Article 6 paragraph 1 of the Convention could theoretically take place (generally as well as in other connections, these are highly exceptional in the case law of the ECHR related to Article 6) when the course of action taken by the given court, with respect to the specific circumstances, would appear to be arbitrary (cf. the decision in the case of Holub and Šroub mentioned above). However, the ECHR itself would probably not derive such arbitrariness from the mere absence of a more detailed reasoning (cf. the decision in the case of Vokoun mentioned above). Finally, as is implied from the provisions of Article 53 of the Convention, the same does not prevent the national bodies from ensuring greater standards of protection, be it through the national legal order or through accessing other international conventions.

11. Through a memorandum dated 1 December 2011, the Constitutional Court requested the Ministry of Justice to provide information whether they have available statistical data or an analysis of the effectiveness of appeals on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code. In a response dated 12 December 2011, the Ministry specified that they did not have such data available, nevertheless, they sent to the Constitutional Court a "brief legal analysis concerning the institute of the vital legal significance of an appeal on a point of law" which concludes that "with respect to the fact that national legal documents of constitutional power do not establish a principle of an instance-based judiciary system in a subjective sense, the restriction of access to a court of third instance in proceedings on an appeal on a point of law cannot be considered to be in conflict with the constitutional order of the Czech Republic, and that the fundamental right to access to a court is thereby not restricted. Not even the system of the Convention for the Protection of Human Rights

and Fundamental Freedoms establishes the principle of an instance-based judiciary. Documents issued by the Council of Europe show that, to the contrary, it is desirable to establish mechanisms which restrict access to courts of the highest instance so that they may deal only with issues of vital significance. Moreover, the current wording of § 237 paragraph 1, clause c) of the Civil Procedure Code indubitably contributes to this, when this may be qualified as a thoroughly common instrument in procedural arrangements of democratic law-based countries of (not only) a Central European legal environment."

12. On 28 November 2011, the Constitutional Court received "an analysis of the flow of appeals on a point of law (Cdo and Odo) by the Supreme Court – a change in conditions for admissibility of appeals on a point of law pursuant to the Civil Procedure Code" developed in 2010 by Jan Petrov for the Ministry of Justice, which utilises a randomly selected sample of 200 appeals on a point of law. On 30 November 2011, the Constitutional Court asked the Chief Justice of the Supreme Court whether the given analysis had been developed by the Supreme Court. In her answer dated 6 December 2011, the Chief Justice of the Supreme Court specified that the given analysis is not an official document processed by the Supreme Court. For this reason, the Analytic Department of the Constitutional Court developed its own analysis based on 500 decisions of the Supreme Court issued in the period from 1 September 2009 to 31 August 2010, selected according to an algorithm defined in advance. Of the total number of 500 decisions under examination, 278 decisions were ones on such an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code to which there is no claim (55.6% of all decisions under examination), of which 54 cases (19.42% of decisions on such a non-claimable appeal on a point of law, 10.8% of all decisions under examination) were found to be admissible (32 granting and 22 dismissive decisions), and in 224 cases, the appeals on a point of law were found to be inadmissible (80.58% of decisions on such a non-claimable appeal on a point of law, 44.8% of all decisions under examination).

13. On 10 January 2012, the Constitutional Court requested the Chief Justice of the Supreme Court and the President of the Czech Bar Association to provide their respective statements on the issue of predictability of the legal arrangement contained in § 237 paragraph 1, clause c) of the Civil Procedure Code, or for statements on the predictability of admissibility of an appeal on a point of law.

14. On 25 January 2012, the Constitutional Court received a short statement from the Czech Bar Association which specifies that the Association considers § 237 paragraph 1, clause c) in connection with § 237 paragraph 3 of the Civil Procedure Code to be "sufficient guarantee for the predictability of whether an appeal on a point of law would be assessed as admissible due to the fact that the contested decision is of a vital significance in the given case." Furthermore, the President of the Czech Bar Association declared that the concept of admissibility of an appeal on a point of law cannot be understood as a room for free legal discretion by the Supreme Court; and even if it was possible to admit a certain degree of unpredictability of "decisions of the Supreme Court, it would be balanced out by an advantage consisting of the possibility on the part of the Supreme Court to respond more expeditiously to development in society and to formulate adequate case law."

15. On 30 January 2012, the Constitutional Court received an extensive statement by the Chief Justice of the Supreme Court, JUDr. Iva Brožová. Here, the Constitutional Court extensively recapitulates only such answers for which the Supreme Court was asked as *amici curiae*, while the Supreme Court additionally commented in an extensive manner on other issues as well, in particular on procedural steps taken by the Second Panel of the Constitutional Court and on the conditions for proceedings, this in spite of the fact that the Supreme Court is not a party to the proceedings. At the beginning of its statement, the Supreme Court stated that, in its conviction, the arrangement concerning the admissibility of an appeal on a point of law contained in § 237 paragraph 1 of the Civil Procedure Code is predictable (the Supreme Court is not aware of any relevant argumentation from literature or case law of ordinary courts and the Constitutional Court which would put this conclusion into doubt), since a) such an arrangement transparently differentiates the admissibility of an appeal on a point of law pursuant to the above provisions from the admissibility of an appeal on a point of law based on divergence (discordance) between a judgment by a court of appeal and a judgment by a court of first

instance, be it apparent divergence (deformity) [§ 237 paragraph 1, clause a) of the Civil Procedure Code] or latent [§ 237 paragraph 1, clause b) the Civil Procedure Code], due to the fact that it must be a decision "whereby a decision of a court of first instance is confirmed," without there being an appeal on a point of law admissible pursuant to § 237 paragraph 1, clause b) of the Civil Procedure Code; b) it does not leave the admissibility of an appeal on a point of law to the arbitrariness of a court of appeal on a point of law, but makes admission of the appeal on a point of law against a decision of the court of appeal dependent on the criterion that such decision is "of vital significance in terms of the legal aspect"; c) it transparently preconditions admission of the appeal on a point of law by the fact that the contested decision (by the court of appeal) is of vital significance in terms of legal aspects regarding "the merits of the case." The predictability of the arrangement of admissibility of an appeal on a point of law contained in § 237 paragraph 1, clause c) of the Civil Procedure Code is, therefore, manifest by the fact that in order to establish the admissibility of an appeal on a point of law "by a conclusion of a court of appeal on a point of law", it is required that the decision is a) an affirmative decision; b) one on the merits of the case; c) one of vital significance in terms of the legal aspect. The Supreme Court is not aware of the fact that any so conceived interpretation of a decision which is of "vital significance in terms of the legal aspect," would oppose the constitutional order of the Czech Republic. Additionally, the Supreme Court categorically denied that its decision-making practice in interpretation of the provisions being examined, be it even outwardly, would seem to be unpredictable.

16. According to the Supreme Court, the hitherto decision-making practice of the Constitutional Court itself proves to the contrary that, even on a constitutional level, reviewing the decisions of the Supreme Court based on the arrangement of admissibility of an appeal on a point of law in § 237 paragraph 1, clause c) of the Civil Procedure Code, has raised no difficulties. In the past, the Constitutional Court has repeatedly adjudicated that in a situation when certain provision of a legal regulation makes various interpretations possible, when one of them is in accordance with the constitutional acts of the Czech Republic while others are in contravention of the same, then the duty of the state body is to interpret the given provision in a constitutionally conforming manner. The Supreme Court, by quoting the decisions of the Constitutional Court, proves that where the Constitutional Court on the contrary expressed doubts concerning an unduly narrowly conceived interpretation of admissibility of an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code, in particular on the issue of "case-law overlap", legal theory as well as case law of the Supreme Court have accommodated the requirements of the Constitutional Court and adopted an interpretation which the Constitutional Court itself considered constitutionally conforming [Judgments dated 2 December 2008 file No. II. ÚS 323/07 (N 210/51 SbNU 627) dated 10 May 2005 file No. IV. ÚS 128/05 (N 100/37 SbNU 355) dated 20 September 2006 file No. I. ÚS 202/06 (N 168/42 SbNU 433) dated 15 March 2010 file No. IV. ÚS 2117/09 (N 51/56 SbNU 553) and others, including dozens of resolutions, some of which were adopted after the date of issue of the resolution on suspending proceedings, and another part also after the date when the Second Panel of the Constitutional Court submitted a case to the plenum of the Constitutional Court]. In relation to this, the Supreme Court referred to a resolution of the Supreme Court dated 30 November 2011 file No. 29 NSČR 66/2011, which has been proposed for publication in the Collection of Judicial Decisions and Opinions (and for this purpose it is to be discussed by Civil and Commercial Committees of the Supreme Court on 8 February 2012) with the following statement of law: "If a legal issue being dealt with in a decision by the court of appeal is of significance for a decision of a specific matter (in an individual case), the admissibility of an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code cannot be rejected merely on the basis of the argument that it lacks vital significance from the viewpoint of the decision-making activities of courts in general (for their case law), in particular due to the fact that a solution is given by unrepeatable and irreplaceable factual circumstance of the case. Even when decision-making on an appeal on a point of law is a legal instrument ensuring consistency in the decision-making of courts, this purpose is fulfilled through decision-making on specific matters (in individual cases), without it possibly being in any way relevant which case-law overlap is had (can be had) by such specific matters".

17. In addition, the Supreme Court submitted detailed statistics regarding appeals on a point of law (cf. clause 12), which suggest that 72.5% of decisions falling under the admissibility of an appeal on a

point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code are ones of rejection, 7.5% are dismissive and 20% are cassational. In 20.9% of cases, the reason for rejecting an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code is the impossibility of inferring an issue of vital significance in terms of law, in 36.7% of cases it is harmony of the contested decision with case law, in 25.9% it is the fact that only factual issues are being dealt with, in 11.5% it is the fact that only defects without vital significance in terms of law are being objected to, in 1.4% it is the absence of case-law overlap, and in 3.6% there are other reasons. Given the context of these figures, it is impossible, according to the Supreme Court, to speak about unpredictability in the decision-making of the Supreme Court regarding admissibility of appeals on a point of law when applying § 237 paragraph 1, clause c) of the Civil Procedure Code, since predictably rejected appeals on a point of law make up 83.5% (20.9% + 36.7% + 25.9%) of such instances. According to the Supreme Court, these figures also prove that (under the direct influence of the case law of the Constitutional Court), such case law was principally removed as was pre-conditioning the admissibility of an appeal on a point of law with the contested decision having to possess the "case-law overlap". The Supreme Court concluded that pursuant to § 14 paragraph 1, clause a) of Act No. 6/2002 Coll. on Courts, Judges, Lay Judges and the State Administration of Courts, and on the amendment of certain other acts (Act on Courts and Judges), as amended by later regulations, the Supreme Court, as the uppermost judicial authority in cases pertaining to the powers of courts in civil proceedings and in criminal proceedings, ensures consistency and legality of decision-making through deciding on extraordinary remedies in cases defined by acts on proceedings before courts. The provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code have an unsubstitutable function when fulfilling this role.

18. As outlined above, the Supreme Court, beyond the issues forming the enquiry, stated that the Second Panel of the Constitutional Court finds that the resolution on suspension of proceedings forms an unconstitutional arrangement that is contained in § 237 paragraph 1, clause c) of the Civil Procedure Code, when the Court does not find it constitutionally conforming "when it is completely left to an unpredictable deliberation by the Supreme Court whether the same considers the issue presented by the appellant in their filing to be an issue of vital significance in terms of law." The provision so formulated, however, does not in fact relate to the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code, which do not define the issue of what is actually understood to form vital significance in terms of law of the contested decision on the merits of the case, but indeed relates to § 237 paragraph 3 of the Civil Procedure Code which designates said vital significance in terms of law of the contested decision of the court of appeal, and also provides reliable guidelines for evaluating anything that actually does not form such significance. On the basis of argumentation contained in a resolution of the Panel of the Constitutional Court, it might be possible (if at all) to evaluate only the constitutionality of the arrangement contained in § 237 paragraph 3 of the Civil Procedure Code. Yet it is clear that the intent declared by the three-member Panel of the Constitutional Court would have been completely satisfied with omitting the phrase "in particular" from § 237 paragraph 3 of the Civil Procedure Code [had, however, the petition for annulment of the legal regulation not been inadequately directed against § 237 paragraph 1, clause c) of the Civil Procedure Code]. Furthermore, the Supreme Court objected that the constitutional complaint within proceedings in the case, administered by the Constitutional Court under file No. II. ÚS 2371/11, was directed firstly against a resolution dated 31 May 2011, ref. No. 29 Cdo 1113/2011-279, whereby the Supreme Court rejected as admissible an appeal on a point of law by a complainant for manifest groundlessness; and secondly against a repealing judgment by the Supreme Court dated 22 December 2009. To this scope, however, such a constitutional complaint is manifestly inadmissible, as it is not directed against a final decision by an ordinary court and thus does not fulfil the requirement defined in § 75 paragraph 1 of the Act on the Constitutional Court.

III.
Dispensation of oral hearing

19. Pursuant to § 44 paragraph 2 of the Act on the Constitutional Court, the Constitutional Court with the consent of the parties may dispense with an oral hearing, unless such a hearing is expected to

clarify the case further. Therefore, the Constitutional Court, pursuant to this provision, requested statements from the parties to the proceedings whether they agree to dispensing with the oral hearing. The parties provided such consent and therefore it was possible to dispense with the oral hearing in the given case.

IV.
Constitutional conformity of the legislative process

20. In proceedings on the control of norms, according to Article 87 paragraph 1, clause a) of the Constitution, pursuant to § 68 paragraph 2 of the Act on the Constitutional Court, the Constitutional Court must first examine whether the given act was adopted and issued in a constitutionally prescribed manner [for an algorithm of reviews in proceedings on the control of norms, see clause 61 of Judgment of the Constitutional Court file No. Pl. ÚS 77/06 dated 15 February 2007 (N 30/44 SbNU 349; 37/2007 Coll.)].

21. The contested provision was included in the Civil Procedure Code through an amendment implemented by Act No. 30/2000 Coll. The bill of this act was submitted to the Chamber of Deputies by the Government on 16 June 1999 and numbered as Print of the Chamber 257. The first reading of the same took place at the 15th session on 30 June 1999. The print was discussed by the Committee on Legal and Constitutional Affairs of the Chamber of Deputies, which adopted resolution No. 70 relating to the same. The second reading took place at the 19th session of the Chamber of Deputies on 3 December 1999. Amendments formed the content of Print 257/3. At the same session on 9 December 1999 the bill of the act was approved, when out of the 187 present members, 164 votes were cast for the bill and one vote was cast against the bill.

22. The bill of the act was delivered to the Senate on 16 December 1999 and recorded in the second term of office as Print No. 146. The bill was discussed by the Committee on Legal and Constitutional Affairs of the Senate, which also worked as a guarantor (resolution No. 131 dated 5 January 2000), by the Committee on Foreign Affairs, Defence and Security (resolution No. 105 dated 5 January 2000), and by the Committee on European Integration (resolution No. 117 dated 5 January 2000), it was recommended by all committees for approval, and thereafter adopted on 12 January 2000 at the 15th session in the 2nd term of office, in the wording submitted by the Chamber of Deputies. Out of the 72 senators present, 68 senators voted for the bill; no member was against the bill.

23. The President signed the Act on 8 February 2000; thereafter, the Act was promulgated in the Collection of Laws on 23 February 2000 as Act No. 30/2000 Coll.

24. From the circumstances described above it may be concluded that the Act which also contained the contested provisions was adopted as part of a constitutionally conforming legislative process.

V.
Wording of the contested provision

25. The provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code read as follows:

"An appeal on a point of law shall be admissible against a judgment of a court of appeal and against a resolution of a court of appeal, whereby a decision of a court of first instance was confirmed, provided that an appeal on a point of law is not admissible according to clause b) and the court of appeal on a point of law concludes that the contested decision is of vital legal significance in relation to the merits of the matter."

VI.
Assessment of the active standing of the petitioner

26. Before the Constitutional Court proceeds to factual evaluation of the petition of the Second Panel of the Constitutional Court for annulment of § 237 paragraph 1, clause c) the Civil Procedure Code, the Court is obliged to examine whether conditions for hearing such a petition, such conditions being defined by Act on the Constitutional Court, are established at all. As was stated by the Constitutional Court in Judgment file No. Pl. ÚS 18/06 dated 11 July 2006 (N 130/42 SbNU 13; 397/2006 Coll.), initiating proceedings on the specific control of norms is preconditioned by a properly filed and admissible constitutional complaint. In the course of proceedings a question has arisen – not only within the scope of objections by the Supreme Court (clause 18) – whether the constitutional complaint by the complainant is admissible as regards the scope of the contested cassational judgment of the Supreme Court dated 22 December 2009 file No. 29 Cdo 101/2007, and thus whether, according to the above-stated facts, the active standing of the Second Panel of the Constitutional Court was indeed existent for suspending the proceedings and filing a petition for annulment of § 237 paragraph 1, clause c) of the Civil Procedure Code, as was applied in the very cassational decision of the Supreme Court.

27. Pursuant to Article 83 of the Constitution, the Constitutional Court is a judicial body for protection of constitutionality, and exercise of these powers by the Court includes decision-making, pursuant to Article 87 paragraph 1, clause d) of the Constitution, on constitutional complaints against a legally binding decision and other interference of public power bodies with constitutionally guaranteed fundamental rights and freedoms [cf. also the provisions of § 72 paragraph 1, clause a) of the Act on the Constitutional Court]. The Constitutional Court is not part of the system of ordinary courts and is not called upon to perform instance review with respect to its own decisions; therefore, if a constitutional complaint is directed against a decision of an ordinary court, it is not in itself relevant whether its factual inaccuracy is the subject of the objection. The powers of the Constitutional Court are constituted solely to review a decision from the viewpoint of compliance with constitutional-law principles, i.e. whether the constitutionally guaranteed rights of the parties have not been violated in proceedings (and thereafter in a decision issued within such proceedings), whether the proceedings were administered in accordance with such principles and whether the proceedings as a whole may be considered fair (see for example Judgment file No. III. ÚS 1976/09 dated 13 December 2011, resolution file No. III. ÚS 3415/11 dated 12 January 2012, resolution file No. IV. ÚS 2945/11 dated 16 January 2012).

