Yearbook of the Constitutional Court of the Czech Republic

YEARBOOK
2016

ISBN: 978-80-87687-12-3

“Everyone has the capacity to possess rights.”

(Charter of Fundamental Rights and Freedoms, Article 5)

CONTENTS

2016

1. INTRODUCTION

2016

Dear readers,

This is the third time the Constitutional Court has compiled an English yearbook to summarise basic information on the court and all the material events that occurred during the past year.

We greatly appreciated that after three years of gradual replacement of our judges, last year was the first when we were able to work with a stable team. And there was indeed some work to do... In spite of the constantly growing number of cases, we are glad to have our ranks complete. Indeed, a mere glance at the unstable composition of other constitutional courts shows us that this is certainly not routine.

The Constitutional Court received almost 4,300 petitions to initiate proceedings in 2016, of which 36 cases were dealt with by the Plenum.

A typical feature lay in the broad scope of our decisions, both those rendered by the individual panels and those of the Plenum. The latter dealt mostly with matters of family law related to adoption of children by a civil partner and rulings of common courts on whether a marriage had been validly established. Other topical issues were related to taxes (taxation of "high-income working pensioners"; legislation on VAT control reports), remuneration of members of the Supreme Audit Office and the constantly recurring question of remuneration of justices in common courts. I should also mention the Plenum's decision on local jurisdiction of courts in pre-trial criminal proceedings and the judgement adopted at the very end of the year in which the Court dealt with protection of personal data in public access to the files of the former State Security service. I cannot – and certainly do not intend to – describe in this introduction all the interesting decisions we rendered last year. A more detailed analysis of our case-law is provided in Chapter 4, dealing with the Constitutional Court's decisions in 2016.

In terms of our foreign relations, we attach the greatest importance to the candidacy of the Czech Constitutional Court for the Presidency of the Conference of European Constitutional Courts in the 2017–2020 period. Our candidacy was driven by two main reasons – one contemporary and one historical. We are concerned about the growing pressures on constitutional courts in many countries of the continent, about the systematic undermining of their position and independence. We believe that the Conference could serve precisely as the platform that could offer support to those constitutional courts which are facing threats to their independence, whether in terms of personnel, functions or systemic arrangements.

The second, and more pleasant, reason for our candidacy is a forthcoming anniversary. The year 2020, when the country presiding over the Conference will hold the 28th Congress, will mark one hundred years from the very inception of European constitutional justice. This primacy is shared by Czechoslovakia and Austria and it would therefore truly be symbolic if the century of constitutional justice was commemorated in a country where a constitutional tribunal was born.

We will learn whether our candidacy was successful only in July 2017 at the Congress held in Batumi, Georgia, and thus long after this yearbook is published. Nonetheless, I am convinced that our efforts make sense and also serve a certain mission. I would therefore like to use this opportunity to thank everyone who has expressed their support and offered us help. We really appreciate it!

Thus, no matter which of the European constitutional tribunals is pronounced the presiding court of the Conference in 2017, the Czech Constitutional Court will continue to emphatically protect the constitutional order and defend fundamental human rights. And we will surely prepare yet another yearbook for you next year.

Prof. Jaroslav Fenyk
Vice-President of the Constitutional Court
(responsible for foreign relations)

2. ABOUT THE CONSTITUTIONAL COURT

2016

History of Constitutional Judiciary

The Czechoslovak First Republic

The history of the constitutional judiciary in our territory began shortly after the birth of the Czechoslovak Republic when, pursuant to the Constitutional Charter of 1920, a separate Constitutional Court was established in 1921. The seven-member body was formed in such a way that the President of the Republic appointed three Justices, including the Chairman, and a further four were delegated to their offices, two from the Supreme Court and two from the Supreme Administrative Court. Justices had a ten-year term of office. The first group of Justices of the Constitutional Court of the Czechoslovak Republic was appointed on 7 November 1921: Karel Baxa became the President, and Antonín Bílý, Petrovič Mačik, Josef Bohuslav, Václav Vlasák, František Vážný and Bedřich Bobek the other Justices. After the term of office of the Court‘s first composition had expired, a new contingent of Justices was only appointed in 1938; naturally, it did not hold court during the war period, and its work was not resumed at the end of the war. The work of the First Republic’s Constitutional Court is viewed as a subject of little interest and not of great significance.

The Constitutional Judiciary during the Communist Regime (1948–1989)

The constitutions of 1948 and 1960, which reflected the legal situation of the totalitarian state of that time, no longer called for a constitutional court. An odd situation came about after the state was federalized in 1968, as the Act on the Czechoslovak Federation not only envisaged the creation of a constitutional court for the federation, but also of a constitutional court for each national republic. None of those courts was ever established, however, even though the unimplemented constitutional directive stayed in effect for more than two decades.

The Constitutional Court of the Czech and Slovak Federal Republic (1991–1992)

It was only after the collapse of the Communist regime that a genuinely operational Constitutional Court of the Czech and Slovak Federal Republic (ČSFR) was established pursuant to a federal constitutional act from February 1991. That federal court was a twelve-member body in which each of the Federation’s constituent republics was represented by six Justices, whose term of office was meant to be seven years. The Court’s seat was also in Brno. Ernest Valko was appointed the President of the Constitutional Court of the ČSFR, and Vlastimil Ševčík became its Vice-president. The members of Panel I were Justices Marián Posluch, Jiří Malenovský, Ivan Trimaj, Antonín Procházka, with Ján Vošček as a substitute member. Panel II comprised Justices Pavel Mates, Peter Kresák, Viera Strážnická, Vojen Güttler, and Zdeněk Kessler as a substitute member. Despite its short existence, the Federal Constitutional Court adjudicated more than one thousand matters, and the Constitutional Court of the Czech Republic has, in its work, followed the federal court‘s legal views in a number of its decisions.

The First Period of the Constitutional Court of the Czech Republic (1993–2003)

Following the dissolution of the Czechoslovak federation, the existence of a constitutional court was also provided for in the Constitution of the independent Czech Republic, of 16 December 1992. The first Constitutional Court of the Czech Republic began working on 15 July 1993. On that day, Václav Havel, the then President of the Republic, appointed twelve of the fifteen Justices of this Court for a ten-year term of office, consent to their appointment having been given at that time by the Assembly of Deputies of the Parliament due to the fact that the Senate did not yet exist. This occurred a mere month after the Assembly of Deputies had approved Act No. 182/1993 Sb., on the Constitutional Court, which, with reference to Article 88 of the Constitution, governed in particular the organization of this Court and proceedings before it, and designated the city of Brno as the Court’s seat.

Thus, with the appointment of the first twelve Justices of the Constitutional Court, a new era for the constitutional judiciary commenced, moreover, in a newly formed state. It is therefore appropriate to recall the initial composition of the Constitutional Court of the Czech Republic.

Zdeněk Kessler was the President of the Constitutional Court until his resignation for health reasons in February, 2003, and Miloš Holeček was the Vice-president (following Zdeněk Kessler's resignation, the President of the Republic, Václav Klaus, appointed him President for the remainder of his term of office). The other Constitutional Court Justices appointed on 15 July 1993 were Iva Brožová, Vojtěch Cepl, Vladimír Čermák, Pavel Holländer, Vojen Güttler, Vladimír Jurka, Vladimír Klokočka, Vladimír Paul, Antonín Procházka and Vlastimil Ševčík. The Court's bench was filled further in November 1993 with the addition of Ivana Janů who also became the second Vice-president, and Eva Zarembová, and then completed at the end of March 1994, when the President of the Republic appointed the fifteenth and final Justice, Pavel Varvařovský.

The Constitutional Court continued to sit in this composition until 8 December 1999, when Iva Brožová resigned from office. Jiří Malenovský (who was the first Justice to be approved by the Senate of the Parliament) replaced her on 4 April 2000. In connection with her election as judge *ad litem* of the International Criminal Tribunal for the former Yugoslavia, Ivana Janů resigned from office on 9 February 2002, both as Justice and Vice-president of the Constitutional Court, and on 20 March of that year, Eliška Wagnerová was appointed. Vladimír Paul, who died on 3 April 2002, was replaced by František Duchoň (appointed on 6 July 2002), and the seat of Vlastimil Ševčík, who died on 15 December 2002, was filled by Jiří Mucha (who was appointed on 28 January 2003). After Zdeněk Kessler's resignation (on 12 February 2003, for health reasons) from the office of President of the Constitutional Court, the Court's bench was filled out by the appointment on 3 June 2003 of Miloslav Výborný.

The bench did not remain full for very long, as on 15 July 2003, the terms of office of Justices Vojtěch Cepl, Vladimír Čermák, Vojen Güttler, Pavel Holländer, Vladimír Jurka, Vladimír Klokočka, Vladimír Paul, and Antonín Procházka expired, as did that of the President of the Constitutional Court, Miloš Holeček. A month later (6 August 2003) Vojen Güttler a Pavel Holländer were appointed for a further term of office, with Pavel Holländer also promoted to the position of Vice-president.

The Second Period of the Constitutional Court of the Czech Republic (2003–2013)

In 6 August 2003, on the same day he reappointed Vojen Güttler and Pavel Holländer, the President of the Republic appointed the current President of the Constitutional Court, Pavel Rychetský. Other departing Justices were gradually replaced in the second half of 2003 by Dagmar Lastovecká (29 August 2003), Jan Musil (27 November 2003) and Jiří Nykodým (17 December 2003); the following year brought the appointments of Stanislav Balík (26 May 2004) and Michaela Židlická (16 June 2004), and the reappointment of Ivana Janů (16 September 2004). However, the Court's bench was still not at full strength, a situation that was aggravated by the departures of further Justices: on 9 November 2003 Eva Zarembová's term of office expired, as did Pavel Varvařovský's on 29 March of the following year, and two months later (8 May 2004), Jiří Malenovský resigned as a Justice to become a judge of the Court of Justice of the European Communities in Luxembourg. The Constitutional Court attained a full composition only in December 2005, after Vlasta Formánková was appointed on 5 August 2005 and Vladimír Kůrka was appointed the fifteenth constitutional Justice (15 December 2005).

Vladimír Kůrka's appointment brought to an end a turbulent period associated with the periodical rotation of Constitutional Court justices. The Constitutional Court was fully staffed and worked under the presidency of Pavel Rychetský up to 20 March 2012 when the mandate of Vice-president of the Constitutional Court, Eliška Wagnerová, expired. Her departure marked the beginning of a new cycle of rotation of Constitutional Court justices which culminated in particular in the second half of 2013: the terms of office of a further nine Constitutional Court justices expired, as follows: those of František Duchoň (6 June 2012), Jiří Mucha (28 January 2013), Miloslav Výborný (3 June 2013),

Pavel Holländer (6 August 2013), Vojen Güttler (6 August 2013), Pavel Rychetský (6 August 2013), Dagmar Lastovecká (29 August 2013), Jan Musil (27 November 2013), and Jiří Nykodým (17 December 2013). The departing Justices were gradually replaced by Milada Tomková (appointed Vice-president of the Constitutional Court on 3 May 2013), Jaroslav Fenyk (3 May 2013, appointed Vice-president of the Constitutional Court on 7 August 2013), Jan Filip (3 May 2013) and Vladimír Sládeček (4 June 2013).

Constitutional Court under the presidency of Pavel Rychetský (current third period)

On 7 August 2013, Pavel Rychetský was appointed President of the Constitutional Court by the President of the Republic for the second time, and together with him, Ludvík David and Kateřina Šimáčková were appointed as Justices. The rotation continued by the appointment of further Justices of the Constitutional Court, namely, Radovan Suchánek (as of 26 November 2013), Jiří Zemánek (20 January 2014), and Jan Musil for the second term of office (20 January 2014). In 2014, the terms of office of three Justices of the Constitutional Court expired: Stanislav Balík (26 May 2014), Michaela Židlická (16 June 2014), and Ivana Janů (16 September 2014). Vojtěch Šimíček (12 June 2014), Tomáš Lichovník (19 June 2014) and David Uhlíř (10 December 2014) were gradually appointed to fill the vacancies. The periodical rotation was completed in 2015 when the mandates of Justices Vlasta Formánková (August 2015) and Vladimír Kůrka (December 2015) expired. The vacant positions were taken by Jaromír Jirsa (October 7, 2015) and Josef Fiala (December 17, 2015). The Constitutional Court´s restoration has been concluded in 2015.

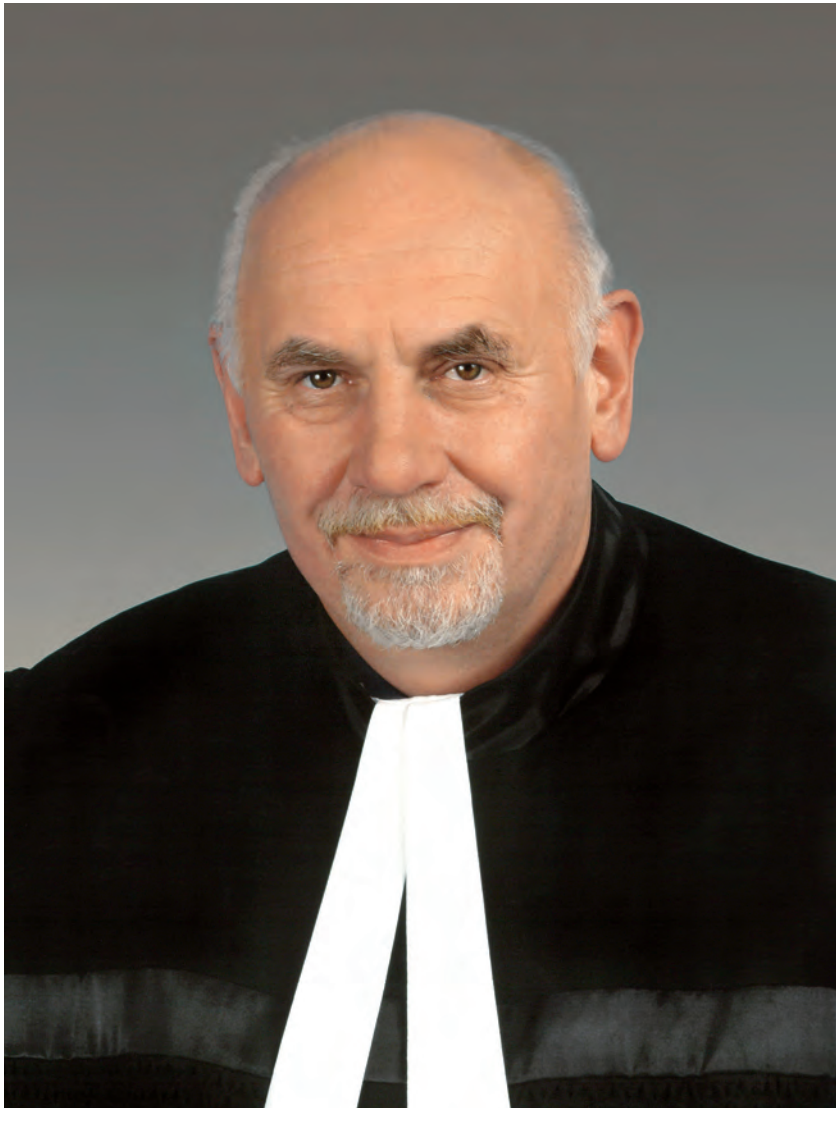
Justices and Structure of the Court

APPOINTMENT OF JUSTICES

According to the Constitution, the Justices of the Constitutional Court are appointed by the President of the Republic with the consent of the Senate of the Parliament of the Czech Republic (hereinafter “Senate”). The President of the Republic selects a candidate whose name is then sent, through the Office of the President of the Republic, to the Senate with a request to express its consent to his/her appointment as a Justice of the Constitutional Court. Consent to the appointment of the candidate as a Justice of the Constitutional Court is given if a simple majority of Senators present vote in favor.

If the Senate grants consent, the President appoints the candidate as Justice of the Constitutional Court, and the candidate thereby becomes a Justice of the Constitutional Court. The Justice enters into office by taking the oath of office prescribed by the Constitution and administered by the President.

It is an indispensable condition to holding office that an appointed Justice of the Constitutional Court take the oath of office prescribed by the Constitution and administered by the President. If he/she does not take the oath of office, or does so with reservations, the candidate does not become a Justice of the Constitutional Court.



CURRENT JUSTICES

PAVEL RYCHETSKÝ
President (6 August 2003 – 6 August 2013)
President (reappointed since 7 August 2013);

JUDr. Pavel Rychetský (*1943) graduated from the Faculty of Law, Charles University, Prague ("Charles University Law Faculty") in 1966 and passed both his doctoral and judicial examinations in 1967. In 1966, he became a trainee judge at the Municipal Court in Prague; however, due to criminal prosecution for his protests against political trials, he was forced to leave the court. He became an assistant professor of Civil Law, Charles University Law Faculty, but was forced to leave after the 1968 Soviet occupation. He worked as an in-house lawyer until the end of 1989. In the "Normalization" era, Pavel Rychetský engaged in civic resistance against the totalitarian regime, was a co-founder and one of the first signatories of Charter 77, and published articles in foreign journals and Czech samizdat. He was a member of the Civic Forum and its Council of the Republic. On 8 January 1990, he was appointed Czech Prosecutor General. From June 1990 to July 1992, he served as Deputy Prime Minister of the Government of the Czech and Slovak Federal Republic (CSFR) and Chairman of the Government Legislative Council, ensuring both the coordination of the CSFR legislative work and the CSFR Government's cooperation with the Federal Assembly and the republics' governments. In his capacity as Deputy Prime Minister of the Federal Government, he submitted numerous bills to the Federal Assembly (e.g., on the Constitutional Court, Referenda, Return of Communist Party Property to the People, the restitution acts, etc.). From 1992, he worked as an attorney-at-law and lecturer in political science at the International Relations Faculty, Prague School of Economics. He published many scholarly and popular articles, both nationally and internationally. In 1996–2003, he was a Senator in the Senate, Parliament of the Czech Republic ("Senate"), where, until he become Deputy Prime Minister, he served as the Chairman of its Constitutional Law Committee and a member of its Mandate and Immunity and Organizational Committees. In 1998–2002, he was Deputy Prime Minister of the Czech Government and Chairman of the

Government Legislative Council, Council for National Minorities, Council for Romany Community Affairs, and Council for Research and Development. From 15 July 2002 to 5 August 2003, he once again served as Deputy Prime Minister, as well as Minister of Justice and Chairman of the Legislative Council. In 1990–92, he was President of the Union of Czech Lawyers, and in 1992–98, President of the Board of Trustees of the Foundation for Bohemia. In 1996, he founded the Fund for Citizens of Prácheňsko, focusing on social issues in the region. On 6 August 2003, after the Czech Senate had granted consent to his appointment, he was appointed a Justice and the President of the Constitutional Court of the Czech Republic ("Constitutional Court") by President Václav Klaus. On 12 July 2005, the President of the French Republic, M. Jacques Chirac, awarded Pavel Rychetský the Légion d´honneur, Officer Class. He is currently Chairman of the Czech Lawyers Union and a member of Science Boards of the Faculty of Law of Charles University in Prague, Faculty of Law of Masaryk University in Brno, and Faculty of Law of Palacký University in Olomouc.