28. Pursuant to Article 87 paragraph 1, clause d) of the Constitution, a constitutional complaint forms a procedural means for protecting constitutionally guaranteed fundamental rights and freedoms, which is subsidiary to other means serving an individual for protection of their rights. The attribute of subsidiarity of a constitutional complaint has two aspects: a formal and a material one. On one hand, subsidiarity of a constitutional complaint is reflected in the requirement that all means before the individual bodies of public power, as are provided to an individual by the legal order, are to be fully used up, a condition which finds its manifestation in the instrument of inadmissibility of a constitutional complaint (§ 75 paragraph 1 of the Act on the Constitutional Court). On the other hand, the principle of subsidiarity possesses a material dimension which implies that the reason for subsidiarity lies in the very powers of the Constitutional Court as a body of protection of constitutionality (Article 83 of the Constitution), i.e. a body which provides protection of the fundamental rights of an individual only when such fundamental rights have not been respected by other bodies of public power.

29. The above stated facts show that it is principally necessary that the decision contested by a constitutional complaint also represents a legally binding decision in the case. For this reason the Constitutional Court principally does not admit constitutional complaints against a cassational decision of the Supreme Court (cf. Wagnerová, E., Dostál, M., Langášek, T., Pospíšil, I.: Act on the Constitutional Court with Commentary. Prague: Aspi, 2007. p. 383). However, this does not mean that there cannot be cases in which it would be necessary to actually contest, in addition to a repeated decision of a court whose original decision was annulled by cassational intervention, and other decision of the Supreme Court (resolution on rejection of an appeal on a point of law), also the actual cassational decision of the Supreme Court. As an example a situation has been highlighted when the

Supreme Court fails to see that an appeal on a point of law was filed late, and considers this appeal from a factual point of view and decides in a cassational manner. It is clear that in such a case the court, whose decision was annulled, is bound by the legal opinion expressed in the cassational decision, and such a court has no competence to draw consequences from the fact that the appeal on a point of law should not have been discussed at all. A similar sample case is also a cassational decision of the Supreme Court, in which admissibility of an appeal on a point of law has been evaluated arbitrarily (in an unjustified manner, or admissibility was inferred in contravention of earlier case law and suchlike). If the Constitutional Court then insisted on a categorical conclusion on inadmissibility of a constitutional complaint against a cassational decision of supreme judicial instances, then part of the judicial proceedings would find itself completely out of the framework of any control, as, *de facto*, these courts would be given almost unlimited cassational powers when a court of lower instance would not be entitled to correct any possible deviation from the limits of a fair trial, in addition to which the constitutional-law protection of rights of a party to the proceedings would also be eliminated, through the inadmissibility of the constitutional complaint.

30. The facts stated above show that cassational decisions may exceptionally become subject to review, naturally under the precondition that all means available to the complainant have been used up in relation to the same, within the scope of which protection of their right to a fair trial was not provided to them, or actually could not be provided to them. In such cases, the Constitutional Court, pursuant to its case law specified under clause 27, is obliged to provide the complainant with protection of their right to a fair trial and to examine the proceedings as a whole. It may be summarised that if, in the given case, a constitutional complaint is admissible and if such a complaint also meets other requirements, additionally the active standing of the Second Panel of the Constitutional Court is established for filing a petition within the scope of a specific norm control, or petition for annulment of § 237 paragraph 1, clause c) of the Civil Procedure Code, which was applied in the very cassational decision of the Supreme Court. Besides, the commentary above (p. 377) expresses a postulate that "until the design of admissibility of appeal on a point of law is changed (simplified), it is not possible to accept even a simple rule for assessing the admissibility of constitutional complaints. The Constitutional Court cannot avoid, *de lege lata*, assessments of admissibility of appeals on a point of law, but, because the issue of access to the Constitutional Court is at stake (and the risk of *denegationis iustitiae* in such a vital issue as protection of constitutionally guaranteed fundamental rights and freedoms), the Court should proceed in an extremely restrained manner and, when in doubt, assess the admissibility of a constitutional complaint to the benefit of the complainant, since it is the duty of the legislature to define procedural rules in a clear and predictable manner, in such a way that the parties might obtain effective protection of their rights, and it is also the obligation of courts, in applying procedural rules, to avert excessive formalism which would contravene the fairness of proceedings and interfere with the right to access to courts in principle."

VII.
Reference aspects for evaluating the petition

31. Judgment file No. I. ÚS 2166/10 dated 22 February 2011 says: "Pursuant to Article 1 paragraph 1 of the Constitution, the Czech Republic is a law-based state established on respect for rights and freedoms of man and citizens. The fact that the Czech Republic belongs amongst democratic materially-conceived law-based states has significant implications in the field of interpretation and application of law. The principle of a law-based state is bound to formal characteristics which must be expressed in legal rules in the given legal system in order for individuals to take them into account when determining future actions (cf. O'Hood, Philips, Paul Jackson: Constitutional and Administrative Law, 7th Edition, Sweet and Maxwell, London 1987, p. 33 *et seq*.). In the opinion of the Constitutional Court, the basic principles of a law-based state include the principle of predictability of law, its comprehensibility and internal consistency [cf. Judgment of the Constitutional Court file No. Pl. ÚS 77/06 dated 15 February 2007 (30/44 SbNU 349, clause 36)]. Without clarity and definiteness of rules, the basic features of law are not fulfilled, and thus even the requirements of a formal law-based state are not satisfied. Every legal arrangement must therefore express respect to general legal guidelines (principles), such as trust in law, legal certainty and predictability of the legal acts which structure the

legal order of a democratic law-based state, or are derivable from the same. Legal norms must also be subjected to contentual requirements, since, in a material law-based state established on the idea of justice, fundamental rights represent a corrective measure for both the content of legal norms and their interpretation and application. Therefore it is the task of a judge under the conditions of a material law-based state to find a solution which would ensure maximum execution of fundamental rights of parties to a dispute, and if this is not possible, to decide in harmony with the general idea of justice, or pursuant to the general natural-law principle [see Judgment file No. II. ÚS 2048/09 dated 2 November 2009 (N 232/55 SbNU 181)]."

32. The requirement for a legal basis for possible restriction of a fundamental right, resulting from Article 4 paragraph 2 of the Charter, is derived from the democratic principle as well as from the principle of a material law-based state. Its reason is to keep the executive from implementing their own ideas on how and to what extent fundamental rights may be restricted. By granting such entitlement to the democratically legitimised parliament it should be ensured that fundamental rights become restricted only upon a democratic parliamentary discourse and, furthermore, restriction of the fundamental right also receives subsequent democratic feedback.

33. Besides, also the Convention anticipates the existence of an act in order to restrict fundamental rights, as does the International Covenant on Civil and Political Rights. However, it must be added that the ECHR (for good reasons resulting from an interest to maintain the internal cohesion of the system of the Convention, the parties to which are formed not only by countries from the domain of civil law, but also countries from the domain of common law, where an act in the formal sense is not and has never been a sole source of law, which today is, however, true also for countries which originally belonged to the sphere of civil law with a limited understanding of sources of law) does not acknowledge an act only in a formal sense, but also accepts an act in the "material sense". From the viewpoint of the ECHR, an act is considered to be such abstract general rules which have external effects, i.e. they are aimed at a group of people which is indefinite in number, for the purpose of arranging a certain number of factual merits, when it is irrelevant whether a specific rule was created by a body which is, pursuant to the national arrangement, due to create acts within a procedure prescribed by the constitutional order. In this regard, the ECHR reflects the specific legal order and its sources of law.

34. As early as in "The Sunday Times" decision dated 26 April 1979, complaint No. 6538/74, the Court noted that the word "law" in the expression "prescribed by law" covers, in addition to written enactments, also unwritten law. It would be in contravention of the intention of the creators of the Convention if restrictions of rights originating in common law were eliminated from the impact of the "prescribed by law" clause merely for the reason of the same not being contained in an act in a formal sense. Such an approach would deprive a common law state which is a party to the Convention of defence through possible restriction of rights, a situation which was, in the given case, anticipated by Article 10 paragraph 2 of the Convention, and would violate the very essence of the legal system of such a state. The ECHR believed that a formal act is necessary only when the rules resulting from common law are so uncertain that they contradict the principle of legal certainty. Thereafter, the Court reviewed the official language versions of the Convention and concluded that they are not identical verbatim and, therefore, the Court attempted to interpret them in a manner so that the objective and purpose of the Convention are attained.

35. Thereafter the Court formulated two requirements which result from the expression "prescribed by law". First, such a legal arrangement must be adequately available so that people are capable of learning that the rule which said arrangement created covers a specific matter. The second requirement is that the norm cannot be considered to be (an act) "law", unless it is sufficiently precisely formulated in such a way that it makes it possible for people to adapt their behaviour. People must be able, being potentially equipped with proper expert advice, to anticipate consequences which may be caused by certain (their) behaviour, this with such a degree of certainty as is adequate to the circumstances. The consequences do not need to be predictable with absolute certainty, since experience proves that this is unattainable. Nevertheless, while certainty is highly desirable, it may also bring about excessive

rigidity; however, law must be able to keep pace with the ever-changing circumstances. In harmony with the above facts, many rules are necessarily formulated in such way which is more or less vague, and their interpretation and application are a matter of practice.

36. The facts presented from the decision of the ECHR imply that its requirements for an act restricting fundamental rights respect the diversity of legal systems, but the declared requirements must also be related to the quality of the act in the formal sense. Even though the ECHR acknowledges the normative power of judicial case law (see for example Markt Intern Verlag GmbH and Klaus Beermann v. Germany dated 20 November 1989, complaint No. 10572/83), its decision-making implies that it must be settled and generally available case law.

37. An act which restricts the fundamental rights must, pursuant to Article 4 paragraph 3 of the Charter, cover equally all cases which fulfil pre-defined conditions. In other words, the point is guarantee of equal restriction of rights, that is equal restriction of a situation of accessory equality set by law. This provision also has links to Article 14 of the Convention.

38. The notion of a democratic law-based state in the 20th century reflects the material concept of democracy and, therefore, only to a certain degree accepts both a certain degree of discretion applied in formulating sub-statutory norms, but always only as long as the purpose anticipated by the very act remains preserved, and the same requirement is posed for the decision-making of impartial and independent courts. In addition, the courts are required to make decisions, i.e. to interpret and apply law equally in equal cases, meaning in a way which is not arbitrary, i.e. random, in terms of selecting the cases under consideration, or in a way which fails to adhere to the purpose of the act being applied, or in a way which has no sense. The above named aspects must be considered ones of fair trial, understood firstly as an individual right and secondly also as a principle contained in objective (positive) constitutional law. It is also an expression of the attained level of materially conceived law-based statehood. The provisions of Article 2 paragraph 2 of the Charter represent a constitutional-law expression of the principle of the general ban on the exercise of arbitrariness in the execution of the state (public) power. In Judgment file No. Pl. ÚS 11/02 dated 11 June 2003 (N 87/30 SbNU 309; 198/2003 Coll.), the Constitutional Court explained that even a non-justified change of legal opinion may bring about an infringement of fundamental rights, as it is executed arbitrarily.

39. Judgment file No. II. ÚS 566/05 dated 20 September 2006 (N 170/42 SbNU 455) says: "At the same time, however, the Constitutional Court could not fail to see that it was in particular the court of appeal on a point of law, who, in such a radical way, changed the conclusions resulting from its own previously published case law. Therefore, the Constitutional Court had to deal also with the issue whether such a procedure does or does not constitute also a violation of constitutionally-guaranteed fundamental rights, and whether the same does or does not deviate from the limits of the constitutionally established principle of a material law-based state (Article 1 paragraph 1 of the Constitution). The material law-based state is built on, besides other items, the trust of citizens in law and legal order. Such trust is preconditioned with the stability of legal order and a sufficient degree of the legal certainty of citizens. Stability of the legal order and legal certainty is influenced not only by the legislative activities of the state (formation of law), but also the activities of state bodies applying the law, as only the application and interpretation of legal norms generate public awareness of what is and what is not law. The stability of law, legal certainty of an individual and, eventually, also the degree of trust of citizens in law and in institutions of a law-based state, as such are consequently influenced also by the manner in which the bodies applying the law, i.e. in particular courts whose basic task is to provide protection of rights (Article 90 of the Constitution), proceed to interpret legal norms. Besides, such significance of case law of courts is the base for the hitherto case law of the Constitutional Court and the European Court of Human Rights, which considers that an act in the material sense is formed also by the case law of courts (cf. decision Kruslin v. France dated 24 April 1990, Müller and others v. Switzerland dated 24 May 1988, Markt Intern Verlag GmbH and Klaus Beermann v. FRG dated 20 November 1989 and others, and, for example, Judgment file Nos. IV. ÚS 611/05 and Pl. ÚS 20/05; Collection of Judgments and Rulings of the Constitutional Court, volume 40, Judgment No. 34 and Judgment No. 47; promulgated under No. 252/2006 Coll.). Therefore, the

decisive role is that of whether interpretation of legal norms in time is settled, which, on the other hand, does not mean that interpretation of a legal norm once attained is unchangeable. The point is that the principle of legal certainty, as well as the principle of equality before law, require that the case law of courts change under certain conditions (change in a value-oriented view of law, change in cultural concepts of society regarding the law, changes in the structure of the legal order, or changes in such elements of the legal order which lie in the hierarchy above the norm being interpreted, etc.), this through certain procedure established in advance. Also, the Constitutional Court adjudicated regarding these issues that at the general level in relationship to the binding effect of judicial case law, interpretation once made should be, unless sufficient relevant reasons based on rational and more convincing arguments are subsequently found, in their aggregate being more conforming with the legal order as a meaningful whole, and thus supporting a change in case law, to be a basic point for decision-making in subsequent cases of the same kind, this from the viewpoint of principles of legal certainty, predictability of law, protection of justified trust in law (justified legitimate expectation) and the principle of formal justice (equality) – cf. Judgment in case file No. III. ÚS 252/04; Collection of Judgments and Rulings of the Constitutional Court, Volume 36, Judgment No. 16. The principle of legal certainty leads to the conclusion that an individual, being led by trust in law, should always have at least a general idea of whether the action they commit is an action permitted or prohibited by law… The principle of equality before law then means that law should be interpreted equally for all cases meeting the same conditions. These principles are not valid without exception if there is a sufficiently legitimate reason for their restriction, that is a sufficiently legitimate reason for change in the interpretation of the legal norm, and when the body changing the interpretation adhered to procedural courses defined for such a purpose. Only so-justified circumstances legitimising a change in interpreting and transparently applied procedural courses may justify interference with legal certainty and the equality of individuals. Even more so do these principles apply in the case of bodies whose function is, in addition to other points, also unification of the case law, i.e. where adopted legal conclusions have, based on the nature of unification, a more general impact on the interpretation of legal norms. In the case of such, usually supreme, judicial bodies, a special procedural course which guarantees the participation of a wider circle of judges is established for change to case law, or deviation from hitherto interpretation of law. This is so also with respect to the fact that a change in the case law of such a judicial body means a much more noticeable interference with the principle of legal certainty and equality before law."

40. In the case of Prince Hans-Adam II of Liechtenstein, the ECHR on 12 July 2001 (complaint No. 42527/98) in clause 43 stated that Article 6 paragraph 1 of the Convention guarantees everyone the right to assert a claim with a court (tribunal) when their civil rights and obligations are concerned. In such sense, Article 6 of the Convention guarantees the right to access to court. In clause 44 they explained that the right to access to a court is not absolute and may be restricted by an enactment issued by the state. When applying the restriction, it must be observed that access to a court is not restricted or reduced in such a way or to such an extent that the very essence of such a right would be violated. Restriction of such a right would not be in harmony with Article 6 paragraph 1 of the Convention also when the same does not pursue a legitimate objective and when a sensible relation of proportionality between the means used and objective pursued by the measure, is not maintained.

41. The provisions of Article 14 of the Convention do not prohibit any difference in treatment in the exercise of rights and freedoms recognised by the Convention. However, they protect persons (including legal entities) who find themselves in an analogical situation from discriminatingly different treatment. "Different treatment" (discrimination) pursuant to Article 14 of the Convention means such procedure that lacks objective and sensible justification, i.e. when the same does not pursue a "legitimate objective" or if there is no "sensible relation of proportionality between the means used and objective which is to be implemented through such means" (adequately clause 637 of decision of the ECHR Neftyanaya Kompaniya Yukos v. Russia dated 20 September 2011, complaint No. 14902/04).

42. The Convention (Article 35 paragraph 1) obliges the complainant to exhaust all domestic means which, however, must be truly available and must be sufficient so that they make it possible for the

complainant to obtain rectification of the violated right. The existence of such means must be sufficiently certain, both in theory and in practice; if this is not the case, then lack of requisite accessibility and effectiveness of such means is established (clause 637 of decision of the ECHR Neftyanaya Kompaniya Yukos v. Russia). In other words, pursuant to the case law of the ECHR, the complainant is not obliged to use remedies which are insufficient or ineffective (decision in the case of Assanidze v. Georgia dated 8 April 2004, complaint No. 71503/01, paragraph 127).

43. Judgment file No. I. ÚS 612/01 dated 17 April 2002 (N 47/26 SbNU 33) says: "One of the basic conceptual attributes of a constitutional complaint, as a means for protecting constitutionally guaranteed fundamental rights or freedoms, is its subsidiarity. This means that a constitutional complaint may be generally filed only once the petitioner, prior to filing the same, has exhausted all other means provided to them by law for protection of the right (§ 75 paragraph 1 of Act No. 182/1993 Coll. on the Constitutional Court). Should it not be so, the constitutional complaint is inadmissible. The principle of subsidiarity of a constitutional complaint is based on the fact that the Constitutional Court is not a part of the system of ordinary courts or system of public administration bodies. Its task is, pursuant to Article 83 of the Constitution of the Czech Republic, protection of constitutionality and, therefore, the Court is competent to intervene in the operations of other bodies of public power only in cases where the Court finds that such bodies' decision-making includes unconstitutional violation of some fundamental rights or freedoms of the complainant."