In 2015, he was introduced as a new member of the Legal Hall of Fame for exceptional life-long contribution to law. In 2016, he received the František Palacký Award by Palacký University in Olomouc which primarily appreciated his participation in lecturing for Master's and Ph. D. students at Law School of PU, regular participation in conferences and overall contribution to the prestige of the university and the Czech Republic. In the same year Pavol Jozef Šafárik University in Košice, Slovakia, bestowed the honorary degree doctor honoris causa in the area of law on him for his influence and his being an outstanding personality which contributed to the development of democracy and humanity.

MILADA TOMKOVÁ
Vice-President (since 3 May 2013)

Graduated from the Charles University Law Faculty, obtaining the title Doctor of Law summis auspiciis. In 1987–2003, she worked at the Ministry of Labor and Social Affairs, from 1992, as Director of the Legislative Department, where she was responsible for the drafting of legal regulations covering social care under the new social conditions after 1990. She was also concerned with issues in international co-operation in the area of social security and took part in a number of international conferences and seminars related to social security law. She went to the European Commission on a research fellowship of several months focusing on EU law in the area of social care. In 1998–2003, she was a member of the Government Legislative Council of the Czech Republic. She drafted amendments to implementing guidelines in the area of social care in connection with the preparation of reforms to the administrative justice system.

She was appointed as judge in 2003 when she joined the Supreme Administrative Court, where she held the positions of Presiding Judge at the Social Security Law Division and Presiding Judge at the Disciplinary Division for matters concerning public prosecutors. She was also a member of the Board of the Judicial Academy. She works externally with the Charles University Law Faculty in Prague.

On 3 May 2013, she was appointed as Justice of the Constitutional Court and Vice-president of the Court by the President of the Republic.

JAROSLAV FENYK
Vice-President (since 7 August 2013); Justice (since 3 May 2013)

Graduated in law from the Charles University Law Faculty in Prague in 1986, where he obtained the title Doctor of Law in the field of criminal law – theory of the state and law – in 1987. In 2001, he obtained the title Ph.D. in the field of substantive and procedural criminal law at the Faculty of Law at Masaryk University in Brno, and in 2002, he obtained a higher doctorate (Doc.) in the field of security services at the Police Academy in Bratislava. In 2004, he was awarded the title Private University Professor (Univ. Priv. Prof.) in social sciences – European criminal law – by the University of Miskolc in Hungary. In 2008, he received the title Doctor of Social and Humanitarian Sciences (DSc.) from the Academy of Sciences of the Czech Republic. He was appointed Professor of Criminal Law by President Václav Klaus in 2009.

He is a professor at the Department of Criminal Law at the Faculty of Law at Masaryk University in Brno, and has also held the same position at the Charles University Law Faculty in Prague. He further lectures at other universities and institutions in the Czech Republic and abroad. He was Vice-dean for Foreign Relations at the University of Law in Bratislava. He held a number of research fellowships abroad, for example at the Supreme Administrative Court and the Ministry of Justice in France, took part in a government anti-corruption study programme in the USA, a programme at the Ford Foundation for the protection of human rights (RSA), etc. He served on expert committees at the Council of Europe and working groups at the European Commission, and participated in many international conferences and seminars related to criminal law, combating economic and financial crime and corruption, and international judicial co-operation. He worked with professional bodies and research institutions abroad (including the Institute for Post-graduate Legal Education in Atlanta, the Max Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau, the Institute of Advanced Legal Studies at the University of London, the Academy of European Law in Trier, universities in Vienna, Rotterdam, Nijmegen, Ghent, Stockholm, Örebro, Miskolc and Luxemburg, the John Marshall Law School in Chicago, etc.), where he lectured and worked on international research projects focusing on criminal law, the position of public

prosecution and international judicial co-operation in criminal matters, and the harmonisation of criminal law and associated legislation in connection with the accession of the Czech Republic to the EU. He published a number of monographs and academic articles focusing primarily on substantive and procedural criminal law in the domestic and international context.

He served on working committees at the Ministry of Justice for the amendment and re-codification of criminal law and on the Government Legislative Council of the Czech Republic. He is currently a member of the Commission for the Defense of Doctoral Theses of the Academy of Sciences of the Czech Republic, and a member of editorial boards of professional and academic periodicals. He is a member of the Science Board of the Faculty of Law at Masaryk University in Brno and the Pan-European University of Law, and a member of the Science Board of the Faculty of Law at Palacký University in Olomouc. He received the award "Lawyer of the Year" for 2010 in the field of criminal law. In 1988–2006, he worked as a counsel for the prosecution, later (1993) as public prosecutor, serving as Deputy to the Supreme Public Prosecutor in 1999–2006. He worked as a barrister in 2006–2013.

On 3 May 2013, he was appointed as Justice of the Constitutional Court by President Miloš Zeman, and on 7 August 2013, Vice-president of the Constitutional Court.

JAN MUSIL
Justice since 20 January 2014
(also from 27 November 2003 to 27 November 2013)

Prof. JUDr. Jan Musil, CSc. (*1941) graduated from the Charles University Law Faculty in 1963. He then worked as an articled clerk and prosecutor at the Prosecutor's Office in Šumperk, focusing on juvenile crime. From 1967, he taught at the Charles University Law Faculty, where he was appointed associate professor in 1985 and full professor in 1993, at which time he became the Chair of the Department of Criminal Law. In 1992–98 he was the Rector of the Czech Police Academy, and Deputy Rector until 2003. He also taught at the Western Bohemian Law Faculty. He has been on many fellowships and lecture visits abroad. He is a regular guest of the Max Planck Institute for Foreign and International Criminal Law in Freiburg im Breisgau. He is a member of the Scientific Council of the Charles University Law Faculty, the Masaryk Law Faculty, and the Police Academy. He sits on the Advisory Board, Institute for Criminology and Social Prevention. He is also a member of the Society for Criminology and of the National Group of the International Criminal Law Society. He is an honorary member of the White Circle of Safety, a civic association that helps victims of crime.

On 27 November 2003, President Václav Klaus appointed him as Justice of the Constitutional Court. On 20 January 2014, President Miloš Zeman appointed him for the second term of office as Justice of the Constitutional Court.

JAN FILIP
Justice (since 3 May 2013)

Professor Filip graduated from the Faculty of Law, University of Jan Evangelista Purkyne (UJEP), today the Masaryk University in Brno. During his studies, he worked part-time, and after graduation, full-time, as assistant lecturer at the Department of Theory of Law and Constitutional Law, Faculty of Law, UJEP (1974–1993). In 1975, he earned his JUDr. degree. His thesis was entitled "Constitution in the Legal System of the CSSR". He become lecturer in 1977. The degree Candidate of Sciences in Constitutional Law was conferred on him in 1984 (dissertation: "The Concept, Substance, Content and Forms of a Socialist-Type Constitution"). In 1992, he received his associate professor's degree. His habilitation thesis was on "Basic Voting Rights Issues in the Czechoslovak Federal Republic" and summarized his experience from the preparation of electoral laws in 1990. The Professor of Constitutional Law degree was conferred on him in 1998. In 1995–2013, Professor Filip headed the Department of Constitutional Law and Political Science at the Faculty of Law, Masaryk University in Brno, which soon gained prominence as a thriving centre of legal studies and the education of young professionals. He lectured mostly on subjects such as constitutional law, constitutional developments in the territory of the Czech Republic, lawmaking, constitutional basis of public authority, litigation before the Constitutional Court and voting rights there. He also provided instruction to foreign students (Constitutional Law, Verfassungsrecht der TchR) and students studying for LL.M and MPA degrees. In 2002–2006, Professor Filip taught Constitutional Law, Comparative Constitutional Law, and Methodology of Creative Work at the University of T. Bata in Zlín. In the late 1980s, he held a secondary employment as an independent researcher at the Institute for State and Law of the Czechoslovak Academy of Sciences and, in 1990, as a specialist at the State Administration Institute. He served on the science boards of Masaryk University and Palacky University. He is currently a member of the science boards at the Faculty of Law, Masaryk University, and the Charles University Law Faculty.

Apart from his pedagogical activities, Professor Filip often helps solve practical problems arising in the process of drafting of legal regulations, or writes expert

opinions for government agencies. From 1992 onward, he worked at the Constitutional Court of the CFSR as assistant to Justice Vojen Güttler, and at the Constitutional Court of the CR as assistant to Justices Vojtěch Cepl and Jiří Mucha. He also worked in the Legislative Department of the Federal Assembly Chancellery (1973, 1987–1989), and subsequently in the Legislative Department of the Senate Chancellery (1997–2007). For a number of years, he was a member of the Government Legislative Council (1998–2006), following his membership in a government commission for public law in 1990–1992. In the same period, he served on the Czech National Council's commission for the drafting of the Constitution.

Professor Filip took part in a variety of foreign internships and conferences. He published hundreds of scholarly papers in the Czech Republic and abroad, focusing on the theory of constitution, voting rights, theory of legislation, parliamentarianism, and especially constitutional jurisprudence. Updated editions of his textbook on constitutional law have been in print since 1993. He co-authored a textbook of political science and a commentary on the Constitution of the Czech Republic and its Constitutional Court. Professor Filip also serves on editorial boards of domestic and foreign professional journals. His gained practical experience in constitutional judicature during his fellowship stays at the constitutional courts of Yugoslavia (1978), Austria (1992, 1995, 1996), Poland (1993) and Germany (2006).

On May 3, 2013, the President of the Republic appointed Professor Filip as Justice to the Constitutional Court.

VLADIMÍR SLÁDEČEK
Justice (since 4 June 2013)

Born in 1954. Studied law in 1975–1979. Joined the Institute for Inventions and Discoveries in the year of his graduation and worked there until March 1983, mainly at the Legislative and Legal Department. Produced a thesis for his doctoral examination during the course of 1980 (on the review and complaints procedure in the area of inventions and discoveries), and defended it on 2 December 1980 (study field: administrative and state law).