44. Judgment file No. IV. ÚS 128/05 dated 10 May 2005 (N 100/37 SbNU 355) stated that "the very existence of an appeal on a point of law as an extraordinary remedy does not enjoy constitutional protection, in other words, it is not the obligation of the state to incorporate such means of protection of rights into its legal order. However, this does not relieve the court from the obligation to interpret and apply the conditions for admitting such means, when the state created such means in its legislation, so that they comply with the maxim of the right to a fair trial. If law includes restriction of the right to access to a court within the scope of proceedings on an extraordinary remedy, it is necessary to monitor whether such restrictions are proportional to protection of fundamental rights, and this not only at the normative level, but also when assessing a specific case at the level of interpretation and application of such a restriction. As specified above, fundamental rights create not only a framework of normative content of ordinary law, but also the very framework of its interpretation and application… the court of appeal on a point of law must be aware, when interpreting and applying the conditions for admitting an appeal on a point of law, of the fact that the party to the proceedings always uses an appeal on a point of law to protect their subjective rights without regard to the issue of what other purpose is pursued by proceedings on an extraordinary remedy. Protection of subjective rights, therefore, cannot be disregarded also when the legislature's purpose for proceedings on an extraordinary remedy is the "unification" of case law. Such a purpose cannot outweigh the protection of subjective rights of a party to the proceedings in such a way that the protection of the subjective right would be completely depleted, and such a party would become a mere "provider of material" for unification of case law, but it is necessary to seek a relationship of adequate balance between restriction of the right to access to a court and such a purpose, which at the same time represents the public interest; this in the given case being the provision of harmonic application and interpretation of ordinary law by ordinary courts."

VIII.
The actual review

45. In light of the above-mentioned criteria, the Constitutional Court has proceeded to the assessment of constitutionality of the contested provision. First of all it is necessary to mention that the Constitutional Court is aware of the necessity (pre-conditioned by the very reality) of certain limitation of admissibility of an appeal on a point of law as an extraordinary remedy as well as of the danger of "congestion" of the Supreme Court. This then leads to disproportionate prolongation of proceedings on appeal on a point of law, thus significantly contributing to the occurrence of unconstitutional delays and the responsibility of the state for loss caused by the same. Generally, therefore, there can be no objections against the limitation of admissibility of an appeal on a point of law solely for the purpose

of unifying case law through solving merely legal questions, as is anticipated by the contested provision. Moreover, such a concept, generally expressed, seems to comply with the practice of other European countries.

46. In connection with this, it was however necessary to solve the issue whether the purpose of the contested provision is, in addition to unifying case law [through removing serious procedural lapses as well as substantive-law lapses on the part of lower courts in the system of ordinary courts, and further through the obligation to provide protection of fundamental rights (Article 4 of the Constitution) – i.e. assurance of individual justice, provided that the decision which has constituted the same may be considered vitally significant in terms of law], also certain regulation of the agenda of the cases assessed in terms of merits, this through decisions made by the Supreme Court on rejecting the admissibility of an appeal on a point of law. Here, in fact, it is not possible to overlook that the Supreme Court does not decide separately on the admissibility of the filing itself (the Court decides this only as a preliminary reference without issuing a decision), but, on the other hand, decides only whether an appeal on a point of law is inadmissible, this in the case that the Court does not earlier find "vital significance in terms of law" of the case, i.e. in terms of the content, the Court does not find the above-listed lapses and thus consider them a case of "vital significance in terms of law" [see resolution of the Supreme Court file No. 30 Cdo 3368/2009, or a resolution of the Supreme Court dated 25 November 2009, ref. No. 29 Cdo 5254/2007–117; however, an example to the contrary is a resolution of the Supreme Court dated 30 November 2011 file No. 20 NSCR 66/2011 in which it has been stated that the decision of the court of appeal need not have vital significance in terms of law from the viewpoint of "decision-making generally", but that it is not possible to reject the admissibility of an appeal on a point of law when the legal issue being solved in the decision of the court of appeal is significant for a decision in a specific case, i.e. it is important that the given legal assessment of the case is significant for the merits of the case. In approximately the same period, however, the Supreme Court maintained the doctrine pursuant to which "The judgment of a court of appeal may have vital significance in terms of law only if the legal issue being solved in said judgment has vital significance in terms of law not only for the decision in the assessed case, but also in terms of the decision-making of courts generally (for the case law of the same)" – see resolution dated 25 November 2011 file No. 23 Cdo 2703/2010 or an even later decision, a resolution dated 15 December 2011 file No. 23 Cdo 1398/2010, where the Supreme Court restated: "The precondition for admissibility of an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code is that the decision of the court of appeal has vital significance in terms of law not only for the assessed case, but for the decision-making of courts generally (for the case law of the same), while the legal issue of vital significance in terms of law must be specifically defined by the appellant."] This implies that the court, after establishing that there are no reasons in terms of the merits of the case for hearing the case, will decide on rejecting the admissibility of an appeal on a point of law.

47. The lastly specified theoretically possible purpose (regulation of agenda) must however be examined, as the same may be, though explicitly not admitted, reflected in the decision-making. Its possible unconstitutionality could originate in its contravention of the principle of predictability of law, derived from the principle of a law-based state and the principle of general equality before law, if rejecting an appeal on a point of law due to inadmissibility in the above-indicated intentions would occur also in cases when review applied to previous decisions or previous proceedings, burdened with serious lapses in the area of substantive as well as procedural law, or if the result of the same would be violation of the fundamental rights of parties to proceedings on an appeal on a point of law, although the case law of the Constitutional Court specifies that such lapses are an issue of vital significance in terms of law (see Judgment file No. IV. ÚS 128/05 and others). In addition, it is not possible to disregard the fact that rejecting to deal with a case which was possibly assessed incorrectly from the viewpoint of procedural or substantive law forms a risk of denial of justice. This, however, in cases burdened with the above-listed lapses, or upon denial to provide protection of fundamental rights, cannot be not tolerated in terms of constitutional law; this moreover in a situation when rejection is not preconditioned by a unanimous decision of a panel of three members [to the contrary, see § 43 paragraph 2, clause a) of the Act on the Constitutional Court], when there is no larger judicial body to make a decision; which would act as a kind of safeguard against possible denial of justice or denial of

protection of fundamental rights [see the decision-making of the whole Supreme Court of the United States on admissibility of a remedy called *a certiorari*, or the decision-making of the German Federal Court of Justice (BHG) where rejecting a remedy (revision) is decided by a two-third majority of a panel of six members]. The concept of the contested provision therefore does not comply with the *a certiorari* instrument, as the same has been constructed in the country of its origin; not mentioning the fact that the same disregards the normative order included in Article 4 of the Constitution, which may not be denied by the concept of the instrument included in a sub-constitutional legal regulation (the Civil Procedure Code). This fact has not been reflected even by the Office of the Government Representative for Representation of the Czech Republic before the European Court of Human Rights, as can be inferred from its expression (see clause 10).

48. When assessing the case, the Constitutional Court additionally took into consideration the fact that pursuant to § 241 paragraph 1 of the Civil Procedure Code it is true that the appellant – a natural person must be, in proceedings on an appeal on a point of law, represented by an attorney at law from the beginning [unless such a person is educated in law – § 241 paragraph 2, clause a) of the Civil Procedure Code; or unless the appellant is a legal entity which may be represented by persons named in § 21, 21a and 21b of the Civil Procedure Code, if such persons are educated in law]. This means that every appellant considers the use of this (extraordinary) remedy, having been professionally informed in terms of law also on the admissibility of the same. In spite of this case law the Supreme Court, as well as the analysis performed regarding its decision-making (clause 12), testifies that a significant share of the filings (80.58%) have been rejected due to inadmissibility, because the Supreme Court has not found in the given appeal on a point of law a properly defined "issue of vital significance in terms of law" related to the contested decision. This condition continues to exist, although the contested provision has been part of the legal order for almost 11 years (see clause 23).

49. The constitutional order fundamentally leaves it up to the legislature to decide whether they create (and if so, which) remedies in civil cases, which purposes should be pursued by the same and how the same should be arranged in detail.

50. The fundamental reason for which the system of remedies has been established in the wider sense is related, on one hand, to the effort to enhance the provision of individual justice in a form of finding as appropriate judicial decisions as possible; on the other hand, it is the institutional assurance of the unity of the legal order through unification of case law, including unification of judicial formation of law. The point is that the unity of legal order is endangered at the very core if an analogical subjective claim (right) is adjudicated on differently. In Judgment file No. Pl. ÚS 15/01 dated 31 October 2001 (N 164/24 SbNU 201; 424/2001 Coll.), the Constitutional Court stated: "No legal order is and may be, from the point of view of the system of procedural means for protection of rights, as well as from the viewpoint of the system of arrangement of reviewing instances, built *ad infinitum*. Every legal order brings about, and necessarily must bring about, some number of lapses. The purpose of reviewing proceedings may realistically be to approximatively minimise such lapses, not to completely remove the same. The system of reviewing instances is therefore a result of comparing the effort to achieve the rule of law on one hand, and the effectiveness of decision-making and legal certainty on the other. From the viewpoint of this criterion, establishing extraordinary remedies, i.e. prolongation of proceedings and breaking the principle of the inalterability of decisions which have already come into power, is adequate only if exceptional reasons are given."

51. Every system of remedies is set into context resulting from entire case law, out of which serious procedural findings are inferred regarding what (related to the subject of the proceedings) complies with the law. In addition, there is no reference model for a remedy which would be binding for normative expression of procedural means. Therefore, in the instance the legislature decides to establish a specific procedural means, the same has a wide space for discretion, both for decision-making on the accessibility to an instance court, and in relation to the formation of proceedings on such a remedy, into which the legislature projects its ideas about the purpose of this remedy. The procedural initiative may be given to the parties, which means that the legislature has more faith in the private initiative also in implementation of general purposes (here the unification of case law) that

should be attained through procedural means; however the legislature could also authorise lower courts to file the case with a preliminary reference to the highest instance, this independently of the initiative of the parties to the proceedings. Also such a solution is conceivable where access to remedies is bound to general criteria, such as, for example, the value of the dispute or deformity of previous decisions in the case, or it may be carried out in accordance with the criterion of the significance of the individual legal cases in light of general interests. This would create a more or less controllable access to the remedy in the form of proceedings on the admissibility of the same, acceptability or rejection of the same, performed by a judge whose decision should be reviewed through the remedy, or by the judges authorised to make a decision on the same.

52. When selecting any of the above-outlined modalities, the legislature is however obliged to respect certain requirements resulting from the constitutional order, which are applied always when exercise of the judiciary organised by the state is to be regulated. These are the safeguards of independence of the judiciary and justices, as well as respect for the basic aspects of a fair trial to such scope which complies with the nature of the remedy. The framework requiring respect is further formed by requirements which are deduced from the principle of a law-based state, fundamental rights and the principle of equality.

53. The fundamental aspect of a law-based statehood is to prevent arbitrary and violent enforcement of legal claims of individual persons towards each other. These persons are dependent on a judicial solution of their legal cases and expect the courts to provide them with legally valid and enforceable decisions respecting or protecting the fundamental rights of the parties to the proceedings. Through the very existence of the judiciary, the ban on arbitrary violence applied in solving legal cases as well as the power monopoly of the state are manifested. These aspects make clear the vital significance of rules regulating access to the courts, as well as rules regulating procedural steps and the form of remedies for protection of the legal order. This is the point from which also the imperative may be derived, pursuant to which the rules on access to higher court instances must be defined as highly specifically as possible so that the same are as clear as possible for individual persons. This is due to the fact that these rules define within which limits and in which way the given person should claim their rights. The requirement for the definiteness of these rules is increased by the fact that the parties to the proceedings suffer, on their way to enforcement of their legal claims, large human and financial burdens, among which belong also court fees and costs of legal representation of the parties, but also compensation for the costs of the other party in the case of an ineffectively used remedy. A legally, finally valid and enforceable decision, emerging at the end of such a process, representing the title for enforcement, may deeply influence the legal sphere of such a party who shall perform or tolerate something. From the above-stated facts it is obvious that the procedural right involves, in these consequences and to a large degree, a function which ensures freedom for an individual as well as for the society.

54. The above-stated facts imply that the concept of an appeal on a point of law, as defined in the contested provision which requires that factual review be performed even at the stage prior to rejecting the same, does not allow, for constitutional reasons, to regulate the number of cases to be decided in terms of merits, through rejecting an appeal on a point of law in cases, by the Supreme Court itself. Should the same happen regarding cases which would otherwise have a chance of success, there would be an increased risk of unequal assessment of analogical cases to such a degree that it would not be possible to deliberate a legal assessment related to the specific content of the case, but to the contrary – this would be an almost fully independent, more or less random, and therefore arbitrary process which does not respect predictable i.e. previously defined criteria, and is, therefore, in contravention of the order of identical application of law in identical (analogical) cases, which is, however, dictated by the constitutional order [explicitly in Article 26 of the International Covenant on Civil and Political Rights, and Article 1 of the Charter in its interpretation by the Constitutional Court, see Judgment file No. Pl. ÚS 15/02 dated 21 January 2003 (N 11/29 SbNU 79; 40/2003 Coll.), or clause 23 of the Judgment file No. I. ÚS 2278/10 dated 30 November 2010]. A similar course was taken also by the Federal Constitutional Court – BverfG which originally identified equality only with arbitrariness (2 BvR 1/51); however, today the same does not consider it sufficient to justify an unequal treatment of

different groups of persons by the legislature, having taken into consideration an appropriate differentiating element resulting from the nature of the matter; there must exist an actually objectively justified differentiating factor of sufficient significance (decision 1 BvR 1164/07). The difference between circumstances must be, therefore, significant enough to justify different treatment (decisions 1 BvL 51/86; 1 BvL 50/87; 1 BvR 873/90; 1 BvR 761/91). This is *de facto* a concept of equality as proportionality: assess similar cases similarly and different differently, in accordance with the degree of their similarity or difference. The main question here is whether the purpose of differentiation justifies the consequences of the same. It also applies that if other fundamental rights are also in question, the possibilities of the legislature are more closely limited (decision 1 BvL 29, 30, 33, 34, 36/83). In the case that the above-mentioned limiting criteria apply to the legislature, the same must be respected even more by the court in interpreting statutory provisions, and thus respect the principle of equality which stands at the core of the constitutional order.

55. First of all, the point therefore is to assess the question whether the contested statutory provision, in terms of its defining purpose, sufficiently predictable for the addressees of the same, especially in the aspect of interpretation of the part of the contested norm, which anticipates that the contested decision, has, in terms of the merits of the case, vital significance in terms of law. The provisions of § 237 paragraph 3 of the Civil Procedure Code which contains only a demonstrative, mechanical list of examples, in which a positive answer to this question should follow, do not decrease the necessity of such a review.

56. It is obvious that the significant purpose of the contested provision lies in providing case law unification. However, as detailed above, also this purpose may be implemented only within limits defined by the constitutional order. This implies that if a legal norm has been framed using an expression not fully definite in content, which requires initial deliberation by the court, it is then necessary to examine whether such a norm, in relation to the case law of the court, which interprets the norm, is sufficiently predictable for the addressees of the same. The predictability of a legal arrangement (an act in the material sense – see above) is ensured by the non-conflicting case law of the court which interprets and applies the legal norm, i.e. the case law of the Supreme Court, naturally corrected by the opinions of the Constitutional Court. Therefore, it is necessary to examine whether this case law may be evaluated as non-conflicting or settled to such a degree that the same may be concurrently considered to be predictable.

57. First, the Constitutional Court examined the empirical data which the Court had obtained for assessing the case (see clause 12). These data imply that professionally informed appellants had been unsuccessful when defining the "issue of vital significance in terms of law" in as many as 80.58% of formally perfectly filed appeals on a point of law, basing their admissibility on the contested provision. The success rate for assessment of appeals on a point of law found to be admissible is not relevant in the given relations. The fact stated above alone leads to a particular conclusion on doubts regarding the predictability of the contested provision.

58. The finding on varying assessment or mutually inconsistent assessment of what may be considered an "issue of vital significance in terms of law" has been arrived at by the Constitutional Court additionally in a random review of the content of cases. For example, in decision 28 Cdo 2996/2009, the Supreme Court came to following conclusion: "As for the issue of admissibility of an appeal on a point of law, further attention may be drawn to a resolution of the Supreme Court dated 15 February 2001 file No. 22 Cdo 1731/99, which deduces that if solving a specific legal issue is connected with assessment of a unique factual basis, the same does not make the decision of the court of appeal a decision of vital significance in terms of law." This was decided by the Supreme Court in spite of instructions resulting from a Judgment of the Constitutional Court dated 10 May 2005 file No. IV. ÚS 128/05, and further confirmed by a Judgment dated 2 December 2008 file No. II. ÚS 323/07.

59. A similar or even more significant problem may be found in a decision – Judgment file No. 25 Cdo 1950/2007 in which the Supreme Court that "an appeal on a point of law is admissible pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code for the issue of vital significance in terms of

law, this being application of § 8 paragraph 2 of Act No. 82/1998 Coll. (in the wording preceding the amendment established by Act No. 160/2006 Coll.), which was in the past adjudicated differently by the court of appeal on a point of law (§ 237 paragraph 3 of the Civil Procedure Code)." After this, the appeal on a point of law was dismissed and rather surprisingly it was stated that there was no reason to divert from the legal opinion expressed by the Grand Panel in a Judgment dated 26 August 2009 file No. 31 Cdo 3489/2007. If there was a decision issued by the Grand Panel in an analogical case, and if there was no space left for factual differentiation from this case, there was surely no reason for solving the "issue of vital significance in terms of law", as herein surprisingly stated by the Panel of the Supreme Court. Another fact that must not go unnoticed is that the decision of the Grand Panel, as well as the decision quoted here, were both based on such interpretation of substantive law which has been repeatedly found constitutionally nonconforming by the Constitutional Court (Judgment file No. Pl. ÚS 35/09 dated 6 December 2011 and case law listed in clause 23 of the same).