In 1983, he took part in the selection proceedings for residencies offered by the then Institute of State Administration, where he was accepted as a residency participant (for two years). In April 1985, he was taken on as a full-time member of staff as a specialist focusing, first and foremost, on the reformation of bodies of local administration and legislation in general.

Following a short period of external co-operation with the Office of the President of the Republic (January to June 1990), he worked at the Office of the Federal Assembly from August 1990 to August 1992, initially as a legal consultant, later as a secretary to the committee of deputies and experts for the preparation of the new Constitution of the Czech and Slovak Federal Republic.

In 1991, he was taken on as a part-time member of staff at the Charles University Law Faculty on the basis of an open competition (Department of Administrative Law), where he has been working full-time from August 1992 to the present day. He worked first as a lecturer, and successfully defended his higher doctorate in September 1995 (Ombudsman, protector of the law in the public administration) and was appointed senior lecturer for administrative law and administrative science on 27 November 1995. The Research Board of Charles University ruled on 29 November 2001, on the basis of the defense of his doctoral dissertation, on the conferral on him of the academic title Doctor of Legal Sciences in the field of administrative law, the state administration and constitutional law. Following professorial proceedings, he was appointed professor in administrative law and administrative science by the President of the Republic on 2 May 2006.

Almost from the beginning of the existence of the Constitutional Court (from November 1993), he worked part-time as assistant to a Justice of the Constitutional Court (until the death of the Justice in 2002). In 2001, he worked with JUDr. Otakar Motejl on the establishment of the Office of the Public Defender of Rights – Ombudsman, and later provided expert consultations to the office, in particular in connection with the Annual Report on the Activities of the Public Defender of Rights – Ombudsman. From 2003, he taught part-time at the Faculty of Law at Palacký University in Olomouc (from 2009, as Head of the Department of Administrative Law and Administrative Science).

He was appointed as Justice of the Constitutional Court by the President of the Republic on 4 June 2013.

LUDVÍK DAVID
Justice (since 7 August 2013)

JUDr. Ludvík David, CSc. was born in 1951. He studied at the Faculty of Law at J. E. Purkyně University in Brno. After completing his studies in 1974, up until 1982, he worked in the academia (as lecturer at the same faculty until 1979, and then as research assistant at the Institute of State and Law at the Czechoslovak Academy of Sciences in Prague). From 1982, he worked as a corporate lawyer. In mid-1985, he became a barrister and worked as such until 1993. In June of the same year, he was appointed as judge, and worked as a judge and Presiding Judge at the Municipal Court in Brno until 2000, and then at the Regional Court in Brno until 2002. In the same year, he was assigned to the Supreme Court in Brno where, after a one-year research fellowship, he became a judge in 2003 and Presiding Judge at the Civil Law and Commercial Division. He was also a member of the Records and Grand Panel of the same court. He lectures externally at the faculties of law at Masaryk University in Brno and Palacký University in Olomouc and abroad (the USA). He is the author and co-author of a number of books (commentaries on legal codes, overviews of jurisdiction) and almost a hundred papers in specialist periodicals on topics concerning substantive and procedural civil law, labor law, restitution and legal philosophy. As a member of the Union of Czech Lawyers, he received the Antonín Randa Bronze Medal. He has never been a member of any political party. He was appointed as Justice of the Constitutional Court by President Miloš Zeman on 7 August 2013.

KATEŘINA ŠIMÁČKOVÁ
Justice (since 7 August 2013)

JUDr. Kateřina Šimáčková, Ph.D. comes from Brno, where she graduated from the Faculty of Law in 1988. She rounded-off her education after 1989 during research fellowships at universities in France and Germany, at the European Court for Human Rights in Strasburg, and at the Collège Universitaire d´Études Fédéralistes in Aosta in Italy.

In the years 1988 to 1990, she worked as a lawyer at a regional hygiene station, and then as Assistant to Constitutional Justice JUDr. Antonín Procházka at the Constitutional Court of the Czechoslovak Federal Republic, and as an articled clerk. She was a barrister for fifteen years (1994–2009) and became acquainted with a number of branches of the law during her practical experience; she frequently appeared as a solicitor at the Constitutional Court of the Czech Republic, both in proceedings on constitutional complaints, and in proceedings on proposals for the abolition of laws, during which she represented senators from various political parties. In 2009, she switched from advocacy to justice as a judge at the Supreme Administrative Court, where she acted as Presiding Judge at the Social Administration Division and as member of the Competence and General Panel.

In 2007–2009, she was a member of the Government Legislative Council. She was appointed Member of the Committee for the Selection of Judges to the EU Civil Service Tribunal by the Council of the European Union for the period 2008 to 2012. Since 2010, she has been substitute member of the European Commission for Democracy through Law (the “Venice Committee”) for the Czech Republic and member of the examination committee for juridical examinations.

Since 1990, in addition to her work as a barrister and judge, she has also been lecturing at the Department of Constitutional Law at the Faculty of Law at Masaryk University in Brno, where she also defended her dissertation on the topic Taxation and the Legal State. Her teaching and publication activity focuses, first and foremost, on the issue of fundamental rights and freedoms.

She teaches courses in constitutional law, human rights and the judiciary, political science, governmental studies, media law and ecclesiastical law, and also runs a clinic in media law and medical law, a course in human rights as applied in practice, a school of human rights and a human rights moot court.

She has published a number of specialised journal and anthology papers and is co-author of several law textbooks and other books (e.g. Communist Law in Czechoslovakia, In dubio pro libertate, and Commentaries on the Charter of Fundamental Rights and Basic Freedoms).

She is chair of the Brno group of the Church Law Society and a member of the Society for European and Comparative Law.

She has never been a member of any political party or political movement. She was appointed as Justice to the Constitutional Court by President Miloš Zeman on 7 August 2013.

RADOVAN SUCHÁNEK
Justice (since 26 November 2013)

JUDr. Radovan Suchánek, Ph.D. (born in 1972) graduated in 1996 from the Charles University Law Faculty in Prague, where he has been teaching since 1998 (as a lecturer since the year 2000). He was a doctoral student at the same faculty, focusing on constitutional law, criminal law, criminology and criminal science. During the course of his post-graduate studies, he also devoted attention to the issue of constitutional law during study residencies at universities in Bern, Tübingen and Linz. In 2001, he defended his dissertation on "The Senate in the Constitutional System of the Czech Republic". In the years 2001 to 2013, he was a member of the Academic Senate of the Charles University Law Faculty, and from 2003 to 2005, Deputy-chairman of the Legislative Commission of the Council of Higher Education Institutions.

In addition to his teaching activities, he also contributed for many years to the drafting of legal regulations and expert reports for state bodies and local government bodies. In the years 1998 to 2004, he worked as assistant to Members of the Chamber of Deputies of the Czech Parliament (in particular Prof. Zdeněk Jičínský) and as consultant to the Deputy-chair of the Chamber of Deputies. From 2002 to 2004, he was consultant to the Minister of Labor and Social Affairs and the Minister of Health. In the years 2004 to 2006, he held the post of Deputy Minister for Legislation, Inspection and International Affairs and Chair of the Committee of Analysis at the Ministry of Health. He also held other public posts at this time: he was a member of the Government Committee for the European Union, a member of the State Electoral Committee, a member of the Government Council for Human Rights and the Government Council for Equal Opportunities, a member of the administrative board of the General Health Insurance Company of the Czech Republic and chair of the administrative board of the Security Fund. In the years 2010 to 2013, he was advisor to the Deputy-chair of the Senate. From 1999 to 2004 and again from 2006 to 2013, he was also active as a specialist associate of the group of parliamentary deputies from the Czech Social Democratic Party in the area of the law and legislation. During the period of his expert work for Members of Parliament, he contributed to the drafting of many draft amendments for the repealing of laws or individual

provisions of laws submitted to the Constitutional Court by groups of deputies or senators.

He has written several dozen specialist articles published in legal periodicals in the Czech Republic and abroad, co-written university textbooks and co-edited anthologies in the fields of constitutional law and governmental studies. In this field he has devoted attention primarily to issues of parliamentarianism, formation of the law, constitutional judiciary, the protection of basic rights and freedoms, direct democracy, state security and selected issues in Czechoslovak constitutional development (e.g. presidential decrees). He has contributed to a number of research projects, e.g. The Constitutional Contexts of the Accession of the Czech Republic to the European Union (1998–1999), Transformation of the Constitutional Systems of the Countries of Central and Eastern Europe (1999–2001), The Constitutional Resolution of Extraordinary Situations and State Security during the Period of European Integration (2002–2004) and Qualitative and Quantitative Transformations to the Legal System at the Beginning of the Third Millennium – Roots, Starting-points and Perspectives (2009–2010). He is also the co-author of commentaries on the Constitution of the Czech Republic and the Charter of Basic Rights and Freedoms. He also publishes in the press (Právo).

He has been a member of the Union of Czech Lawyers since 2000. He was a member of the Green Party from 1992 to 1998 and a member of the Czech Social Democratic Party in the years 1998 to 2013.

He was appointed as Justice of the Constitutional Court by President Miloš Zeman on 11 November 2013. He took up the post by swearing his oath on 26 November 2013.

JIŘÍ ZEMÁNEK
Justice (since 20.1. 2014)

Jiří Zemánek (born in 1950) worked from 1974 onwards as a research worker in the field of international law and economic integration, in which he also defended his post-doctoral dissertation (1978), at the Institute of State and Law at the Czechoslovak Academy of Sciences, after studying the economics of foreign trade at the School of Economics and law at Charles University. In addition to the Comecon and the EEC, he also studied the unification agenda of the UN International Law Commission, GATT, UNCITRAL, etc. He also went to the Supreme Court of the Czechoslovak Republic and the Department of International Economic Relations at the Office of the Government of the Czechoslovak Republic on research fellowships. He augmented his professional qualifications in the Summer Programme at the Hague Academy of International Law and, at the end of the 1980s, the International Faculty of Comparative Law in Strasbourg. His publication output at this time strived for the broader engagement of Czechoslovakia in contractual and institutional structures of international legal co-operation. A long-term research residency at the Max Planck Institute for Comparative and International Private Law in Hamburg on the basis of a scholarship from the Alexander von Humboldt Foundation, a three-month research fellowship at the Swiss Institute of Comparative Law in Lausanne with the support of the Swiss government, and courses at the Free University of Brussels and the University Institute in Florence at the beginning of the nineteen nineties were significantly reflected in his professional focus on European law.

He was a part of the team responsible for the introduction of European legal studies at Charles University and co-authored the first large-scale textbook on the law of the European Union (now in its fifth edition), and as Vice-dean of the Faculty of Law, developed its engagement in the mobility of students and lecturers within the framework of the European Union programmes Tempus and Erasmus (“The Czech Legal System in the European Context”), introduced special courses in English, German and French law in the European context run by professors from foreign universities, co-founded the interdisciplinary training programme Europeum for public administration workers, acts as national coordinator of research projects (Deutsche Forschungsgesellschaft,

the Faculty of Law at Dresden University of Technology), lectures at the Czech Judicial Academy, became President of the Czech Association for European Studies, the Czech branch of the International Law Association, and member of the editorial boards of specialist periodicals, etc. In 1998, he was awarded the Jean Monnet Chair of European Law by the European University Council. In the same year, he received an honorary plaque on the occasion of the 650th anniversary of the foundation of Charles University. In 2001–2012, he also lectured in European law at the Metropolitan University Prague.

As a member of the Government Legislative Council in the years 1998–2006 he contributed, first and foremost, to the process of integrating the Czech legal code with the law of the European Union and to the work of the committee for the preparation of Euro-amendments to the Constitution of the Czech Republic. During the course of the negotiations on the Treaty establishing a Constitution for Europe (2002–2003) he was member of the advisory team of governmental representative to the Convention, Jan Kohout. He was also often invited as an expert of the Permanent Committee of the Senate for the Constitution and Parliamentary Procedure. His extra-academic professional work includes work in the legal profession (1992–2009) and expert consultancy for the European Union (the selection of lawyers–linguists for the Court of Justice of the EU, the panel of the Education, Audiovisual and Culture Executive Agency).

His extensive work in the international academic field included lecturing at universities in, for example, Hamburg, Berlin, Regensburg, Warsaw, Madrid and the USA. He makes regular appearances at conferences of the European Constitutional Law Network, Societas Iuris Publici Europaei, the T.M.C. Asser Institute in The Hague and other conferences throughout Europe. He has published numerous essays and acted as joint editor of collective works for the publishers Nomos, Duncker & Humblot, Berliner Wissenschaftsverlag and Eleven International Publishing. He is a founding member of the committee of advisors to the European Constitutional Law Review, and a member of the editorial boards of the journals Jurisprudence and Mezinárodní vztahy (International Relations) in the Czech Republic. His publication and teaching work focuses primarily on the topic of European constitutional law – issues of democratic legitimacy and responsibility in the EU, European judicial dialogue, comparative study of the interaction between European and national law, and methods of harmonising the law of the member states of the EU.

He was appointed as Justice of the Constitutional Court by the President of the Republic on 20 January 2014.

VOJTĚCH ŠIMÍČEK
Justice (since 12 June 2014)

Born in a distinctive cultural and industrial Moravian-Silesian metropolis of Ostrava in 1969, he spent a happy childhood there, which resulted in his calm and balanced personality. In 1992, he graduated from the Masaryk University in Brno, Faculty of Law, where he later obtained his Ph.D. in 1995 and became an associate professor in 2001. He studied in Regensburg, Bochum and Vienna. In addition, he spent five months as an intern in German Bundestag. He loved it everywhere, however, he never really thought about working abroad. In 1996–2003, he worked as a law clerk of a Constitutional Court justice. In 2003, he was appointed as judge of the Supreme Administrative Court. Apart from serving as president of the financial administration collegium, he also served as president of the seven-member chamber for electoral matters, matters of local and regional referendum and matters concerning political parties and political movements, and president of the six-member disciplinary chamber for judges. Since 1992, he has been teaching constitutional law and related courses at the Masaryk University in Brno, Faculty of Law. He is an author or a co-author of dozens of specialized texts and publications published in the Czech Republic and abroad, edited several collections of papers, and is a member of certain editorial boards. He is happily married to a beautiful, tolerant, funny and witty wife, and a father to three mostly well-behaved and kind children. In addition to the customary upbringing of his kids, he spends his free time passionately indulged in (mainly) collective sports. This joy is in no way spoiled by the fact that he is regrettably not good at any of them.

The President of the Czech Republic appointed him as Justice of the Constitutional Court on 12 June 2014.

TOMÁŠ LICHOVNÍK
Justice (since 19 June 2014)

JUDr. Tomáš Lichovník (*1964 in Olomouc) studied at University of Jan Evangelista Purkyně, Faculty of Law, between 1982 and 1986. In 1988, he successfully completed his rigorosum studies. Subsequently, he worked as an in-house counsel for the Czechoslovak Railways – Administration of Central Track in Olomouc, and later on at the Construction Company in Žďár nad Sázavou. In 1991–1992, he served as a trainee judge at the Brno Regional Court, preparing for his future profession of judge. In 1992, he was appointed as judge at Žďár nad Sázavou District Court, and spent twenty years in total there. He served as president of the court between 1994 and 2011. His last place of work was the Brno Regional Court, where he served as a vice-president and led its Jihlava branch. Since the beginning, he specializes mainly in civil law, including family matters.

In 2005–2008, he was a vice-president of the Judicial Union of the Czech Republic, and served as its president from the autumn of 2008 until his appointment as Constitutional Court Justice. He lectured to students of secondary and higher specialized schools for many years. He also acts as lecturer for the Judicial Academy and employees of the bodies of social and legal protection of children or children's homes. In his publication activity for various legal journals and daily press, he addresses systems issues of the judiciary and the practical impact of law on individuals and the society. He is also a co-author of the commentary to the Rules of Civil Procedure. He is married and has a son and a daughter. He loves to travel and likes to relax especially by doing sports.

The President of the Czech Republic appointed him as Justice of the Constitutional Court on 19 June 2014.

DAVID UHLÍŘ
Justice (since 10 December 2014)

JUDr. David Uhlíř was born on 18 July 1954 in Boskovice, Blansko. He attended grammar school in Prague 6 from 1969 to 1973, was enrolled in the Charles University Law Faculty in 1975. Following his graduation in 1979, he practised as a trainee attorney in Prague. In 1980, David Uhlíř completed his military service and passed his rigorosum examination a year later. After 1983, he worked as an attorney-at-law, focusing on criminal matters. Despite having been a member of the Czechoslovak Communist Party until 1989, David Uhlíř represented clients persecuted on political grounds. In 1990 and 1991, he served as a councilor of the City of Prague for the Civic Forum (Občanské forum). In 1992, he became the founding partner of Uhlíř, Homola and Partners and stayed there until 2014. As a senior lawyer, David Uhlíř specialised in civil and business law, and also worked as an interim receiver.

Since 1998 David Uhlíř has been lecturing externally at the Department of Civil law of the Charles University Law Faculty. He regularly provides training to trainee attorneys and attorneys-at-law, focusing mainly on the re-enactment of civil law. Furthermore, he is a member of the civil law examination panel of the Czech Bar Association. He is also a member of l'Union International des Avocats and gives speeches at their annual meetings. David Uhlíř writes for scholarly journals and newspapers on issues revolving around the re-enactment of civil law. He is a co-author of the commentary to the Civil Code published by Wolters Kluwer. He made a critical contribution to the drafting of the new Civil Code, and among other things, he was a member of the Ministry of Justice Commission for the Application of New Civil Legislation.

In 2009, he was elected a member of the Board of the Czech Bar Association, and in 2013, vice-president of the Bar. Apart from his other charitable activities, he has been chairing the Sue Ryder Association, founder of the Domov Sue Ryder in Prague – Michle, for many years. David Uhlíř is married and has three children.

On 10 December 2014, David Uhlíř was appointed as Constitutional Court Justice by the President of the Czech Republic.

JAROMÍR JIRSA
Justice (since 7 October 2015)

JUDr. Jaromír Jirsa (*5. 5. 1966) finished law school at Charles University in 1989. He started working in the judiciary as a law clerk at the Prague 8 District Court in 1990. After passing the judicial exam in 1992, he was appointed as a judge of this court. As a civil law judge, he dealt with, inter alia, restitutions, family, housing and health law cases. In May 1999, he became a civil law judge and the vice-president of Prague 1 District Court. Since August 2007, judge Jirsa served as the vice-president of Prague Municipal Court where he worked on insolvency and securities cases, as well as appellate cases.

Judge Jirsa has been focusing on civil procedural law for a long time. For that reason, he's been a permanent member of expert committees with the Ministry of Justice for civil procedure; in 2010, he was appointed a president of one of these committees. In the area of substantive law, he specialized himself in classic civil cases, e. g. ownership, rental and labor law cases. He also decided in family cases or on the custody of minors. While working for Prague 1 District Court, which is characterized by one of the hardest civil cases in the country, he aimed his attention to recovery of damages caused by the state (for unlawful decision or incorrect procedure) and health injuries. In addition, he has experience with intellectual property disputes, unfair competition disputes and protection of good reputation of corporations.

In 2002–2008, judge Jirsa served as the president of Union of Judges. He participated in many projects, e. g. adoption of the code of ethics for judges, adoption of principles of career structure for judges, so-called "mini-teams", educational projects for judges or support of mediation in non-criminal cases finalized by adoption of the Mediation Act. He is the Honorary President of Union of Judges which is the only professional organization of judges in the Czech Republic.