60. In decision file No. 26 Cdo 5211/2007, the Supreme Court stated that when the court examines the content of a contract using interpretation of manifestations of will, it is a factual finding, not a legal assessment of a case. In a decision file No. 29 Cdo 101/2007, the Supreme Court interpreted the "Conditions of Tender" as wills manifested and embodied into a legal act by one of the parties to the dispute, the subject of which was formulation of the right to effect a purchase contract, to which the other party to the dispute responded with their own legal act, and their action was assessed as innominate contract pursuant to § 269 paragraph 2 of the Commercial Code. The parties to the dispute differed in the interpretation of will declared by the same.

61. In decisions file No. 26 Cdo 689/2009 file No. 26 Cdo 3876/2010 and file No. 22 Cdo 1936/2009, the Supreme Court stated that the question whether certain execution of a right is, according to the factual circumstances found as significant for assessment of the given case, in contravention of good manners, may not be considered an issue of vital significance in terms of law with general influence on judicial practice. In a decision file No. 22 Cdo 1185/2009, the Supreme Court stated, to the contrary, that the Court is entitled to include a deliberation on contravention of a legal act (contract) of good manners pursuant to § 39 of the Civil Code as part of their review, however, only under circumstances of obvious inadequacy of relevant deliberations of a court in first-instance proceedings. The Constitutional Court in Judgment file No. I. ÚS 548/11 dated 21 June 2011 stated, regarding this issue, that if the Supreme Court generally excludes the possibility of assessing vital significance in terms of law with respect to the question whether the objection of limitation was in contravention of good manners, the Court undertakes deliberation which is clearly illogical and, therefore, arbitrary, establishing violation of the complainant's right to a fair trial.

62. The latter-mentioned case could lead to a thought that the given question, as a result of an enforceable decision of the Constitutional Court (Article 89 paragraph 2 of the Constitution), has been resolved and that the Supreme Court shall in the future proceed in accordance with the binding instructions provided by the Constitutional Court. However, examples shown below prove that it is not possible to rely on deliberation, as formulated in this way and based on the Constitution.

63. In a decision file No. 20 Cdo 2530/2003, the Supreme Court stated that the complainant in an appeal on a point of law had not applied claim reasons for incorrect legal assessment of the case, or that their argumentation was not subsumable under § 241a paragraph 2, clause b) of the Civil Procedure Code. Therefore, according to the Supreme Court, a criterion was lacking for evaluation of the decision of the court of appeal as one of vital significance in terms of law [§ 237 paragraph, 1, clause c) and paragraph 3 of the Civil Procedure Code]. If an appeal on a point of law is to be admissible pursuant to the contested provision, the same, pursuant to the Supreme Court, may be justified only by § 241a paragraph 2, clause b) of the Civil Procedure Code, i.e. incorrect legal assessment of the case. The objection that proceedings were burdened with a defect which could have resulted in an incorrect decision in a case [§ 241a paragraph 2, clause a) of the Civil Procedure Code] is not subsumable under § 237 paragraph 1, clause c) of the Civil Procedure Code. This decision has been annulled by Judgment file No. IV. ÚS 128/05 dated 10 May 2005 (N 100/37 SbNU 355), in which the Constitutional Court stated that they "are convinced that these provisions must be

interpreted with respect to the above-mentioned constitutional-law framework of limitation of access of an individual to a court, i.e. so that the obligation of courts defined by the Constitution to provide protection of fundamental rights to an individual as well as the purpose of the given type of proceedings on an appeal on a point of law, leading to unification of case law of ordinary courts, are fulfilled. As already stated above, it is not possible to fully disregard the constitutionally based obligation which is binding also on a court of appeal on a point of law, to provide protection of fundamental rights to the individual, and the more so in a case when admitting an appeal on a point of law would also fulfil another purpose of proceedings on an appeal on a point of law, which is unification of case law of ordinary courts."

64. For a similar reason, Judgment file No. II. ÚS 182/05 dated 18 December 2007 (N 227/47 SbNU 973) annulled a resolution of the Supreme Court file No. 32 Odo 260/2004. In the same way, Judgment file Nos. IV. ÚS 128/05 (see above), II. ÚS 650/06 dated 9 January 2008 (N 3/48 SbNU 25), I. ÚS 2030/07 dated 11 September 2007 (N 138/46 SbNU 301), II. ÚS 2837/07 dated 6 August 2008 (N 136/50 SbNU 205), II. ÚS 3005/07 dated 4 March 2009 (N 45/52 SbNU 449) or I. ÚS 2884/08 dated 18 March 2009 (N 60/52 SbNU 591) or I. ÚS 1452/09 dated 17 August 2009 (N 186/54 SbNU 303) have reproached the Supreme Court that the decisions of the same annulled by these Judgments unacceptably restrict the right of the appellants to access to the Supreme Court. All the quoted decisions of the Constitutional Court discovered there were violations of the fundamental right of the individual complainants to a fair trial in the steps taken by the Supreme Court. In Judgment file No. IV. ÚS 2117/09 dated 15 March 2010 (N 51/56 SbNU 553), the Constitutional Court, for example, stated: "16. The Constitutional Court has repeatedly dealt in the past with the interpretation of the relation between § 237 paragraph 1, clause c) and § 241a paragraph 2, clause a) of the Civil Procedure Code, for example, in Judgment file No. IV. ÚS 128/05 dated 10 May 2005 (N 100/37 SbNU 355) and file No. I. ÚS 2030/07 dated 11 September 2007 (N 138/46 SbNU 301). In these Judgments – used by the same also in the reasoning of this decision – the Constitutional Court came to the conclusion that the interpretation of the Supreme Court, pursuant to which a reason for an appeal on a point of law pursuant to § 241a paragraph 2, clause a) of the Civil Procedure Code excludes a possibility of admitting an appeal on a point of law pursuant to § 237 paragraph 1c) of the Civil Procedure Code, leads to unacceptable restriction of the right to access to a court of appeal on a point of law. This is because such interpretation implies that the review of defects in the proceedings will be conducted by the court of appeal on a point of law only on the basis of an appeal on a point of law admissible *ex lege* pursuant to § 237 paragraph 1, clauses a) and b) of the Civil Procedure Code. 17. In these Judgments, as well as in other decisions, the Constitutional Court has admitted that the right to an appeal on a point of law or an exceptional remedy is not constitutionally guaranteed, and if the same exists, it is in excess of the scope of constitutionally guaranteed procedural entitlements [compare also resolution file No. III. ÚS 298/02 dated 18 June 2002 (U 18/26 SbNU 381)]. Concurrently, however, the Court repeatedly stated that the decision-making of a court, be it decision-making in proceedings on and ordinary or extraordinary remedy, may not exceed the constitutional framework of protection of fundamental rights of an individual. In Judgment file No. IV. ÚS 343/04 dated 14 March 2005 (N 55/36 SbNU 581), the Constitutional Court explained, through an example of specific judgments, that the European Court of Human Rights repeatedly confirms that Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not force the contractual states to create courts of appeal or cassational courts, however, when these jurisdictions exist, guarantees of Article 6 of the Convention must be respected primarily where the same provide the parties to the proceedings with the effective right to access to courts in order to have their rights discussed (for an example compare the decision in the case of Brualla Gómez de la Torre v. Spain, 26737/95, § 33 *in fine*, accessible in an electronic version on http://www.echr.coe.int/). 18. The very existence of an appeal on a point of law as an exceptional remedy is therefore not a subject of constitutional-law protection; in other words, it is not an obligation of the state to implement such means of protection of rights in their legal order. This, however, does not relieve the court of the obligation to interpret and apply the conditions of admitting such means in the case the state has created the same in their legislation, so that the court complies with the maxim of the right to a fair trial. In the case that the law contains restrictions of the right to access to a court within proceedings on an exceptional remedy, it is necessary to monitor whether such restrictions are proportional to the protection of the fundamental

right, not only at the normative level, but also in assessment of the specific case at the level of interpretation and application of such restrictions. As consistently adjudicated by the Constitutional Court, fundamental rights do not only create a framework for the normative content of ordinary law, but also the framework of its interpretation and application. Therefore, also the conditions of admitting an appeal on a point of law pursuant to § 237 paragraph 1, clause c) and paragraph 3 of the Civil Procedure Code must be interpreted in order to fulfil both the constitutionally stated obligation of courts to provide protection of fundamental rights to the individual (Article 4 of the Constitution) and the purpose of the given type of proceedings on an appeal on a point of law. 19. The Supreme Court – bound by Judgment of the Constitutional Court in case file No. IV. ÚS 128/05 – in their resolution dated 25 November 2005 file No. 20 Cdo 1643/05 (available at www.nsoud.cz), explained the term "legal assessment" according to § 241a paragraph 2, clause b) of the Civil Procedure Code so that the same applies not only to the norms of substantive law, but also procedural law. The Supreme Court had also expressed a similar adjudication earlier – for example, in resolution file No. 20 Cdo 1591/2004 dated 26 May 2005 (available at www.nsoud.cz). 20. The Constitutional Court had no reason to divert from the above-stated conclusions (resulting from the above-quoted decisions of both the Constitutional Court and the Supreme Court) even in the case under consideration, and, therefore, the Constitutional Court, after finding that the Supreme Court had assessed the admissibility of an appeal on a point of law based on an interpretation, which is constitutionally incompatible due to the reason of unacceptable restriction of access of an individual to the court, came to the conclusion that a reason for their intervention had been established. The Constitutional Court, the function of which is protection of constitutionally guaranteed fundamental rights of an individual, repeats that they fully respect the powers of the Supreme Court to choose an appropriate interpretation of the relevant provisions of the Civil Procedure Code, however, only in such a manner that this interpretation respects the protection of fundamental rights of an individual. In the case under consideration, the Supreme Court has not complied with its constitutional obligation to provide protection of the fundamental rights of the complainant and has violated their fundamental right to access to a court pursuant to Article 36 paragraph 1 of the Charter... 22. In brief, the Supreme Court in the given case respected neither their own previous case law nor the judgment case law of the Constitutional Court, this without submitting sufficiently justified (opposing) argumentation capable of explaining why the same differs from case law; of course, a reference to an older and obsolete decision of the Supreme Court does not constitute a reason for departure from the case law system. Through this, Article 89 paragraph 2 of the Constitution has been violated [to this, for example, Judgment file No. III. ÚS 252/04 dated 25 January 2005 (N 16/36 SbNU 173)]. In addition, through rejecting an appeal on a point of law of the complainant for its alleged inadmissibility, the Supreme Court denied justice to the complainant, and thus violated Article 36 paragraph 1 of the Charter. By the above-stated facts, the Constitutional Court naturally does not anticipate at all how the Supreme Court shall decide on the appeal on a point of law of the complainant. In the further proceedings, however, the Supreme Court shall be forced to take into account the reasons applied in assessing said admissibility from the viewpoint of § 237 paragraph 1, clause c) of the Civil Procedure Code. 23. The above-stated facts are not changed even by the condition that – pursuant to § 237 paragraph 3 of the Civil Procedure Code, in the wording of Act No. 7/2009 (i.e. in the wording effective from 1 July 2009) – circumstances applied by the reasons for an appeal on a point of law pursuant to § 241a paragraph 2, clause a) are not taken into account when assessing the admissibility of an appeal on the point of law from the viewpoint of § 237 paragraph 1, clause c) of the Civil Procedure Code. Pursuant to temporary provisions relating to Act No. 7/2009 Coll., appeals on a point of law against decisions of courts of appeal, pronounced (issued) before the date on which this Act became effective, shall be heard and adjudicated according to existing legal regulations." Due to the disrespect shown for the judgment case law of the Constitutional Court, when dealing with the issue outlined above (within the intentions of Article 89 paragraph 2 of the Constitution), the Supreme Court has been ordered to reimburse the costs of proceedings before the Constitutional Court to the complainant.

65. In resolution file No. I. ÚS 281/10 dated 31 May 2010 (not published in the Collection of Judgments and Resolutions of the Constitutional Court, available at http://nalus.usoud.cz), it was necessary, in spite of the facts stated above, to state again the following: "According to the Supreme Court, this is only an incorrect legal assessment of the case pursuant to § 241a paragraph 2, clause b)

of the Civil Procedure Code, not a reason for an appeal on a point of law pursuant to § 241a paragraph 2, clause a) of the Civil Procedure Code, objecting to a defect in proceedings which could have resulted in an incorrect assessment of the case. In order to support this restrictive conclusion, the Supreme Court refers, among other items, to resolution of the Constitutional Court file Nos. III. ÚS 51/06, III. ÚS 10/06, IV. ÚS 155/06 and III. ÚS 1482/08. In connection to this it is necessary to add that the resolution listed last deals with legal disorder, i.e. a different type of problem, and the three decisions quoted previously represent unique excesses from March, April and July 2006, which are confirmed neither by the prior nor latter case law of the Constitutional Court. In addition, these decisions have only a form of resolution on rejecting a constitutional complaint, not a judgment. To the contrary, judgments of the Constitutional Court consistently tend towards the opposite legal conclusion. From the recent past, it is possible to quote, for example, Judgment file No. I. ÚS 1452/09 dated 17 August 2009 (N 186/54 SbNU 303); in clause 19 of the reasoning in this Judgment, the Constitutional Court stated as 'incorrect and unconstitutional the conclusion that an appeal on a point of law admissible pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code *a priori* excludes the application of a reason for appeal on a point of law defined under § 241a paragraph 2, clause a) of the Civil Procedure Code. The Supreme Court, therefore, did not respect the settled case law of the Constitutional Court (for example, file Nos. II. ÚS 182/05, IV. ÚS 128/05, II. ÚS 650/06, I. ÚS 2030/07, II. ÚS 2837/07, II. ÚS 3005/07), according to which only an interpretation pursuant to which a decision of the court, against which the admissibility of an appeal on a point of law pursuant to § 237 paragraph, 1, clause c) of the Civil Procedure Code has been constituted, may be generally contested for the reason of incorrect legal assessment of the case as well as for the reason of defects in the proceedings, which means at the same time fulfilment of the constitutionally stated obligation of courts to provide protection of the fundamental rights to the individual, as well as of the purpose of the given type of proceedings on an appeal on a point of law, which leads, among others, to unification of the case law of ordinary courts. Interpretation according to which the reason for an appeal on a point of law pursuant to § 241a paragraph 2, clause a) of the Civil Procedure Code excludes the possibility of admitting an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code, leads to unacceptable restriction of the right to access to a court of appeal on a point of law. It is indubitable that also the procedural course of a court may represent a question regarding which different opinions in judicial practice may exist, requiring unification of the same by the Supreme Court.' The circumstance that the legislature has arbitrarily and contrary to the case law of the Constitutional Court in Act No. 7/2009 Coll., whereby Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, and other related Acts have been altered, in § 237 paragraph 3 of the Civil Procedure Code, excluded the possibility to take into account, among other items, also the reason for an appeal on a point of law pursuant to § 241a paragraph 2, clause a) of the Civil Procedure Code, does not alter anything concerning this conclusion. Firstly, in the case under consideration, the legal condition before this amendment is decisive, and secondly, the Constitutional Court shall, only in relation to the application of this provision, assess whether such restriction of reasons for an appeal on a point of law may be considered constitutionally conforming."

66. As for the controversial "issue of vital legal significance" after the above-mentioned amendment of the Civil Procedure Code, resolution file No. II. ÚS 2771/09 dated 11 March 2010 (available at http://nalus.usoud.cz) also expresses the following opinion: "The essence of the above-quoted legal opinion is not changed in any way by the fact that Act No. 7/2009 Coll. has amended § 237 paragraph 3 of the Civil Procedure Code, in which the words 'the courts of appeal or the court of appeal on a point of law have decided differently, or when the same solve a legal issue in contravention of substantive law' have been replaced with 'courts have decided differently, or when the legal issue solved by a court of appeal on a point of law is to be assessed differently; circumstances applied by reasons for an appeal on a point of law pursuant to § 241a paragraph 2, clause a) and § 241a paragraph 3 shall not be taken into account.' For the above-quoted opinion of the Constitutional Court – that a specific procedural lapse may possess case-law overlap – continues to be applicable, and as such represents – due to the nature of the case – a qualified reason for an appeal on a point of law for assessing the issue of vital significance in terms of law. That is, if the court bases its decision on an interpretation of procedural law and the appellant objects to said interpretation, such an issue cannot be excluded from assessing the existence of the issue of vital significance in terms of law. The only

difference compared to prior judgment case law (in competition with which therefore 'mere' resolutions will not stand) would only consist of the form, i.e. inclusion under a specific reason for an appeal on a point of law. Therefore, in the future it will be possible to subsume such an objection under § 241a paragraph 2, clause b) of the Civil Procedure Code. This is supported not only by a constitutionally conforming interpretation, but also interpretation methodology of interpretation of subconstitutional law. This also with regard to the explanatory report concerning the relevant part of Act No. 7/2009 Coll., pursuant to which: 'Exclusion of reasons for appeal on a point of law listed in § 241a paragraph 2, clause a) is given by the nature of such a reason for an appeal on a point of law, when it may be expected that a specific procedural lapse shall not possess any case-law overlap, when a court bases its decision on interpreting procedural law and the appellant objects to said interpretation, it is argumentation applicable pursuant to § 241a paragraph 2, clause b).'"