Judge Jirsa has been lecturing and publishing specialized texts. He has lectured for Judicial Academy, Czech Bar Association, Chamber of Law Enforcement Officials, Union of Judges etc. In 2010, he was awarded the bronze medal of Antonin Randa by the Union of Czech Lawyers for his lecturing and publication

activities in the area of civil procedural law. In 2007–2012, he was a member of accreditation working group for the areas of law and security with the Charles University, School of Law.

Judge Jirsa is a member of the editorial board of magazine “Soudce” (The Judge) and legal web portal “Právní prostor” (Legal Space), where he often publishes his texts, as well as in other specialized periodicals. He also presided the team of authors, and is the main author, of the five-volume judicial commentary to Civil Procedure Code (Havlíček Brain Team, Prague, 2014).

Judge Jirsa is married and he has two children.

On 7 October 2015, the President of the Czech Republic appointed him as a Justice of the Constitutional Court.

JOSEF FIALA
Justice (since 17 December 2015)

Josef Fiala (*1953) studied law at J. E. Purkyně University (today's Masaryk University) in 1971–1976. In the course of his studies, he started to work as an assistant on the basis of a part-time contract. After finishing his law school studies, he joined the department of civil law as a full-time assistant (1976–1996). In 1978, he obtained the "JUDr." degree (thesis entitled "Position of civil law in the system of law"). He became senior assistant in the same year. In 1984, he obtained the academic degree "Candidate of Sciences" in the field of civil law. In 1996, he was awarded the degree of assistant professor after defending his thesis entitled "Ownership of apartments in the Czech Republic" where he took into account previous outcomes of scientific approaches to the nature of apartment ownership. He was awarded the full professorship in 2006. In 1995–2001, he served as a vice-dean of the law school, and in 2004–2015, he led the department of civil law. He took part in various forms of pedagogical work in all study programs at the Masaryk University, School of Law. In addition, he was a member of several research projects (e. g. in 2004–2011, he was the deputy coordinator in the project entitled "European context of the evolution of Czech law after 2004"). He used the outcomes of this research in his publications.

Apart from his academic activities, he used to be a commercial lawyer, an attorney, member of Government's Legislative Board and its committees, member of appellate boards of the President of the Office for the Protection of Competition, and an arbitrator of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic. He frequently lectures professionals, e. g. Czech Bar Association etc. In 1991, he worked at the Constitutional Court of the Czech and Slovak Federal Republic as a law clerk of judge Pavel Mates. Since 1993, he has been a law clerk of three judges of the Constitutional Court of the Czech Republic – Ivana Janů, Eva Zarembová and Miloš Holeček.

On 17 December 2015, the President of the Czech Republic appointed him as a Justice of the Constitutional Court.

STRUCTURE OF THE COURT

The Constitutional Court consists of a President, two Vice-presidents, and other Justices. The President of the Constitutional Court represents the Court vis-à-vis third parties, performs the Court's administrative work, convenes meetings of the Constitutional Court's Plenum, fixes the agenda for, and directs the business of, meetings, appoints Chairpersons of the Constitutional Court's panels, and performs other duties placed upon him by statute.

The Constitutional Court's internal structure is such that it has a Plenum, which comprises all Justices, and four three-member panels. The Act on the Constitutional Court lays down which matters are to be decided by the Plenum and which by panels. The Justice Rapporteur, assigned to each matter by the Court's agenda, can also be considered as one of the Court's organizational components, as her task is to prepare the matter for deliberation, unless she finds that there are preliminary grounds for rejecting the petition.

Each Justice is assigned three assistants. Justice's chambers were created to facilitate the business of the individual judicial offices.

Apart from the President and Vice-presidents, the Constitutional Court's other official is the Secretary General, under whose purview comes the entire Court´s Administration, Judicial Department, the Analytic Department including the Library, and the Department of External Relations. The Court's administration is managed by the Director of Court Administration.

IVO POSPÍŠIL
Secretary General
(since 1 March 2013)

JUDr. Ivo Pospíšil, Ph.D. was born in Brno in 1978 and he is a graduate of the Faculty of Law (2001) and Faculty of Social Studies, study field political science (2005), at Masaryk University.

In his work to date, he has tried to combine legal practice with academic and educational activities. He has worked in the academic sphere at, for example, the International Institute of Political Science of Masaryk University (1999–2001), and has taught human rights and international law at the Faculty of Law at Masaryk University (2004–2005) and at a number of private universities. He has worked as a member of the academic staff of the Institute for Comparative Political Research (2005–2006), and has been working part-time from 2005 to date as an assistant professor at the Department of International Relations and European Studies at the Faculty of Social Studies, Masaryk University.

As far as his legal practice is concerned, he joined the newly formed Office of the Public Defender of Rights (2001–2002) after completing his studies. Soon afterwards, he has moved to Constitutional Court where he gradually occupied several positions. He started as an assistant to then Vice President of the Court Eliška Wagnerová, in 2009 he was appointed head of the Analytical Department and he was appointed to his current position of Secretary General by the President of the Constitutional Court in 2013.

Beside his position at the court he stands as a member of Examination Commission of the Czech Bar Association and a member of Governmental Legislative Council.

Ivo Pospíšil has also written a number of monographs, such as The Rights of Ethnic Minorities: Between the Universalism of Human Rights and the Particularism of Group Difference (2006) and Formation of the Political System in Estonia (2005). He has also co-authored the monographs The Baltic States in Transformation. Political Development in Estonia, Lithuania and Latvia (2000), Armed Conflicts after the End of the Cold War (2012), Judicialization of Politics (2013), Human Rights in International Relations (2014) and Helsinki Process, Velvet Revolution of 1989 and the Czech Transformation (2015). He also co-authored commentaries to the Law on the Constitutional Court (2007), to the Charter of Fundamental Rights and Freedoms (2012), and the Constitution (2015) and acted as joint editor of a number of anthologies, such as In dubio pro libertate – Thoughts on Constitutional Values and Law and Vladimír Klokočka – liber amicorum (both 2009). He also publishes his critical opinions on current affairs in the daily press.

He is married and has two sons.

Powers and Competences

While the first constitutional court in Europe had a mere two powers (both related to the review of legal regulations), modern constitutional courts possess a much broader array of powers. The Constitutional Court of the Czech Republic has a total of 15 different powers, although most of them are used rather infrequently, and are *de facto* "sleeping competences".

An overwhelming majority of all proceedings before the Constitutional Court are proceedings on constitutional complaints (over 95%), and the other significant group are proceedings examining the constitutionality of legal regulations.

The activities of the Constitutional Court are governed by a number of legal regulations. In addition to constitutional laws and law regulating, to a greater or lesser extent, the actual proceeding before the Constitutional Court, there is a host of laws and decrees providing for the operations of the Constitutional Court, as is the case of any other public authority. The Constitutional Court is a judicial body for the protection of constitutionality. However, in addition to the Constitution of the Czech Republic proper, the constitution comprises, in a broader sense, other constitutional laws, in particular the Charter of Fundamental Rights and Freedoms.

The Czech constitution further includes:

- Constitutional Act No. 1/1993 Sb., on the Creation of Higher Territorial Self-Governing Units,
- Constitutional Act on the Security of the Czech Republic,
- Constitutional Act on the Referendum on the Czech Republic's Accession to the European Union,
- other constitutional acts adopted pursuant to the Constitution of the Czech Republic,
- constitutional acts relating to the break-up of Czechoslovakia and the establishment of the Czech Republic as a new successor state,
- and constitutional acts delineating the Czech Republic's borders with neighboring states.

The sum of constitutional acts, i.e., the constitution in a broader sense, is thus collectively referred to as the constitutional order of the Czech Republic. Apart from the constitutional order, the Constitutional Court also applies ratified and promulgated international treaties on human rights and fundamental freedoms as a reference criterion.

The actual proceeding before the Constitutional Court is governed by Act No. 182/1993 Sb., on the Constitutional Court. This particular act stipulates who and on what terms is entitled to file a motion for the initiation of proceedings, and sets forth other rules of proceedings before the Constitutional Court. The provisions of the Rules of Civil Procedure, and in special cases, also the provisions of the Criminal Justice Code relating to court proceedings, apply in proceedings before the Constitutional Court *mutatis mutandis*.

The Constitutional Court has jurisdiction (pursuant to Article 87 (1) and (2) of the Constitution):

- to abrogate statutes or individual provisions thereof if they are in conflict with the constitutional order;
- to abrogate other legal enactments or individual provisions thereof if they are in conflict with the constitutional order or a statute;
- over constitutional complaints made by the representative body of a self-governing region against unlawful encroachment by the state;
- to decide jurisdictional disputes between state bodies, state bodies and bodies of self-governing regions, and between bodies of self-governing regions, unless that power is vested by statute in another body;
- over constitutional complaints of natural or legal persons against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms;
- over remedial actions against decisions concerning the certification of the election of a Deputy or Senator;
- to resolve doubts concerning a Deputy or Senator's loss of eligibility for office or incompatibility under Article 25 of some other position or activity with holding the office of Deputy or Senator;
- over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65 (2);
- to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66;
- to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented;
- to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws; and
- to decide on the conformity with the constitutional order of a treaty under Article 10a or Article 49, prior to the ratification of such treaty.

The Constitutional Act on the Referendum on the Czech Republic's Accession to the European Union (No. 515/2002 Sb.) entrusted two further powers to the Constitutional Court, which, in view of the results of the actual referendum held in 2002, are no longer applicable [jurisdiction stipulated in Article 87 (1) (l) and m) has been formally repealed by Constitutional Amendment No. 71/2012 Sb.], namely:

- to make decisions on remedial actions against a decision of the President of the Republic declining to call a referendum on the Czech Republic's accession to the European Union; and
- to determine whether the manner in which the referendum on the Czech Republic's accession to the European Union was held is in harmony with Constitutional Act No. 515/2002 Sb., and with the statute issued in implementation thereof.

Constitutional Court in session

© Constitutional Court/Jan Symon

3. ON THE SEAT OF THE CONSTITUTIONAL COURT

2016

The constitutional court as an institution only moved to its current seat, i.e. a Neo-renaissance palace in Joštova Street in Brno, in 1991. The Constitutional Court of the Czechoslovak Republic, established in 1921, had its formal seat in Prague. However, it was never given its own building, its justices met *ad hoc* and their offices were in the building of the then unification ministry.

After WW2, constitutional judiciary was not reinstated, and debates concerning the new seat were only initiated after 1990. As the modern constitutional judiciary respects a consistent separation of the judicial power from the executive and legislative powers, the city of Brno was chosen to be the seat of the Constitutional Court (and subsequently as the seat of other supreme judicial institutions), as a logical counterweight to Prague where government and parliamentary institutions have their seats.

House of Estates just opened (1877)

And what building was chosen for the Constitutional Court?

Between 1875 and 1878, the monumental building of the House of Moravian Estates was built in Brno. The extensive transformation of the entire Joštova Street area was preceded by a competition for the development of former city walls no longer serving their military purpose in the second half of the 19th century. The author of the Viennese Ringstrasse – Ludwig von Förster – won the competition; his executed projects in Brno included Klein Palace in Liberty Square, and a restaurant in Lužánky. He inserted a ring-shaped avenue between the historical city center and its suburb, supplemented with added open spaces, a fancy promenade and park vegetation, and lined with public edifices and residential buildings.

Preparations of the building site for Joštova Avenue involved the demolition of the Baroque city walls and the north-western bastion of the municipal fortress, headquarters of the military engineering unit, former artillery unit headquarters, the main customs authority and other buildings. Based on Förster's winning design, municipal engineer Johann Lorenz drew up a zoning plan two years later, and its main principles were implemented over time. It made it possible to connect the until then independent suburban settlements to the historical city in terms of space, architecture and road systems, and brought a solution of an exceptional and permanent value.

The House of Estates became a important part of the Brno ring road and one of the key dominant features of Joštova Avenue. It was built for the purposes of the Moravian Provincial Assembly. The building was constructed according to a winning design from an architectural competition held in 1872 and 1873. Two Viennese architects, Anton Höfft and Robert Raschka, won the competition. The huge palatial building was built between 1875 and 1878 by builder Josef Arnold under the supervision of the provincial building council Johann Ullrich.

In terms of style, the design of the House of Estates by Viennese architects draws on the experience and knowledge of North Italian Renaissance. The ground plan reflects the purpose of the palace – to tailor the building to the needs of a parliamentary institution as much as possible – and consists of

Window block replacement © Constitutional Court/Aleš Ležatka

Basement Drain © Constitutional Court/Aleš Ležatka

a rectangle with four inner courtyards. The four wings of the palace intersect to create the large assembly hall, accessible by a staircase from the portico. Today, the assembly hall is used for public oral hearings held before the Plenum of the Constitutional Court comprising all fifteen Justices of the Constitutional Court. The hall is the most valuable room in the entire building. It is flanked by a vestibule and smaller lounges on the sides: originally, they were used as a restaurant and a club room, while today, they serve as conference rooms for the three-member senates of the Constitutional Court.

Interior decoration is concentrated in particular in the assembly hall and the adjoining rooms. The walls are faced with reddish artificial marble and end in a painted freeze with a bracket cornice which supports a flat barrel vault adorned with a mural boasting the provincial emblem. A box with a balustrade faces the hall on the first floor.

The last remodeling of the building took place in the 1980s and 1990s. In 2010, the library of the Constitutional Court was modernized; other than that, only necessary repairs and maintenance is performed. As the building needs to be maintained in a condition fit for its operation, yet a modern working environment needs to be procured, a medium-term plan of reconstructions and capital expenditure for 2014–2017 was drawn up in 2014. The plan envisages a gradual revitalization of the Constitutional Court building. The building is listed as

Scaffolding grew quickly on the western facade of the Court

a cultural monument, and enjoys general protection thanks to its architectural design. For that reason, a structural and historical survey of the building was commissioned in order to ensure the preservation, and restoration, if necessary, of the original architectural elements.

The building is currently undergoing an extensive restorations with aim to resume its previous fame and glory. There is a strive to complete all the renewal (both interior and exterior) by the October 2018 and celebrate thereby the 100th Anniversary of Czechoslovak Republic and the 25th Anniversary of the Constitutional Court of the Czech Republic.

The Seat of Justice

4. DECISION-MAKING OF THE CONSTITUTIONAL COURT

2016

Naturally, the Court's decisions vary every year depending on the matters presented to it by the applicants. The decisions described in the following text may therefore be linked to case-law from the previous years, but may as well reflect recent trends and bring new topics and perspectives. The following overview of court cases presents the most important aspects dealt with by the Constitutional Court in 2016. However, a complete picture of the Court's case-law can only be made by seeking the individual decisions on the Constitutional Court's website or in the Collection of Judgements and Resolutions.

Basic constitutional principles

Rule of law

The Czech Republic is defined in Art. 1 (1) of the Czech Constitution (hereinafter the "Constitution") as a democratic State governed by the rule of law. The mentioned Art. lays down a general and primary principle that forms the basis for a number of sub-principles, some of which are laid down explicitly at the constitutional level, while others have been inferred in the Constitutional Court's case-law.

The first paragraph of Art. 1 (1) of the Constitution combines two principles – democracy and the rule of law. In the Czech Republic, the democratic principles are thus finely intertwined with the principles of constitutionalism, which draws its main source from the liberal political concepts of modern times. It therefore also holds that no regime other than democratic can ever be legitimate (judgement file No. Pl. ÚS 19/93 of 21 December 1993) and that a citizen has priority over the State and that the same priority must therefore be attached to fundamental civil and human rights and freedoms (judgement File No. Pl. ÚS 43/93 of 12 April 1994). Our democracy must therefore be construed in a material way, as indicated in judgement File No. Pl. ÚS 29/11 of 21 February 2012.

The foundations of the constitutional order and the entire structure of fundamental rights in constitutional democracy lie in "supra-positive" values such as dignity, freedom and equality. Human **dignity** was invoked in a number of judgements in 2016, the most important of which was judgement File No. Pl. ÚS 7/15 of 14 June 2016 in the matter of civil (registered) partnership as a preclusion to individual adoption of a child. In the opinion of the Constitutional Court, Section 13 (2) of Act No. 115/2006 Coll., on civil (registered) partnership, which stipulates that the existence of a partnership prevents either of the partners from adopting a child, is – among other things – contrary to the first sentence of Art. 1 and to Art. 10 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter the "Charter"). It is human dignity that the Constitutional Court interpreted as the basis of the entire regulation of fundamental rights and freedoms. It is based on the perception of a human being as a unique personality that is, at the same time, a social being. Human dignity is violated when the State power places a specific individual in the role of an object where he or she becomes merely a means, and is reduced to the form of an interchangeable quantity. People's equality in dignity and rights serves as the basis of recognising the value of every human being, regardless of their other qualities and usefulness or benefit for society as a whole. The contested statutory provision could not succeed in the prism of human dignity as a fundamental objective value of humanity and the focal point of other fundamental rights. In fact, if a certain group of persons is excluded from a certain right (even if stemming from sub-constitutional law) solely owing to the fact that they have decided to enter into a civil (registered) partnership, it thus turns them into *de facto* "second-rank" individuals and stigmatises them groundlessly in a certain manner, which evokes the idea of their inferiority, fundamental differences from others, and probably also of their inability to properly take care of children.

The Constitutional Court dealt with the concept of human dignity in its judgement File No. II. ÚS 46/16 of 1 August 2016, concerning a violation of the principle of predictability of decisions in assessment of personal injury claims. In the opinion of the Constitutional Court, the situation of a person to whom serious and irretrievable harm has been caused touches on the most intrinsic value of his or her existence, i.e. human dignity. With reference to the distinguished American legal philosopher Ronald Dworkin, the Constitutional Court inferred that the current concept of human dignity consists of two principles: (1) self-respect and responsibility to oneself, and (2) authenticity as the ability to decide

on the fulfilment of one's life. The latter in particular, entailing decisions on the matters of personal status, accepted morals, order of values and, last but not least, the manner of providing for one's basic vital needs, is a *conditio sine qua non* toward the fulfilment of a person's human dignity.

Another supra-positive value embodied in Art. 1 of the Charter is **freedom**. In its judgement File No. I. ÚS 190/15 of 13 September 2016, the Constitutional Court based its view of freedom on the famous principle of harm formulated by the great liberal philosopher of the 19th century, John Stuart Mill, according to whom self-defence is the only objective capable of allowing mankind to encroach – individually or collectively – upon the freedom of the acts of others. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. According to Mill, when society interferes in the matters of individuals with which it ought not to meddle, it practises a social tyranny. Based on its earlier case-law, the Constitutional Court stated that the subjective right of individuals to act freely within the statutory limits follows from Art. 1 (1) of the Constitution in conjunction with Art. 2 (3) of the Charter. This right may be invoked directly, even in proceedings on individual constitutional complaints. Art. 2 (3) of the Charter thus protects the freedom to act and, consequently, also the autonomy of will and freedom of contract. As a result, when assessing a contract, it is always necessary to give priority to interpretation that will not render the contract invalid. If common courts intend to infer a prohibition of private acts not expressly stipulated by law, they need to present some very convincing arguments as they are thus complementing the law against the interests of private individuals. Such judicial development of the law must be subject to especially stringent constitutional review, as this approach adopted by common courts can violate not only the complainant's fundamental rights (in particular, the complainant's right to freedom of act within statutory limits in terms of Art. 2 (3) Charter, and the *pacta sunt servanda* principle enshrined in Art. 1 (1) of the Constitution), but also the principle of separation of powers (as an integral part of the rule of law under Art. 1 (1) of the Constitution).