67. Evaluation of the above-listed empirical data necessarily leads to the conclusion that there really does exist a problem which concerns non-uniform case law of the Supreme Court related to interpretation and application of the contested provision, this following constant negligence with respect to corrective opinions of the Constitutional Court on various legal issues. In the opinion of the Constitutional Court, this unfortunate condition has been constituted by the fact that the Supreme Court has not identified the general purpose of the appeal on a point of law, and even the purpose of the same as specified by the above-mentioned case law of the Constitutional Court is not respected (clause 43). Through this, a constitutionally unacceptable inequality of appellants before law or before the act occurs, which should be treated through settled interpretation of the Supreme Court (see domestic as well as foreign case law in clause 54, and further clause 52). Under this condition (based by the procedurally non-unified process of the Supreme Court, and neglecting the case law of the Constitutional Court), it is necessary to conclude that the contested provision is an uncertain or vague legal norm to such extent that the same does not represent, in real circumstances i.e. within the possibilities of general justice, predictable law (see clauses 34 to 38); thus it becomes inconsistent with the requirements resulting from the principle of a law-based state (Article 1 paragraph 1 of the Constitution), from which the requirement for predictability of law may be deduced. In the individual cases in which the complainants file constitutional complaints, the case law of the Constitutional Court usually finds violation of the right to a fair trial in the decisions of the Supreme Court (Article 36 paragraph 1 of the Charter) or exercise of constitutionally banned arbitrariness (Article 2 paragraph 2 of the Charter, see clause 38). The empirical data further imply that the time has come to formulate a systematic conclusion which would solve the problem outlined generally, not only at the level of individual constitutional complaints. It cannot be disregarded that the Czech Republic is relatively often called to international-law responsibility before the ECHR, primarily as a consequence of unclear interpretation of the contested provision. The Constitutional Court wishes to express its astonishment that the Government Representative for Representation of the Czech Republic before the European Court of Human Rights did not notify the Minister of Justice of this inconsistency which originates from the conceptual lapse of the contested provision, with a relevant draft on correction, as well as that the Minister of Justice and the Supreme Court remain passive in regard to analysing the effectiveness of application of the contested provision, even though both these institutions are, or should be, familiar with the given issue. At present, it shall become a task for the Parliament of the Czech Republic to adopt a constitutionally conforming legal arrangement of the instrument of appeal on a point of law, so that function of the Supreme Court is ensured consisting in unifying the case law of ordinary courts, which may definitely not be fulfilled by the Constitutional Court whose function (protection of constitutionality) has been defined in Article 83 of the Constitution and may not be altered by an ordinary act or on the basis of common practice.

68. In the above, the Constitutional Court dealt with the argumentation of the Chief Justice of the Supreme Court (clause 18). As for her objection related to § 237 paragraph 3 of the Civil Procedure Code, the Constitutional Court adds that by mere annulment of the word "especially" the Court would infringe the entitlement of the legislature to define admissibility of an appeal on a point of law, or would itself restrict such admissibility in such a way, although there are also other possible reasons leading to adjudication by the Supreme Court, which also the legislature anticipates through the actual demonstrative enumeration.

69. The Constitutional Court wishes to respect the free will of the legislature, which they will incorporate in the new arrangement of an appeal on a point of law; nevertheless the Constitutional Court notes that such an arrangement must be predictable to such scope that admissibility of an appeal on a point of law must be obvious to any potential appellant even before they utilise a remedy in the form of an appeal on a point of law. After annulling the contested provision, a number of provisions of the Civil Procedure Code, related to the same in terms of content, become obsolete, including § 237 paragraph 3 of the Civil Procedure Code and others. The new arrangement of the appeal on a point of law should have a clear theoretical concept, primarily regarding the purpose and function said remedy wishes to pursue (while respecting the hitherto case law of the Constitutional Court, and naturally also with regard to functions which should be fulfilled by the Supreme Court, see above); for this, the Constitutional Court has provided the legislature with a sufficient period of time by postponing the enforceability of the derogative verdict.

70. Due to all the reasons indicated above, the Plenum of the Constitutional Court has decided, pursuant to § 70 paragraph 1 of the Act on the Constitutional Court, to annul the contested provision as a result of its being in contravention of the provisions of the constitutional order, specified in the previous clauses.

71. As *obiter dictum*, the Constitutional Court adds that through this decision the Court does not comment generally on the issue of the possibility of actual "selection" of cases, i.e. the instrument of *a certiorari*, or to the instrument of admissibility of a filing, because in the indicated consequences the Court does not see any reason for this. The Court only notices that this instrument is hardly applicable in the circumstances of the Supreme Court, whose decisions must always be fully reviewable from the viewpoint of constitutionality within the proceedings on constitutional complaints. The reasons for such a requirement have been listed, for example, in Judgment file No. III. ÚS 202/05 dated 16 March 2006 (N 60/40 SbNU 579), in which the same others stated: "the Constitutional Court in its Judgment dated 11 February 2004 file No. Pl. ÚS 1/03 (Collection of Judgments and Resolutions of the Constitutional Court, Volume 32, Judgment No. 15, promulgated under No. 153/2004 Coll.), in connection with a draft for annulment of the provisions of § 243c paragraph 2 of the Civil Procedure Code, dealt with the question of what requirements must be fulfilled by a decision of a court of appeal on a point of law regarding rejection of an appeal on a point of law because of non-compliance with the condition resulting from the provisions of § 237 paragraph 1, clause c) and paragraph 3 of the Civil Procedure Code. In this Judgment, the Constitutional Court referred to its own Judgment dated 20 June 1995 file No. III. ÚS 84/94 (Collection of Judgments and Resolutions of the Constitutional Court, Volume 3, Judgment No. 34), according to which the independence of decision-making of ordinary courts is realised within the constitutional and statutory framework of procedural law and substantive law; the framework of procedural law is especially represented by the principles of a proper and fair trial, as based on Article 36 *et seq.* of the Charter, as well as Article 1 of the Constitution, and one of these principles, being a part of the right to a fair trial as well as the term "law-based state" (Article 36 paragraph 1 of the Charter, Article 1 of the Constitution) and excluding arbitrariness in decision-making, is also an obligation of courts to justify their judgments. Additionally, the Constitutional Court referred to its Judgment dated 26 September 1996 file No. III. ÚS 176/96 (Collection of Judgments and Resolutions of the Constitutional Court, Volume 6, Judgment No. 89), according to which if one of the purposes of judicial jurisdiction is to be fulfilled, i.e. the requirement of 'education to comply with the law… to respect the rights of fellow citizens' (§ 1 of the Civil Procedure Code), it is completely necessary that the decisions of ordinary courts are not only in compliance with the act in terms of the merits of the case and issued with full respect to procedural norms, but also that the justification of the issued decisions, in relation to the mentioned purpose, complies with the criteria defined by the provisions of § 157 paragraph 2 *in fine*, paragraph 3 of the Civil Procedure Code; because only factually correct (fully compliant with the law) decisions, and properly (i.e. in the way required by law) justified decision, fulfil – as an integral part of the 'defined process' – the constitutional criteria resulting from the Charter (Article 38, paragraph 1); similarly as within the factual domain, also within the field of insufficiently interpreted and justified legal argumentation, similar consequences occur leading to incompleteness and especially to an unconvincing nature of the

decision, which is, however, in contravention not only of the required purpose of the judicial proceedings, but also of the principles of a fair trial (Article 36 paragraph 1 of the Charter), as understood by the Constitutional Court. The Constitutional Court also referred to Judgment dated 9 July 1998 file No. III. ÚS 206/98 (Collection of Judgments and Resolutions of the Constitutional Court, Volume 11, Judgment No. 80), in which it was stated that a part of the constitutional framework of independence of courts is also the obligation of the same to respect equality in rights resulting from Article 1 of the Charter; equality in rights in relation to ordinary courts, therefore, constitutes, among other items, the right to identical decision-making in identical cases and at the same time excludes arbitrariness in application of law... in some cases, a mere reference to a previous decision of a court of appeal on a point of law (or the Constitutional Court) may seem to be sufficient; this will generally happen in cases which are factually and legally identical or considerably similar... When in such a situation the Supreme Court was convinced that – despite some differences between both cases – also this case may be assessed identically, then the same should have explained this opinion sufficiently in the reasoning of its decision, especially under the condition when its legal assessment was (possibly) different from the assessment of the court of appeal (and when even the opinions of lower courts were not uniform, as stated above). Since this did not take place, the relevance of the given reference may not be assessed at all."

Justices Ivana Janů, Vladimír Kůrka, Jiří Mucha, Jiří Nykodým and Miloslav Výborný hold dissenting opinions to the decision of the Plenum pursuant to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations.

Dissenting Opinion of Justice Ivana Janů

Pursuant to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, I submit a dissenting opinion against the verdict as well as the reasoning of Judgment of the Constitutional Court file No. Pl. ÚS 29/11.

1. I express my dubitation regarding the active standing of the Second Panel to submit a petition pursuant to § 64 paragraph 1, clause c) of the Act on the Constitutional Court. The point being that the provisions of § 78 paragraph 2 of the Act on the Constitutional Court anticipate that the panel must become convinced of the unconstitutionality of provisions where "the application of which resulted in the situation which is the subject of the constitutional complaint". In this case, after the cassational verdict of the Supreme Court dated 22 December 2009 file No. 29 Cdo 101/2007-197, in which the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code were applied, it was further adjudicated through the judgment of the High Court in Prague dated 25 October 2010 File No. 3 Cmo 205/2010-240 and subsequently through a resolution of the Supreme Court dated 31 May 2011 File No. 29 Cdo 1113/2011-279, which no longer employed the procedure pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code; rather, the provisions of § 237 paragraph 1, clause a) of the Civil Procedure Code were applied. In such a situation, the steps taken by the Second Panel lack the application immediacy, which has been until now strictly required for initiating proceedings on a "specific review of norms". On the contrary, this procedure has signs of judicial activism. The practice of the Constitutional Court has so far complied with the principle of self-restraint and minimisation of infringement to the decision-making of courts, which should have been reflected also in the given case in such a way that for possible granting the constitutional complaint it would have been sufficient merely to annul the decision on the last remedy in the case, presuming that the ordinary courts, pursuant to § 89 paragraph 2 of the Constitution, would be bound by a judgment of the Constitutional Court, not by the legal conclusions of other courts [for example Judgment file No. IV. ÚS 290/03 dated 4 March 2004 (N 34/32 SbNU 321)]. In the case this should have been a review of the constitutionality of the instrument of appeal on a point of law pursuant to § 237 paragraph 1, clause c),

the majority of the Plenum has chosen an inappropriate case, although it would have been possible to find a number of more suitable opportunities for such a significant legal procedure in the past.

2. When the majority of the Plenum arrived at the conclusion that the hitherto legal arrangement of the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code causes unpredictable results and, therefore, is in contravention of the principles of a law-based state, then I object that the focus of the problem so posed is in the provisions of § 237 paragraph 3 of the Civil Procedure Code, which (problematically) defines what is to be understood as "an issue of vital legal significance", and not the instrument of appeal on a point of law itself, admissible pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code.

3. The derogative judgment comes surprisingly after ten years of judicial practice and many hundreds of issued decisions (both resolutions and judgments), in which the Constitutional Court did not express any doubt about the constitutionality of the instrument of appeal on a point of law admissible pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code. In hitherto judgments, only partial corrections of the approach of the Supreme Court to some related questions have been handled. As significant I consider, for example, the definition of limits for a constitutionally conforming interpretation of reasons for an appeal on a point of law [Judgment file No. II. ÚS 182/05 dated 18 December 2007 (N 227/47 SbNU 973) and many others]. The majority of the Plenum should have persisted with these principles and required implementation of the same from the Supreme Court.

4. The issue of predictability of a conclusion as to whether an appeal on a point of law is or is not admissible is in the assessment of the Plenum paradoxically based on a completely formal concept of what the appellant expects from the guarantees of a fair trial. The existing legal arrangement is often criticised because the appellant does not know in advance whether their appeal on a point of law would be found admissible or not. However, in my opinion, the appellant is not concerned about the statutory formal category under which their failure in the proceedings before the Supreme Court would be classified. In the instance that the legislature in reaction to the judgment of the Constitutional Court incorporates into the Civil Procedure Code a fundamental admissibility of any appeal on a point of law, and concurrently newly establishes a "filtering" category which one may as hyperbole designate as "sophistication of the appeal on a point of law", they would fulfil the essential requirement to let the appellant know in advance (in relation to the significant fee for proceedings on an appeal on a point of law) whether their appeal on a point of law would or would not be admissible (principally it always would be), however, uncertainty would remain as to whether their appeal on a point of law would be found sophisticated, based again on the same criteria which are today used by the Supreme Court (in connection with the case law of the Constitutional Court) for assessing the issue of vital significance in terms of law. Similarly, in the case that an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code would theoretically change into a mere motion for the Supreme Court, which would again unpredictably assess whether or not to initiate proceedings. Through these considerations I would primarily like to express that whatever the change turns out to be regarding the formal arrangement of the reasons for an appeal on a point of law (or should such an arrangement be lacking) in the future in the Civil Procedure Code, as a reaction to the judgment of the Constitutional Court, the main point would be primarily the overall ethos governing the Supreme Court and the specific attitude of the individual judges that will influence the degree to which the case-law approach to the appellants changes. When the majority of the Plenum emphasise that the Supreme Court has long disrespected the case law of the Constitutional Court (clause 67), I do not know from where the conviction comes that through annulling § 237 paragraph 1, clause c) of the Civil Procedure Code, or possibly through adopting a new legal arrangement, something would be changed.

5. When the majority of the Plenum in the reasoning of the Judgment based their argumentation on "empirical" findings on the case law of the Supreme Court, they evidently disregard the different nature of arguments which could testify systematically against the instrument of an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code, as well as the nature of arguments which they amass on clauses 57 to 67, as a strict list of misconduct by the Supreme Court in relation to the case law of the Constitutional Court. I believe that reference to contradictions and

unconstitutionality in the specific case law of the Supreme Court is not a persuasive argument to annul the contested provision or the given type of appeal on a point of law. These specific situations are and have been rectifiable through individual constitutional complaints.

6. Furthermore, I consider the "empirical data" out of which the majority of the Plenum infers the (excessively) low success rate of appellants claiming admissibility of their appeals on a point of law from the affirmed issue of vital legal significance (clauses 17, 57) to be absolutely irrelevant for assessing the constitutionality of the instrument of appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code. According to the findings of the Constitutional Court, 72.5% of the decisions covered by § 237 paragraph 1, clause c) of the Civil Procedure Code are ones of rejection, 7.5% are dismissive and only 20% cassational (clause 17). It is further given by the statistics that the "entire" 80.58% of unsuccessful cases of an appeal on a point of law covered by § 237 paragraph 1, clause c) of the Civil Procedure Code consists in deficiency in formulating the "issue of vital legal significance". This datum should lead to a conclusion of the unpredictability of the provision contested by the Second Panel (clause 57).

7. However, in this respect, even the constitutional complaint itself, pursuant to § 72 of the Act on the Constitutional Court, would pass the test based on percentage ratio of successful complaints arranged in this way only with difficulty. According to my own calculations based on officially published statistics of the agenda of the Constitutional Court from 2001 to 2010, the ratio of issued judgments (granting as well as dismissive) oscillates around 6.6% (average and median); if one took into consideration only the years which have been completed in terms of case law (2001 to 2004), the number would be even lower (average 6.53%, median 6.28%). Other complainants were either rejected by a resolution, or their filing was suspended. If it is taken into consideration that among the judgments, those of a granting verdict form an average of 90% (in the decisive period as well as in the period which has been completed in terms of case law), one arrives at a conclusion on the success rate of complainants before the Constitutional Court in the decisive period, those who obtained a cassational judgment, of under 6% [compare with the above data on the ratio of cassational judgments of the Supreme Court, clause 17 of the reasoning].

8. As for the structure of the unsuccessful complainants in proceedings on a constitutional complaint, I further state that in the decisive period an average of 65% of the complete agenda ended up rejected as manifestly unfounded pursuant to § 43 paragraph 2, clause a) of the Act on the Constitutional Court (average 64.97%, median 66.83%; in the years which have been completed in terms of case law, average 58.9%, median 58.7%). If one deducts resolutions through which the constitutional complaint was rejected due to formal reasons (§ 43 paragraph 1 of the Act on the Constitutional Court), one comes to a conclusion that in the decisive period approximately 78% "of the formally perfectly filed" constitutional complaints [average 78.3%, median 78.46%; in the years which have been completed in terms of case law average 73.27%, median 73.33%] have been rejected as manifestly unfounded. The data stated above show that three quarters of the complainants represented by a qualified attorney were unsuccessful in framing a constitutional complaint in terms of being only able to formulate it in such a way that it was clear at first glance that such a complaint did not contain any constitutional-law basis. Compare this percentage with the number of appellants who were not successful in formulating the issue of vital legal significance pursuant to clause 57 of the reasoning. It is an utterly comparable figure, this even under the condition of a significantly lower total success rate of the complainants before the Constitutional Court. I miss a similar wider (and self-critical) reflection in connection with the appeal on the point of law pursuant to the contested provision in the reasoning.

9. The ratios between successful and unsuccessful appellants or complainants do not show anything essential regarding the importance of the given remedy (an appeal on a point of law or constitutional complaint) in finding individual justice or within overall refinement of legal environment, this on the basis of the decision-making practice of the supreme courts here or abroad. Therefore, regarding any statistics on the success rate of appeals on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code, I wish to state that constitutional complaints end up rejected in a

significantly higher percentage of cases, and yet it cannot be stated that the Constitutional Court does not considerably and purposefully influence legal relations in the society.

10. In addition, if in the past the issue of admissibility of an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code had a negative impact on assessing admissibility or the timeliness of a constitutional complaint, and the mutual incompatibility of the Civil Procedure Code and the Act on the Constitutional Court led to denial of justice to some of the complainants, I state that this complication has been removed through an amendment executed by Act No. 83/2004 Coll., which incorporated into § 75 paragraph 1 of the Act on the Constitutional Court an exception from the obligation to use up all the remedies, this explicitly for an "extraordinary remedy, which may be rejected as inadmissible by the body which decides on such a remedy due to reasons depending on such a body's assessment". The layout of admissibility of a constitutional complaint, therefore, does not force the complainant to undergo unpredictable proceedings on an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code, because their constitutional complaint is admissible even without filing the above-quoted appeal on a point of law. The procedural steps depend on subjective assessment of the appellant and do not bring about a risk of frustrating a constitutional review, as used to be in the past. At the same time, pursuant to § 72 paragraph 4 of the Act on the Constitutional Court, it is true that "in the case an extraordinary remedy was rejected as inadmissible by a body which makes a decision on such a remedy due to reasons depending on their assessment", it is possible to file a constitutional complaint against the previous decision, this within a period of 60 days from the delivery of said decision on the extraordinary remedy. Therefore, if the appellant decides to undergo proceedings on an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code, the unpredictable lack of success of the appeal on a point of law in a form of its inadmissibility does not form an obstacle to a review in terms of (quasi)merits regarding the constitutionality of previous decisions on the merits of the case, and does not constitute a negative consequence in their access to the Constitutional Court. Additionally, this aspect of the Act on the Constitutional Court essentially mitigates the possible negative consequences of the unpredictability of the decision of the Supreme Court, because the appellant/complainant still has the opportunity to assess the further procedural steps in the case, without being exposed to the risk of formal denial of justice. In this respect it is, therefore, not possible to say that the appellants/complainants would be forced by the Constitutional Court to use an ineffective and inefficient means (from the viewpoint of the Charter, as outlined by clause 42 of the reasoning).

11. On the contrary, on the basis of the decision of the majority of the Plenum, there is a risk of a further undesirable burden upon the Constitutional Court and the transfer of responsibility for unification of case law on the same [as already apparently happens in cases in which an appeal on a point of law – for example, in issues related to family – is inadmissible by law: see critical *obiter dicta* in Judgments dated 23 February 2010 file No. III. ÚS 1206/09 (N 32/56 SbNU 363); dated 18 August 2010 file No. I. ÚS 266/10 (N 165/58 SbNU 421); dated 2 November 2010 file No. I. ÚS 2661/10].

12. Finally, regarding the formal completeness of the reasoning, I completely lack conclusions regarding the inter-temporal effects of the Judgment. After the experience resulting from the consequences of Judgment file No. Pl. ÚS 3/09 dated 8 June 2010 (N 121/57 SbNU 495; 219/2010 Coll.), whose temporal application had to be solved through an opinion file No. Pl. ÚS-st. 31/10 dated 14 December 2010 (426/2010 Coll.), the absence of these considerations constitutes a risk that mere annulment of the provision under assessment will make the situation worse for individual appellants instead of strengthening their legal certainty.

Dissenting Opinion of Justice Vladimír Kůrka

I.

I find the Plenary Judgment issued unfortunate, or rather very unfortunate. Not only for frequently erroneous argumentation, for the "violence" with which this or that consequence of such a Judgment is inferred, or for plentiful case law quotations which have no connection to the topic, but – primarily – for the fact that the provision of § 237 paragraph 1, clause c) of the Civil Procedure Code, contested by the Constitutional Court (Second Panel) itself, has apparently became victim to an ambition objectively unrelated to the same. Specifically, the Constitutional Court will not rid itself of the suspicion that through an attack against this provision, the Court pre-emptively meddled with the preconceived intention to amend the Civil Procedure Code through a completely different arrangement of admissibility of an appeal on a point of law, which the Court relates to an allegedly unacceptable "selective" instrument "*a certiorari*". The statement included in the Judgment in *obiter dicto* that the same does not comment on "this issue", seems rather sanctimonious and rather strengthens the suspicion mentioned above.

And yet, the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code are not to be blamed in the case; the Constitutional Court has simply chosen this provision as – in their opinion – a "suitable" battlefield, and in their enthusiasm they have disregarded that it is only seemingly suitable for this purpose.

II.

In brief: the arrangement of an appeal on a point of law is essentially based on its admissibility in a situation of two mutually deformal decisions of lower courts, which implies – in order to remove the collision – the suitability of calling in a third arbiter [§ 237 paragraph 1, clauses a) and b) of the Civil Procedure Code], and this "need" results in an appeal on a point of law admissible "by law" or one to which there is a claim. On the contrary, in the case of two conforming decisions, when such reasoning cannot be applied, the appeal on a point of law represents the possibility of an "extra" remedy, i.e. a kind of a bonus which is justified firstly by increase in procedural amenity for the party that obtains, even in such a situation, an occasion to address another judicial instance, and secondly through strengthening the position of the court of appeal on a point of law, which thus acquires a solid grounds for fulfilling the role of case law unification in relation to all (even confirmatory) decisions of the courts of appeal. Limitation of the grounds for such an "extra" remedy (compared to the "claimable" appeal on a point of law) is then logical in the fundament, even twice: firstly because of the threat of "congestion" of the court of appeal on a point of law (as is also mentioned in clause 45), and secondly – from the point of view of the mission of the same – in focussing review through an appeal on a point of law only on assessment of legal issues [§ 237 paragraph 1, clause c) of the Civil Procedure Code].

Not even the Constitutional Court apparently doubts that such a restriction of access to the third instance is based on a legitimate objective and respects the requirement of proportionality, when (see again clause 45) the Court itself states that against such restriction, "there can be no objections" and that "such a concept… seems to comply with the practice of other European countries".

Completely in compliance with this, in clause 10 of the Judgment the Constitutional Court notices the evaluation of "the concept of a remedy in the system of ordinary courts of *a certiorari* type", filed by the Office of the Government Representative for Representation of the Czech Republic before the European Court of Human Rights (hereinafter referred to only as "ECHR"), to which the same has been asked in the given case. This implies not only that the ECHR considers the same to be generally acceptable ("is not principally in contravention of Article 6 paragraph 1 of the Convention"), but specifically that the same approves this in situations when "national law makes it possible to reject a remedy for the reason of the same not raising any vital legal issue" (which is exactly "our" case!), and even that as for the reasoning of such a rejection: "it may suffice that the given court only refers to the provisions of the act which make it possible for the court to proceed in such a way, without specifying more detailed arguments" (note: should not this have been sufficient for the majority of the Plenum to apply restraint?).

III.

It is not insignificant to mention that although many points in the Judgment (see clauses 31 and following) speak about "fundamental rights and freedoms" or "requirement for a legal basis for possible restriction of a fundamental right, resulting from Article 4 paragraph 2 of the Charter"(clause 32), it is evident that the right to judicial review in three instances does not belong to such fundamental rights (and the corresponding long considerations of the Judgment are unnecessary), which is, moreover, explicitly stated by the majority of the Plenum of the Constitutional Court in clause 44.

In relation to the task which the majority of the Plenum took on [i.e. to remove the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code], the majority could have pursued nothing else but to come to the conclusion that a limited review through an appeal on a point of law based on the conformity of decisions of lower courts, as arranged through this provision (and definitely in connection to paragraph 3 of the same), is not a predictable process, is insufficiently defined for the appellant and the equality of the parties is threatened in access to the same (see, for example, clauses 54, 55, 56 or 67), "thus it becomes inconsistent with the requirements resulting from the principle of a law-based state (Article 1 paragraph 1 of the Constitution)".

In spite of the fact that such a conclusion could be correctly made only upon exhausting all conceivable possibilities of interpretation (to eliminate possible constitutional conformity), the majority of the Plenum – apparently on purpose – settled for only list of examples of individual situations (see in particular clauses 59, 60, 61), which however cannot not prove (at most) anything more than the fact that the Supreme Court has failed in the specific decisions in assessing admissibility of appeals on a point of law (not to mention that even this may be questioned). Naturally, this may not be sufficient proof that the given legal arrangement is unconstitutional.

The point is, through an identical method one could easily "prove" the unconstitutionality of the arrangement of access to the Constitutional Court. In particular, or for example, in assessing conditions of violation of Article 36 paragraph 1 of the Charter of Fundamental Rights and Basic Freedoms at the level of evaluating the significance of subconstitutional (in)correctness of contested decisions of the ordinary courts, and corresponding conditions for rejecting constitutional complaints as manifestly unfounded, there exist easily traceable evident collisions of criteria between the individual panels of the Constitutional Court (although there are only four of them), as well as between the individual decisions issued by the same, and then the "predictability" of success of the complainant may be considered similarly as the majority of the Plenum does in relation to the process of rejecting of an appeal on a point of law as inadmissible pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code.

The same applies to the argument (in favour of the opinion on an unpredictable or arbitrary process – see clause 48) that an appeal on a point of law is rejected (as a consequence of obligatory representation by an attorney at law) with assistance of these professionally capable persons, as the situation regarding the proceedings on constitutional complaints is comparable [moreover, the Czech Bar Association states that they consider the arrangement of admissibility of an appeal on a point of law pursuant to § 237 paragraph 1, clause c) of the Civil Procedure Code to be satisfactory in terms of constitutional law as well as in practice].

A "conceptual" criticism of the decision-making practice of the Supreme Court is formulated by the majority of the Plenum only in two ways: firstly (see clauses 46 and 58) within the issue of defining the term of "vital significance in terms of law" (whether only existence of case law "overlap" is decisive, i.e. possibility of generalising for a defined group of similar cases, or whether the same is established also by "significance" for the given case itself), and secondly (see clauses 63 and 66), within the issue of the "qualified reason for an appeal on a point of law", i.e. a reason applicable in a review open only to assess legal issues [whether this is also the reason pursuant § 241a paragraph 2, clause a) of the Civil Procedure Code or not]. Both of these objections are described against the background of collisions between the Supreme Court and the Constitutional Court and both of them should testify to the condition of permanently "unpredictable" law, this through an explicit opinion

(see clause 67) that the same is given by "non-unified process of the Supreme Court, and neglecting the case law of the Constitutional Court".

This conclusion, however, is clearly unacceptable and more than odd, when even the majority of the Plenum does not deny (see clauses 46 and 66) that at both controversial levels the original collisions between the Supreme Court and the Constitutional Court have been actually removed in such a way that the case law of the Supreme Court has accommodated (to full scope) to the opinions of the Constitutional Court (incidentally, not always consistent ones). It is sufficient to refer to the decision of the Supreme Court dated 30 November 2011 file No. 29 NSČR 66/2011 – besides, known to the majority of the Plenum – adopted by the Division on 8 February 2012 for publication in the Collection of Judicial Decisions and Opinions ("even though decision-making on an appeal on a point of law is a legal means ensuring unity of the decision-making of courts, the same fulfils this purpose through decision-making in individual cases... without it being important in any way... what the actual case-law overlap of such an individual case is"), as well as to the very amendment of the Civil Procedure Code executed by Act No. 7/2009 Coll. (see the explanatory report of the same, quoted in clause 66 of the Judgment), through which the dispute on admissibility of the "procedural" reason for an appeal on a point of law has been concluded [in the case a procedural defect is objected to, and its "origination" is a manifestation of disunity of interpretation of procedural law, then it is an unquestionable "legal" reason for an appeal on a point of law pursuant to § 241a paragraph 2, clause b) of the Civil Procedure Code].

[In this connection, the reasoning for a resolution of the Second Panel on suspension of proceedings concerning a constitutional complaint dated 13 September 2011 file No. II. ÚS 2371/11, sounds rather surprising; through this, review of provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code has been initiated, if, through the same, the Supreme Court is reproached, on the contrary, for the same having opened a review for the question merely "unique, which *prima facie* does not have and from the nature of the matter cannot have any overlap which would in particular influence the following case law in terms of unification of the same". Similarly, it may be objected – which is seen also in clause 60 of the Judgment – that the Constitutional Court is mistaken when, in criticism of the crucial cassational resolution of the Supreme Court dated 22 December 2009 file No. 29 Cdo 101/2007, the Court considers the legal act of the parties to be the subject of a solely factual finding; this is so only as for a finding regarding the content of the same, while the finding of rights and obligations resulting from the same forms an issue of legal evaluation, and thus an issue which naturally may be opened through an appeal on a point of law admissible only pursuant to § 237 paragraph 1, clause c) – as opposed to the opinion of the Constitutional Court. It is also possible to apply criticism regarding the lack of active standing of the Second Panel to submit the given petition to the Plenum through an argument that the same is directed against the cassational decision of a court of appeal on a point of law; not regarding the considerations stated in clauses 29 and 30 of the Judgment, the point is whether the Judgment of the Constitutional Court dated 4 March 2004 file No. IV. ÚS 290/03 (N 34/32 SbNU 321) is still in effect or not, since the situation for both is identical. Finally, another paradox of the "suspending" resolution of the Second Panel consists of the fact that although in other cases the Supreme Court is reproached for rejecting appeals on a point of law as an unacceptable and purposeful "regulation of agenda" or for "artificial reduction" of the same, the criticism therein focuses on the decision through which – on the contrary – the Supreme Court opened the review through an appeal on a point of law for factual consideration.]

If then the Constitutional Court does not consider its own interpretation of § 237 paragraph 1, clause c) and paragraph 3 and consequently § 241a paragraph 2, clauses a) and b) of the Civil Procedure Code to be "indefinite", "arbitrary" or "unpredictable", then the Court cannot deny the same quality to the Supreme Court, when the Constitutional Court is in harmony with the Supreme Court the next time. Therefore, it will hardly stand when the majority states in clause 67 of the Judgment that "the time has come" for a "systematic conclusion" which would "solve the problem outlined generally", because – in these solitary "systematic" levels – everything has already been "solved" in terms of interpretation and case law. At the "other levels", and even in any other way, the Constitutional Court has not stated in the past that the same would be so much perturbed about the instrument of a non-claimable appeal

on a point of law that the Court would consider to contest it from a constitutional-law standpoint; on the contrary, in dozens of decisions the Constitutional Court has exhibited how much in order it is that assessing the issue of vital significance in terms of law is in the exclusive competence of a court of appeal on a point of law, in which the Constitutional Court claims the right of infringement only under very exceptional conditions. When it is further stated in the same clause 67 of the Judgment that "the Czech Republic is relatively often called to international-law responsibility before the ECHR, primarily as a consequence of unclear interpretation of the contested provision", it is more likely (if not at all) because of "unclear" nature of the decision-making practice of the Constitutional Court itself on the issue of interpreting the condition for rejection of an extraordinary remedy "due to reasons depending on their assessment" pursuant to the provisions of § 72 paragraph 4 of the Act on the Constitutional Court.

IV.
Before the Constitutional Court proceeded towards derogation of the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code, the Court should have had a specific vision about which arrangement of an appeal on a point of law, against a confirming decision of a court of appeal, may comply with its opinions on constitutionality and – primarily – be internally certain that such an arrangement is possible at all, or feasible in such a way that it would bring about a specific positive effect both from the viewpoint of the purpose of the remedy and from viewpoints considered by the Constitutional Court as decisive in terms of constitutional law; in other words, as always, the point was to predict what consequences may be caused by the derogative judgment and what the Constitutional Court may actually expect from the legislature.

In clause 51, the Constitutional Court allocates, for the legislature's future arrangement, "wide space for discretion" and at an abstract level presents several – a total of five – concepts, of which three already have been proven through judicial practice; specifically "deformity of previous decisions", "authorisation of lower courts" as well as "initiative… given to the parties"; therefore, only the criteria announced of the "value of the dispute" and "significance of the individual legal cases" remain, but are, however, from the viewpoint of the mission of the Supreme Court, "unifying" case law, evidently worthless and there is no need to assess the same any longer.

Moreover – and in a kind of dissonance with that – in clause 69, the majority of the Plenum states a requirement that the admissibility of an appeal on a point of law is "obvious to any potential appellant even before they utilise a remedy in the form of an appeal on a point of law". Should this have any relation to the list of the remaining possibilities pursuant to clause 51, then – because the concept of appeal on a point of law admissible "based on the initiative of the parties" logically does not come into consideration, moreover when the same was evaluated in the past as ineffective – options available include either admissibility of an appeal on a point of law only on the basis of "deformity" of previous decisions, which is constituted by the existing provision of § 237 paragraph 1, clauses a) and b) of the Civil Procedure Code, or on the basis of "authorisation of lower courts" (as a matter of concept on the basis of the verdict of the court of appeal), which was in effect in the past, in an arrangement according to the amendment of the Civil Procedure Code, executed by Act No. 30/2000 Coll., effective from 1 January 2001.

Future enforcement of the first option (by the legislature), however, presents, compared to existing circumstances, reduction in the comfort of the party to the proceedings by the hope for a third instance (a hope which the party holds at present) and limitation of the unifying potential of the Supreme Court (with transfer of this part of the existing agenda of appeal on a point of law directly to the Constitutional Court!). Enforcement of the second option then means a return to something what has evidently failed and has therefore been replaced superseded by, in the end – but only just – the present arrangement. Procedural empiricism has proven that the decision-making practice of the ordinary courts has been "unified" primarily – naturally particularly – at the level of the courts of appeal, and the Supreme Court then "unified" only what the courts of appeal allowed it to unify. Not to mention that, for the needs of decision-making of the courts of appeal on a point of law, whether they admit an appeal on a point of law in one case and do not in another, it is necessary to define – so that this has

not been affected by "arbitrariness" – some criteria, and it is clear that it is hardly possible to define different ones than those acknowledged by the existing arrangement (§ 237 paragraph 3 of the Civil Procedure Code). The objected "indefiniteness" and "unpredictability" of the existing approach to an appeal on a point of law would then be only transferred to a level of lower instance.

Has this been actually deliberated, or intended?

V.
In the context of the "abstract control of norms", the Second Panel of the Constitutional Court, proposing the same, should have a clear vision (and so should the Plenum, deciding on their petition) about what the result of this control may bring for the proceedings administered regarding a constitutional complaint; more precisely, the panel should be certain that through removing the contested provision a way would be opened to a different, constitutionally conforming, result which would not be obtainable otherwise. If it is not possible to believe this to happen, then there is no sense in embarking on such a review, and *stricto sensu* the decision-making panel must not do so, since they do not have active standing for the relevant petition.

In the given case, the Second Panel will thus return to the first (cassational) decision of the court of appeal on a point of law, annul the same and will have to make the court reject the appeal on a point of law as inadmissible [the question remains as to when the Panel does so when annulment of the provisions of § 237 paragraph 1, clause c) is not in effect yet – will the panel wait until the Plenary Judgment becomes effective?]. However, this brings about the unpleasant consequence that the designation of "inadmissible" will be attached to an appeal on a point of law which the party (here the secondary party) filed at the time when the same actually was admissible or could have been admissible (and moreover has been acknowledged as such). How will, in relation to them, the principles to which the majority of the Plenum otherwise repeatedly refers in the Judgment, specifically the law-based state, predictability and legal certainty, be applied? Or to the contrary – and to protect also the secondary party – the Second Panel will yet adhere to this general principle corresponding with this protection, pursuant to which assessment of conditions for a remedy is conditioned by the legal arrangement existing at the time when the remedy was filed; that would, however, mean to acknowledge that the derogative effect constituted by the Judgment was completely useless for the given case, which, however, would be proof that the Second Panel actually did not have the active standing for the petition for annulment of the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code.

VI.
A summary is appropriate here: the justification which was adopted by the majority of the Plenum in favour of derogation of the provision contested by the Second Panel is partially incorrect (may not be shared) and partially incomplete (the majority refused to deal with relevant considerations). The petition should have been, therefore, dismissed, if not (for deficiency of entitlement of the petitioner) actually rejected.

The opinion signified in the introduction, i.e. that a different point was at stake, has been proven as well.

Dissenting Opinion of Justice Jiří Mucha

Pursuant to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, I submit a dissenting opinion to the verdict and reasoning of Judgment file No. Pl. ÚS 29/11.

The proceedings in this case were initiated through a petition by the Second Panel of the Constitutional Court, which suspended proceedings in the case of a constitutional complaint file No. II. ÚS 2371/11 and filed a petition to the Plenum of the Constitutional Court for annulment of the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code for the same being in contravention of the constitutional order. The Plenum of the Constitutional Court has granted the petition and annulled the given provision. I cannot identify myself with this conclusion and in particular with the steps taken by the majority of the Constitutional Court both from the viewpoint of reasons on which the majority based their decision and from the viewpoint of the procedure on the basis of which the majority created conditions for a significantly activist intervention into the decision-making of the Supreme Court as well as into the currently running legislative process. To evidence this, I give the following reasons:

1. The Constitutional Court itself as a judicial body of protection of constitutionality is in its decision-making bound not only by the constitutional order, but also by the Act on the Constitutional Court. The Court must interpret this Act in a constitutionally conforming way and not expand the possibility of its interventions to where the constitutional framer and the legislature anticipated this neither through the design of the relations between the individual state powers, nor through the arrangement of proceedings in the case of constitutionality of legal regulations.

2. From the viewpoint of the frame of the separation of powers in the Constitution, the Constitutional Court is to enter this field in the case that the same is called upon by a petitioner so entitled. Pursuant to § 64 paragraph 1, clause c) of the Act on the Constitutional Court, this may include also a panel of the same, but only under the condition that this takes place "in connection with deciding a constitutional complaint". The term "in connection" must be, in my opinion, interpreted restrictively, which does not mean "in" deciding a constitutional complaint, but only when it is necessary for a decision in the case as indicated by the term "the application of which resulted in the situation which is the subject of the constitutional complaint", used in § 78 paragraph 2 of the Act on the Constitutional Court. Otherwise this would mean that there would be distortion in the basis of the design of the position of the Constitutional Court as a body of protection of constitutionality and a way would open – as in this case – for the Constitutional Court to become a body of supervision or surveillance, which moreover enters a recently initiated legislative process of amending § 237 of the Civil Procedure Code (see clause 69 of the reasoning). In addition, this either occurs (as in this case) through the Court's approach motivated by an effort to "establish order" in a problematic section of the nation's legislation, or through becoming involved in the process by operation of external motives. The Constitutional Court is not even in the position of the much-criticised third chamber of Parliament [see my dissenting opinion to Judgment file No. Pl. ÚS. 55/10 dated 1 March 2011 (80/2011 Coll.)]. In this case, the Court set off in an opposing direction and tries even to influence the very beginning of the legislative process at a time when a draft of a new concept of an appeal on a point of law is being discussed by the Government Legislative Council.

3. The Constitutional Court rejects petitions by the ordinary courts as ones filed by petitioners who are manifestly unfounded within the specific control of constitutionality in the case that they submit a petition which does not comply with the condition that the contested act or its provision "should be used" when dealing with the case. Analogically, the petition by the Second Panel should have been rejected because a petition submitted from within the Constitutional Court must also comply with all requirements of the Act on the Constitutional Court, not only the filing of the complainant itself (see clauses 26 *et seq.*). Even from the viewpoint of construction of state power and its division, it is necessary to expect the Constitutional Court to apply maximal restraint; such restrain is mentioned in the reasoning (clause 30), but actually the reasoning is the very opposite of such restraint.

4. Furthermore, it is necessary to emphasise the need for self-restraint when using the possibility to proceed in accordance with § 64 paragraph 1, clause c) in connection with § 78 paragraph 2 of the Act on the Constitutional Court. Here the case is even more complicated by the fact that the Constitution Court itself does not only submit the petition, but also frames the criteria of the actual evaluation regarding the abstractness of terms which the Court employs in this decision. This applies especially

for the term “unpredictability” in the context of interpreting a term “law-based state”. The question of predictability of decision-making must be posted and evaluated objectively on the basis of analysing a number of decisions of the Supreme Court by means of objective criteria, not only through repeating a critical opinion on the concept of the instrument of an appeal on a point of law and repeating critical objections to the decision-making of the Supreme Court.

5. Statistics which include only numbers of decisions, without individually assessing which questions “of vital significance in terms of law” have been involved in these hundreds of decisions are, therefore, questionable; obtaining such data does not even pertain to the Constitutional Court. The point is that it is not possible to prove that according to such an approach and “proof” the quantity of petitioners unsatisfied with the decision should pass, pursuant to the majority opinion, to the form of new quality, i.e. unconstitutionality of the legal base itself (this way, also the appeal, constitutional complaint and other procedural instruments could be questioned). Moreover, the Constitutional Court so far has proceeded from the fact that evaluating questions of vital significance in terms of law is not a matter of their cognition [see resolution file No. III. ÚS 116/94 dated 21 February 1995 (U 7/3 SbNU 333) or resolution file No. III. ÚS 181/95 dated 23 August 1995 (U 19/4 SbNU 345)], since through that, the Court would infringe on the position of the Supreme Court as the highest “general” and case-law unifying judicial instance and would instate itself in this position, which pursuant to settled case law does not pertain to the Constitutional Court. Even if the courts proceeded unconstitutionally in 100% of the cases collected in the statistics, it is still not unquestionable evidence on the unconstitutionality of the very provision which may have been, for example, incorrectly applied by these courts. The same applies vice versa. Unconstitutionality cannot be “calculated”, it can only be inferred in a prescribed way. In this regard, the Constitutional Court and the steps its took do not play the role of a “third chamber” of the Parliament, but substitute for the apparatus of the Ministry of Justice (cf. clause 11 of the reasoning).

6. This is apparent also from the subject of the dispute between the parties, which was being solved in judicial proceedings, the result of which was contested by this complaint. The constitutional complaint in case file No. II. ÚS 2371/11 shows that the dispute was on the interpretation of Article 9 of Conditions of Tender regarding the sale of *Stáčírna stolních vod a džusových nápojů* (Table Water and Juice Filling Plant) company. Specifically, the point was whether the controversial provision of these conditions meant that as non-exercise of the right to effect a sale contract, punished by forfeiture of the deposit, would include not only simple inactivity of the successful tenderer, but also such action by such a party through which such a party exercises the right to conclude the sale contract within the specified period of time, but later the same relinquished such an intention. In the case under examination, the successful tenderer, which was in the given case a legal predecessor of the complainant, notified the defendant in the proceedings before ordinary courts that with respect to the lack of financial resources they would not enter into the sale contract. This was assessed by the courts in the initial proceedings in such a way that the conditions for returning the deposit required within the tender for the sale of the given company were not fulfilled and the action of the defendant who rejected to return the deposit had to be considered “legitimate”.

7. In other words, the problem of the whole constitutional complaint is not the issue of the design of the appeal on a point of law, statistics on the success rate of the same from the viewpoint of the appellants and generally, arrangements of proceedings on an appeal on a point of law, but the result of the same, which according to the complainant exceeds requirements for evaluating declaration of will as has, in their opinion, been supported so far by the Supreme Court. For the complainant, it is essential – and it should have been essential also for the Constitutional Court – that in this “connection” pursuant to § 64 paragraph 1, clause c) of the Act on the Constitutional Court, the Constitutional Court assesses the contested decision of the High Court in Prague and the Supreme Court in respect of how the autonomy of will of the contractual parties should be understood pursuant to Article 2 paragraph 3 of the Charter of Fundamental Rights and Basic Freedoms, or how the Constitutional Court assesses, in this connection, the “related” provisions of the codes of civil law. That is, however, in this context neither § 237 paragraph 1, clause c) of the Civil Procedure Code, which the majority decision has chosen to be their main target, nor other related and consequent

provisions of the Civil Procedure Code, but actually § 35 paragraph 2 of the Civil Code and § 266, 269, 276 and 281 of the Commercial Code from the viewpoint of Article 2 paragraph 3 of the Charter of Fundamental Rights and Basic Freedoms, or Article 2 paragraph 4 of the Constitution. All this, of course, under the condition that the position of the Supreme Court as the "supreme" court will be respected for decision-making in this area in assessing issues of vital legal significance. In my opinion, there was no reason for suspending the proceedings in this context and the case should have been adjudicated by assessing the constitutionality of the resolution of the Supreme Court dated 31 May 2011 file No. 29 Cdo 1113/11-279, which, however, was (naturally) not even mentioned by clause 1 of the reasoning.

8. On the contrary, in the whole constitutional complaint, the complainant themselves refers to conclusions made by the Supreme Court in connection with interpretation of will in the contractual relationships in its decisions on an appeal on a point of law. The complainant does not thus question the provision in this connection annulled, for example, due to the fact that it would be unconstitutional, if the same, through its concept, permitted an unpredictable decision for the complainant. This, however, may not be inferred from an individual case. A defective constitutional structure of an appeal on a point of law would mean that every decision on an appeal on a point of law would be burdened by such a defect of unconstitutionality which results already from applying the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code, not only this individual decision (usually the "fruit of the poisonous tree" doctrine). However, as is well known, since 2000 to date, the Constitutional Court has never considered this arrangement as unconstitutional, regardless of the problems which the appeal on a point of law necessarily creates in its decision-making. Therefore, I cannot identify myself with the approach of the majority in this respect, because even without this decision the Second Panel could have decided the given case, without such a controversial procedure being necessary. Moreover, this opinion on unconstitutionality is not shared by anyone else, as is inferred from statements which the Justice Rapporteur requested in the given case from the participants to the proceedings and from other parties (clauses 6 to 18 of the reasoning).

9. Within their constitutionally guaranteed right to judicial protection, the complainant requests assessment by the Constitutional Court on whether the given decision is not a surprising one in contravention of the settled case law of the Supreme Court and the Constitutional Court, and whether such a decision can hold up constitutionally (not in terms of general law). Just like the complainant states in the given case that they were not able to find the motivation for such a decision of the Supreme Court and lacks a sensible reason for it, also I did not find a reason why – in a situation when the above-mentioned provisions of the Civil Code and the Commercial Code have not been found unconstitutional and preventing from making a decision on a constitutional complaint pursuant to § 64 paragraph 1, clause c) and § 78 paragraph 2 of the Act on the Constitutional Court – the majority of the Constitutional Court decided to reassess the meaning, sense, structure and possible future arrangement of the instrument of an appeal on a point of law, when *sedes materiae* consists *nota bene* not in the annulled provisions of § 237 paragraph 1, clause c), but in the provisions of § 237 paragraph 3 of the Civil Procedure Code.

10. The condition of § 78 paragraph 2 of the Act on the Constitutional Court has, therefore, not been fulfilled. Although the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code were applied in the proceedings, it was not in terms of a condition for suspending the proceedings. The complainant submitted a constitutional complaint, because they did not comply with the result of judicial proceedings, specifically with the conclusions of the Supreme Court in their case, while the complainant refers to conclusions in other decisions on an appeal on a point of law to support their statements. By the way, it is necessary to mention in this connection that this refutes also the opinion stated in clause 2 of the reasoning, because the interpretation of a specific contract may have, from the viewpoint of circumstances of the case, i.e. evaluating the autonomy of will of contractual parties pursuant to Article 2 paragraph 3 of the Charter of Fundamental Rights and Basic Freedoms, a general outreach. In the end, what else other than unique disputes between individual parties should be examined in such cases by courts? The fact that it is possible to infer general conclusions from these disputes cannot be questioned only in order to find – at all costs – a way to contest the provision being

annulled. In this connection, clause 3 of the reasoning of the Judgment appears to be rather strange, where it is stated as an argument that assessing the Conditions of Tender for the sale of *Stáčírna stolních vod a džusových nápojů* (Table Water and Juice Filling Plant) cannot possess case-law overlap. This is strange because, to the contrary, in clause 17 of the reasoning, the statement of the Supreme Court is quoted, which states that, under the influence of the case law of the Constitutional Court, case law has been basically removed, pre-conditioning the admissibility of an appeal on a point of law by the contested decision having to exhibit this "case-law overlap", and the reasoning, clause 44, widely quotes the main reasons of Judgment file No. IV. ÚS 128/05 dated 10 May 2005 (N 100/37 SbNU 355), which emphasise the protection of subjective rights of the appellant in such an individual case.

11. The very decision of the majority is, already in clause 1 of the reasoning, based on the fact that the complainant claims "among other items, annulment of judgment of the Supreme Court dated 22 December 2009 file No. 29 Cdo 101/2007". This cassational decision, of which the verdict says "Judgment of the High Court in Prague dated 19 September 2006 file No. 3 Cmo 138/2005-160 shall be annulled and the case shall be returned to the court of appeal for further proceedings", is not a final decision. The final decision is the above-mentioned resolution on rejecting the appeal on a point of law. In the case of a cassational decision becoming subjected to review by the Constitutional Court, it would necessarily bring about the consequence of change in the concept of admissibility of a constitutional complaint and, at the same time, also the procedure of proceedings on the same. The point is that the decision on "arbitrariness" is not simply an issue of procedural conditions of proceedings, but also a matter of evaluating the justification of the constitutional complaint itself. This seems to be the majority's way to create leeway in a procedure, exceeding the scope of or even in contravention of § 75 paragraph 1 of the Act on the Constitutional Court, and causes new doubts on the need to contest even a cassational decision, should the same be considered "arbitrary", not to mention doubts which then arise in relation to § 72 paragraph 4 of the Act on the Constitutional Court. The objection of arbitrariness may be eventually directed, based on such an approach which does not respect the basic postulates of procedural law, against any decision during proceedings. It may then concern any decision which any person concerned may consider "arbitrary" within the legal opinion presented here, and claim its "restraint" (read: in the style of "we help who we want to help") in review. I have serious doubts about the road the Constitutional Court has taken here. Pursuant to the Act on the Constitutional Court, the Constitutional Court must always start to solve the case from the end. The Constitutional Court may not, even restrainedly, as was descriptively and very unfortunately demonstrated in practice by the majority of the Constitutional Court in this case, choose a decision to begin with, because it is for some reason advantageous when, moreover, this reason lies even outside the subject of the proceedings on a constitutional complaint.

12. In this connection, I resign to objections against the very assessment of the problems regarding the appeal on a point of law and to the form of argumentation accompanied by a number of considerations which are not directly related to the given issues (explicitly in clauses 31 *et seq.* of the reasoning), because in my opinion, suspension of the proceedings should not have happened at all. In this respect, I identify myself with the arguments stated in the dissenting opinion of Vladimír Kůrka.

Dissenting Opinion of Justice Jiří Nykodým

I disagree with the majority opinion of the Plenum, through which, upon a petition by the Second Panel, the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code shall be annulled. It is primarily because I am convinced that procedural conditions for filing a petition of the Second Panel for annulment of the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code – defined by Act 182/1993 Coll. on the Constitutional Court, as amended by later regulations – have not been fulfilled. Pursuant to the provisions of § 64 paragraph 1, clause c) of the aforementioned Act, a panel of the Constitutional Court may submit a petition for annulment of an act or part of the same only in

connection with deciding on a constitutional complaint. Therefore, it is a case of a "specific control of constitutionality" which is admissible only when the act or part of the same, of which said annulment is proposed, have been directly applied in the given specific case.

The constitutional complaint through which proceedings before the Constitutional Court have been initiated, in which the Second Panel suspended proceedings and addressed the Plenum with a petition for annulment of the above-mentioned provision, contested firstly judgment of the Supreme Court dated 22 December 2009 file No. 29 Cdo 101/2007-197, whereby judgment of the High Court in Prague dated 19 September 2006 file No. 3 Cmo 138/2005-160 has been annulled, as well as a further judgment of the High Court in Prague dated 25 October 2010 file No. 3 Cmo 205/2010-240, in addition to a resolution of the Supreme Court dated 31 May 2011 file No. 29 Cdo 1113/2011-279, whereby an appeal on a point of law, directed against judgment of the High Court in Prague dated 25 October 2010 file No. 3 Cmo 205/2010-240, has been rejected.

Even when the proposed verdict of the constitutional complaint suggests that all three above-mentioned decisions be annulled, the entire argumentation of the constitutional complaint is directed against judgment of the Supreme Court dated 22 December 2009 file No. 29 Cdo 101/2007-197. Filing a constitutional complaint against this decision is inadmissible, as such a complaint was filed after the deadline and, moreover, the Constitutional Court principally does not admit a constitutional complaint against a cassational decision of the Supreme Court. This is so because such a decision is not final, and the parties to the proceedings may apply other objections in further proceedings in order to protect their rights, and it is, therefore, not excluded that they would obtain rectification of a possible deficit in constitutional law, which might have occurred at the stage prior to the cassational decision [see, for example, Judgment file No. II. ÚS 248/04 dated 31 August 2005 (N 168/38 SbNU 343) or resolution IV. ÚS 125/06 dated 30 March 2006 (U 4/40 SbNU 781)]. The argumentation of the Judgment to this objection, elaborated in part VI, is unconvincing as the exceptions to said rule there listed may hardly concern the case under examination.

Besides that, annulment of the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code does not make sense because the above-mentioned provisions may not be applied without the provisions of § 237 paragraph 3 of the Civil Procedure Code, of which the annulment has not been proposed, probably due to the fact that in the last amended arrangement the same has not been applied in the case which pertains to the constitutional complaint, additionally, in the form in which the same was applied, the same may not be annulled as the amendment to the Civil Procedure Code, executed by Act No. 7/2009 Coll., effective from 1 July 2009, essentially altered the same. Besides, the potential of the argumentation of the Judgment becomes exhausted primarily at the level of the unpredictability of decision-making by the Supreme Court when assessing the issue of vital legal significance, and, therefore, the alleged indefiniteness of the conditions defined by law for such a conclusion.

The definition of vital legal significance, as the same has been arranged in the provisions of § 237 paragraph 3 of the Civil Procedure Code, including the formulation "in particular", and the room for assessing the admissibility of an appeal on a point of law, in my opinion, does not establish unpredictability in a decision of the Supreme Court, even taking into account the fact that different interpretations of the issue of vital legal significance may occur. The purpose of the arrangement is to attain unification in the case law of ordinary courts, and this provision constitutes conditions under which any case, actually, save for the exceptions defined by law, could reach the Supreme Court, whose main mission is to unify the interpretation of generally binding regulations. Such unpredictability, therefore, does not consist in the formulation of the provisions of § 237 paragraph 1, clause c), in connection with the provisions of § 237 paragraph 3 of the Civil Procedure Code, but in the arrangement of the constitutional-law review of the decision of the Supreme Court on this question by the Constitutional Court, which constitutes a state of legal uncertainty as to whether through submitting an appeal on a point of law, the admissibility of which depends on the discretion of the Supreme Court, the participant (in case of failure, especially if the court of appeal on a point of law comes to a conclusion that no issue of legal significance has been posed at all), loses the opportunity

to file a constitutional complaint against the previous decisions of the court of the first instance and the court of appeal, which could be considered as submitted late under such circumstances. This problem consists in the formulation of the provisions of § 72 paragraph 4 of the Act on the Constitutional Court.

Dissenting Opinion of Justice Miloslav Výborný

Pursuant to the provisions of § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, (hereinafter referred to only as the "Act on the Constitutional Court "), I submit a dissenting opinion to the verdict as well as to the reasoning of the Judgment adopted. The arguments with which I refuted the possibility, necessity and correctness of adopting a granting judgment, have not been to my great grief accepted by the majority of the Plenum, and, therefore, I briefly summarise the same in this dissent.

I.
Procedural objections

1. Pursuant to the provisions of § 64 paragraph 1, clause c) of the Act on the Constitutional Court, a panel is entitled to submit a petition for annulment of an act or the individual provisions of the same in connection with deciding on a constitutional complaint.

2. The purpose of the above-quoted provision is to allow a panel of the Constitutional Court to initiate proceedings on control of constitutionality of a statutory norm in a situation when it would not be possible to solve the case heard by the panel without such review. However, this is not and was not the case here. The point is that if the panel filing the petition was convinced that the constitutionally guaranteed fundamental rights of the complainant have been (among other items) violated by the fact that the Supreme Court granted the appeal on a point of law of a secondary party, there was nothing to prevent the panel from assessing the case within the review of the consequent decisions. In the absence of the necessary connection of the immediate control of the contested norm with the case being heard, the petition filed by the Second Panel was, in essence, a petition for abstract control of a norm rather than specific control; however, neither the Constitution nor the Act on the Constitutional Court (by which the Constitutional Court is bound pursuant to Article 88 paragraph 2 of the Constitution) grants active standing to a panel of the Constitutional Court for such a petition. With respect to this, I would like to refer also to Judgment file No. Pl. ÚS 18/06 dated 11 July 2006 (N 130/42 SbNU 13; 397/2006 Coll.; available – together with the decisions quoted below – also at http://nalus.usoud.cz). There, the Constitutional Court explicitly stated: "The Constitutional Court Plenum decided in a proceeding on concrete norm control, and in its jurisprudence relating to the outcome of a derogative judgment in such a proceeding, based on the fulfilment of the conditions of § 74 of the Act on the Constitutional Court (see, in particular, Judgments Nos. I. US 102/2000, I. US 738/2000) the Constitutional Court has repeatedly emphasised: 'Although the constitutional complaint and the petition proposing the annulment of statutory provisions represent relatively separate petitions, upon which the Constitutional Court decides separately, their substantive interconnection cannot be disregarded. That is to say, this type of proceeding before the Constitutional Court falls within the field of 'concrete norm control', where a specific adjudicated matter, in which the contested legal enactment was applied, serves as the instigation for the Constitutional Court 's decision-making as to that enactment's constitutionality. It is true that one cannot, alone from the fact that the petition proposing the annulment of the legal enactment is granted, automatically draw conclusions as to whether the constitutional complaint itself will also be granted. One cannot rule out the possibility of the situation (albeit exceptional) where even following the annulment of the contested legal enactment the Constitutional Court would reject the constitutional complaint on the merits as not well-founded, where it finds in the specific case that the annulled provision did not interfere with the complainant's constitutionally protected fundamental rights; it is equally clear, however that in deciding on the constitutional complaint the Constitutional Court must take into consideration the judgment of annulment in the norm control proceeding. Were it otherwise, the submitted constitutional complaint would not fulfil its individual function, the function

of protecting the complainant's constitutionally guaranteed fundamental rights or freedoms.' the Constitutional Court would add to this that a properly submitted and admissible constitutional complaint is a prerequisite to the institution of a proceeding on this type of concrete norm control."

3. I considered and I still consider as a lapse that the activism of the Second Panel, not respecting the previous (not only the above-quoted) case law of the Constitutional Court, has been accepted by the deciding majority, as through that, the majority has washed away the significant difference between abstract and specific control of a legal norm. Only at the first sight may it seem that this distinction is a mere theoretical construction without a practical impact. In fact, accepting a possibility that the abstract control of an act is initiated by a court (here a panel of the Constitutional Court) makes judicial power almost a participant in the legislative process, i.e. a necessarily political process; and this is inadequate and dangerous for a democratic legislation.

4. In addition to that stated above, in connection with the issue of the active standing of the petitioner, the stabilised and unambiguous case law of the Constitutional Court related to the issue of admissibility of a constitutional complaint has not been taken into consideration.

5. It was the primary obligation of the Panel filing the petition to first consider whether they do not fall into conflict with this case law as well as the case law quoted above in paragraph 2, and then – if the same was convinced that it was necessary to overrule this case law – to proceed, being still bound by this case law, in a way anticipated in the Act on the Constitutional Court (§ 23), i.e. submit its dissenting opinion to the decision of the Plenum.

6. It is apparent that the contested provision of § 237 paragraph 1, clause c) of the Civil Procedure Code has been applied in previous proceedings only in the decision-making of the Supreme Court through Judgment file No. 29 Cdo 101/2007 dated 22 December 2009, through which the Supreme Court granted an appeal on a point of law of the secondary party, and annulled the previous judgment of the High Court in Prague (file No. 3 Cmo 138/2005-160), contested by the appeal on a point of law. Therefore, the Second Panel interconnected their entitlement to file a petition with hearing a constitutional complaint contesting the cassational decision of the Supreme Court. In this part, however, the constitutional complaint was inadmissible. The Constitutional Court has explicitly adjudicated in such a manner in dozens of decisions – for illustration it is sufficient to refer to Judgment file No. IV. ÚS 290/03 dated 4 March 2004 (N 34/32 SbNU 321) or resolution file No. Pl. ÚS 38/10 dated 9 February 2011 (quite recently determined for publication by the decision of the Plenum of the Constitutional Court), most recently also Judgment No. II. ÚS 2317/11 dated 24 January 2012.

7. In clauses 29 and 30 of the reasoning, the Judgment adopted subsequently attempts to remedy this lapse on the part of the petitioner. I believe that this is taking place not only belatedly and incompletely, but primarily incorrectly.

8. I believe that the incompleteness of the submitted argumentation lies primarily in total ignorance of existing case law (as an example) quoted here in paragraph 2, and further in silence about the fact that the issue of inadmissibility of a constitutional complaint against a cassational decision, through which proceedings are not ended, has been very clearly solved many times by the Constitutional Court (cf. paragraph 6 here), and, therefore, it would be appropriate to at least mention the previously adopted solutions, and subject the same to possible criticism, or refute or complete the same through argumentation, but not to sort of incidentally constitute a new doctrine without quoting at least judgment decisions related to this issue.

9. This new doctrine is principally based on the following premises:

a) a constitutional complaint is inadmissible against a cassational decision (of the Supreme Court); however,

b) there are cases when such a complaint actually is admissible; and then,

c) cassational decisions may become subjected to review only after the complainant has used up all means which they had available in relation to the cassational decision.

10. Concerning these premises newly admitting submission of a constitutional complaint against a cassational decision, I submit the following objections.

11. Only marginally to the premise stated above under clause c): it is good that this supplement has been added – otherwise also the question of timeliness of a constitutional complaint would come into consideration, connected in addition with a possibility to annul cassational decisions during the proceedings.

12. However, when it is, according to the majority of the Plenum, so or so necessary for the complainant to undergo the subsequent proceedings prior to submitting a constitutional complaint against a cassational decision, then the adopted innovation does not bring about anything at all to the protection of the constitutional rights of the complainant. If subsequent decisions, as a consequence of the opinion of a higher court, having a binding nature upon the lower court, violated the constitutionally guaranteed rights of the complainant, then nothing hinders the provision of such constitutional-law protection to the complainant through annulling such decisions; the fact that there is no possible clash (less so, the exclusion of constitutional-law protection of rights of the party to the proceedings) was explained by the Constitutional Court previously in the above-quoted Judgment file No. IV. ÚS 290/03, in which the Court explicitly stated that not only a constitutional complaint against a cassational decision of a court of appeal on a point of law is inadmissible, but also that courts whose verdicts were annulled by a judgment of the Constitutional Court would be in subsequent proceedings bound, pursuant to Article 89 paragraph 2 of the Constitution, by a repealing judgment of the Constitutional Court, not the preceding conclusions included in the cassational judgment of the Supreme Court.

13. The exception pursuant to the premise stated above in paragraph 9 b) is, moreover, in my opinion not only unnecessary, but primarily incorrectly justified.

14. Both of the model cases justifying the exception, as are stated in clause 29 of the Judgment, are essentially completely incomparable. By such incommensurability, the explanation of the need for its introduction into the procedural practice of the Constitutional Court is considerably.

15. As for the first model case (a belatedly submitted appeal on a point of law was heard and granted), I wish to remark that no case so framed is known; should such a case occur in the future, it would be solvable using existing means (here compare paragraph 12).

16. However, what is dangerous are the conclusions resulting from the second model (admissibility of an appeal on a point of law was assessed arbitrarily). A closer analysis makes it apparent that the exception framed here is actually no exception at all. When the decisive majority of the Plenum admitted that an analogy to the first model (I personally do not believe at all that this could be an "analogy") is a situation of arbitrary assessment of the admissibility of an appeal on a point of law, then the majority did not adjudicate merely an opinion on the admissibility of a constitutional complaint against an allegedly arbitrarily adopted cassational decision, but primarily the consequence resulting from this opinion: i.e. that for every cassational decision contested by a constitutional complaint it is necessary to examine whether the admissibility of the same has or has not been assessed arbitrarily by the Supreme Court; an exception thus becomes an uncompromising rule. Moreover, it would not be the arbitrariness of a decision which would be reviewed, but the arbitrariness of consideration on the admissibility of an appeal on a point of law, i.e. a consideration which, as a necessary preliminary act of thought, is not included in the verdict of the decision, but at most in the reasoning of the same.

17. Meanwhile it is not true that – I quote from clause 29 of the Judgment – that "if the Constitutional Court then insisted on a categorical conclusion on inadmissibility of a constitutional complaint against a cassational decision of supreme judicial instances, then part of the judicial proceedings would find itself completely out of the framework of any control, as, *de facto*, these courts would be given almost unlimited cassational powers when a court of lower instance would not be entitled to correct any possible deviation from the limits of a fair trial, in addition to which the constitutional-law protection of rights of a party to the proceedings would also be eliminated, through the inadmissibility of the constitutional complaint." On the contrary, the strict conclusion enforced by the majority brings about a question whether the complainant is obliged, in addition to the consequent decision (decisions), to contest also the preceding cassational decision (for arbitrariness in adopting the same; here I wish to add that if subsequent decisions based on legal opinions of the repealing judgment of the Supreme Court were unconstitutional, it would probably always be necessary to assess the judgment of the Supreme Court as an arbitrarily adopted decision).

18. Due to the above, the structure of admissibility of a constitutional complaint against a cassational decision of the Supreme Court is not only in contravention of the existing case law of the Constitutional Court, but also meaningless both for hearing the case being solved by the Second Panel of the Constitutionally Court and generally. The only purpose of the same may be to subsequently justify the active standing of the Second Panel for submitting the petition; however, I cannot agree with this.

19. *In concreto* I pose the question of how will the derogative decision of the Plenum actually help the Second Panel to correctly solve the case assessed by the Panel. I cannot find a relevant answer to this question and thus I come circuitously to the previously explained opinion that the Second Panel initiated here not specific but an abstract norm control.

20. Therefore, the petition of the Second Panel should have been rejected pursuant to the provisions of § 43 paragraph 1, clause c) of the Act on the Constitutional Court.

II.
Factual objections

21. With my being convicted that the petition should not have been heard at all due to the lack of authorisation of the petitioner, I could have ended with my procedural objections. However, I consider it polite to express at least briefly my disagreement also with the assessment of the case itself.

22. I find the derogative reasons listed in the Judgment to be very unconvincing. It is surely possible to agree with the general deductions as regards the right to access to the court and as regards the predictability of judicial decision-making, but applying these principles to a review of the constitutionality of the contested statutory provision is inadequate. Even if the Supreme Court decided on the admissibility of the appeal on a point of law pursuant to the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code in an inconsistent or volatile way, even (sometimes) arbitrarily, it would not be a relevant argument for annulling a legal norm. Any excesses in decision-making, i.e. in applying a legal norm, should be corrected through annulment of excessive decisions, not through annulment of the norm itself. The longstanding and correct doctrine of the Constitutional Court that a reason for derogation of any legal norm is constituted only under the circumstance that it is not possible to interpret such a norm in a constitutionally conforming way is hereby – again silently and without counterarguments – abandoned, even when the provision being reviewed not only is interpretable in a constitutionally conforming way, but also at the present, further under the influence of the case law of the Constitutional Court, is being interpreted by the Supreme Court in compliance with this case law. Even if arbitrariness has occurred in one case or another, it is not, as stated above, a reason for annulling a basically reasonable provision of the procedural law. Besides, I have not even mentioned the connection of the derogated provision primarily with the provisions of § 237 paragraph 3 of the Civil Procedure Code, which provides a sufficient guideline for interpreting the admissibility also of a "non-claimable" appeal on a point of law.

23. A number of other reasons for which derogation of the contested provision should not have occurred, have been stated in the dissenting opinions of other dissenting Justices. I do not consider it beneficial to repeat the argumentation submitted by them.

III.
Conclusion

24. The entire Judgment seems to be infused with the sense of the majority that through derogation of the contested provision and a new, "better" definition of the same, a condition will be established of predictability of decision-making of the Supreme Court with respect to the issue of admissibility of an appeal on a point of law.

25. I could hardly find an example of a less predictable decision of the Constitutional Court than the judgment now adopted by the majority. Through many years, in dozens, or rather hundreds, of cases the Constitutional Court has found no reason to doubt the constitutional conformity of the statutory provisions annulled through the judgment. The sudden revelation on the unconstitutionality of § 237 paragraph 1, clause c) of the Civil Procedure Code, unsolvable even through interpretation, may surprise the legislature to such a degree that they might leave unregulated the admissibility of an appeal on a point of law against a non-deformal decision, which would, as a consequence of the Judgment of the Constitutional Court, dramatically restrict the access of parties to the Supreme Court. Such construction of a civil procedure is perhaps constitutionally possible, but I do not find it correct.

26. It is not true and it is insufficient that the majority of the Plenum of the Constitutional Court probably considered the provisions of § 237 paragraph 1, clause c) of the Civil Procedure Code, or its application by the Supreme Court, to be a problem. Even if there were issues regarding such application, these would be solvable and a solution has been already found by the Supreme Court and the Constitutional Court, and the Constitutional Court has never considered it necessary to proceed to a derogative decision. If the decisive majority is currently convinced that "the time has come" (clause 67 of the Judgment) for a legislative formulation different from the existing one, the majority quite optimistically disregards that the legislature needs not proceed to create a new arrangement. Besides that, even if the legislature adopted a new arrangement, it may hardly be expected that such an arrangement – as generally every procedural innovation – would not bring about, though maybe temporarily, problems in interpretation and application. Within the protection of constitutionality, the Constitutional Court should through its derogative judgments solve real problems, that is those that are unsolvable without derogation, and not demonstrate their ambition to become the inspirer of a legislative arrangement, whose trouble-free nature is merely a hardly-feasible desire.