Equality is perhaps the most controversial supra-positive value. In above-mentioned judgement File No. Pl. ÚS 7/15, the Plenum of the Constitutional Court considered the chosen legislative method illogical, irrational and ultimately discriminatory in relation to persons who have entered into a civil (registered) partnership. In the opinion of the Constitutional Court, the contested statutory provision prefers the formal legal status (a civil partnership) to reality. On the one hand, the legislature admitted that an individual who does not live in a marital relationship could adopt a child, and did not, in fact, even lay down any restrictions in terms of whether that person would have to be heterosexual or homosexual. On the other hand, the legislature prohibited this individual from living in a civil (registered) partnership. At the same time, however, in paragraph 3 of the contested provision, the legislature imposed on the other partner duties concerning the protection of the child's development and upbringing. The Constitutional Court therefore could not but find violation of the right to equal treatment.

Judgement File No. Pl. ÚS 18/15: On variance with the Constitution of taxation of pensions paid out to high-income working pensioners

According to the complainants – a group of Senators – the contested legislation regarding taxation of pensions paid out to working pensioners with income exceeding CZK 840,000 in a calendar year violates the principles of equality and non-discrimination, both separately and in conjunction with the fundamental right to protection of ownership and in conjunction with the right to operate a business and carry out some other economic activity.

In connection with the principles of equality and non-discrimination, the Constitutional Court stated that the intensity of constitutional review in this area was not primarily dependent on whether or not unequal treatment occurred in relation to another constitutionally guaranteed right (accessory or non-accessory nature of the rights in question). What is of crucial importance is, in particular, the ground of different treatment, i.e. the distinguishing feature laid down by law (e.g. race, sex, nationality, origin, age, religion, property) and also the specific right or property in relation to which unequal treatment occurs (e.g. political rights guarantees or

duty to pay taxes). This must be reflected in the Constitutional Court's demands for justification of the legitimacy of different treatment.

Art. 3 (1) of the Charter, and thus Art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also the "Convention"), will only be applicable if – among other things – the distinction is based on the criteria set out in those provisions, or based on "other status". However, the Constitutional Court did not establish the asserted violation of those provisions, as they are not applicable specifically to the case at hand. In contrast, the Constitutional Court concluded that, in terms of applicability of the principle of equal rights, or of the general prohibition of arbitrariness with respect to making any distinctions, there can be no doubt as to the applicability of the given provisions to the case at hand, as the issue under scrutiny is a difference in treatment between two groups of pension insurance beneficiaries with varying income.

The difference in tax burden between the two described groups lies in taxation of the entire pension paid out to the members of one group, as opposed to taxation of only a part of the pension exceeding 36 times the minimum wage, in the case of the other group. The difference in taxation is of a relatively fundamental nature and even if the amount of other income varies by a mere "one Czech crown", it can amount up to CZK 53,460 for the year 2016. This results in an extreme disproportion between the difference in tax burden and the difference in income. Indeed, the contested legislation does not place a different tax burden on the part of income relevant for distinguishing between the said groups, but rather affects entirely different income (in the form of pension), which moreover, can be absolutely identical in both groups, i.e. completely irrelevant in terms of distinguishing between the two groups. In addition, in view of the step increase in the taxation of this income (pension), it is not possible to identify and take into account the relevant differences in income between the two groups of pensioners.

Consequently, although the assessment of unequal treatment based on grounds not representing an a priori "suspicious" criterion for distinction is usually quite restrained, where substantive and rational reasons will suffice to justify any difference in treatment, the Constitutional Court has not found any substantive or rational grounds that would justify the form of different treatment in this case. The contested provision entails an unjustified arbitrary distinction violating the prohibition of unequal treatment. The Plenum of the Constitutional Court therefore granted the petition of the group of Senators seeking to annul Section 4 (3) of the Income Taxes Act.

In judgement File No. ÚS 30/15 of 15 March 2016 concerning the exemption for the State from the duty to pay any payments for withdrawal of agricultural land from the agricultural land fund, it was emphasised that regions and municipalities may only invoke encroachment on their accessory equality, i.e. equality in implementing some other fundamental right or freedom. In contrast, they do not enjoy any non-accessory equality (general equality before the law); such equality is only enjoyed by people, i.e. individuals as dignified human beings in accordance with Art. 1 of the Charter. However, the crucial role in reviewing the matter at hand was played by the State's commitment to ensure sound use of natural resources and conservation of natural heritage (Art. 7 of the Constitution). The main argument in favour of dismissing the petition lay therefore in the fact that this very commitment of the State prevents any specific assessment of whether the principles of equality and prohibition of discrimination were violated as a consequence of the contested provision.

The matter of violation of the statutory authorisation and of the principle of equality was dealt with by the Constitutional Court in its judgement File No. Pl. ÚS 29/15 of 31 May 2016, where the Court annulled a part of an ordinance issued by the municipality of Štěpánovice whereby the municipality exempted itself from the market rules. Beyond the scope of the actual grounds provided in the petition, the Constitutional Court examined the constitutionality of Art. 8 of the ordinance, based on which certain events organised by the municipality of Štěpánovice were exempt from the restrictions imposed by the ordinance.

The municipality thus went beyond the limits of its statutory authorisation, as the latter only allows it to lay down exceptions with respect to specified general types of sales of goods and services, but not with respect to individual cases. Furthermore, the ordinance introduces two distinct legal regimes depending on the person organising the given event. The above therefore amounts to an unjustified unequal approach of the municipality of Štěpánovice to itself, on the one hand, and to other natural and legal persons, on the other hand, without there being any rational and acceptable objective.

The material aspect of the **rule of law** (i.e. ultimately, the notion of justice) is expressed primarily by the concept of an individual as a dignified human being that has equal rights with all other beings. The concept of material rule of law, as developed by the Constitutional Court's case-law in a number of areas, goes beyond the original idea of formal rule of law, as a concept based on legalism and positivism. Even nowadays, nevertheless, the principle of the rule of law is bound to the formal characteristics that must be manifested by the legal rules in the legal system so that individuals can take them into account when determining their future conduct. The concept of **formal** rule of law is primarily associated with the principle of legal certainty (regarding the latter cf. judgement File No. IV. ÚS 2766/15 of 12 May 2016, on taking evidence and providing proper reasoning for court decisions) and with the principle of predictability of law (or, more specifically, the principle of predictability of decision-making by the courts – cf. judgement File No. II. ÚS 2635/15 of 31 May 2016). A matter closely related to the principle of predictability of law is the question of limits to the statutory authorisation (cf. judgement File No. Pl. ÚS 17/15 of 9 February 2016, on the duty of an insolvency trustee to be present in person in the relevant establishment, and the above-mentioned judgement File No. Pl. ÚS 29/15 of 31 May 2016).

Several important judgements related to the concept of **material** rule of law. These include judgement File No. I. ÚS 3964/14 of 13 June 2016 and judgement File No. I. ÚS 3943/14 of 2 August 2016. In the first of the mentioned decisions, the Constitutional Court referred to its very first judgement, File No. Pl. ÚS 19/93 of 21 December 1993, according to which the Constitution not only makes positive law conditional on formal legality it also subjects the interpretation and application of legal norms to the meaning of their contents in material terms; it makes the law conditional on respect for the fundamental constituent values of democratic society and also measures the application of the legal norms based on these values.

Judgement File No. I. ÚS 3964/14: Interpretation of legal regulations of the communist regime conforming to the Constitution with regard to discontinuity with the previous regime

The complainant sought from the Czech Republic financial compensation for property left by her grandmother in the territory of the former Subcarpathian Rus (Carpathian Ruthenia). She inferred her claim from the restitution regulations issued during the communist regime on the grounds that the administrative proceedings conducted at that time on a claim for compensation raised by the complainant's mother were not formally closed and were merely set aside. Indeed, no administrative decision was issued and the Ministry of Finance merely informed the complainant's mother through a letter that she would not be granted any compensation, as she did not participate in farming as a member of the United Agricultural Co-operative (JZD). The Ministry of Finance of the Czech Republic decided that it would now issue the missing decision, but nonetheless resolved the matter in a manner identical to that stated in the letter of 1962. The condition of JZD membership necessary for recognising the claim was laid down by Decree No. 159/1959 Coll., which the claimant perceived as discriminatory, since it made a distinction between "personal" and "private" ownership.

The Constitutional Court recalled the doctrine formulated in its very first judgment regarding continuity with the "former laws", with simultaneous discontinuity with the "previous regime" (in terms of values), implying the duty of the courts to reflect on the modern concept of material rule of law, however outdated the applicable laws may be.

In the view of the Constitutional Court, the common courts thus erred when they noted that the relevant decree clearly conformed to the totalitarian

times, when socialist ownership was given preference, but nonetheless reached the conclusion that it was not possible to adopt an overly extensive line of interpretation and thus devise by interpretation rights that are, in fact, not established by any legal regulation, and that it was not up to the courts to construct any claims for indemnification that have no basis in any restitution regulation.

The Constitutional Court, however, determined the existence of overt discrimination against the complainant resulting from the application of the given decree, which preferred – in violation of the Constitution – socialist or co-operative ownership to other forms of ownership, as the protection of ownership is now guaranteed without any exception whatsoever. Moreover, the given restitution regulation did not, in fact, lay down any such condition and the discriminatory criterion in question was only brought about by the implementing decree, which is not binding for courts in accordance with Art. 95 (1) of the Constitution.

The Constitutional Court therefore yet again drew attention to the importance of interpreting restitution norms in the light of their sense and purpose, i.e. to alleviate the wrongs caused by former regimes.

In judgement File No. I. ÚS 3943/14, the Constitutional Court recalled that under the conditions of material rule of law, the judge should always strive to find a solution that will ensure maximum respect for the fundamental rights of parties to proceedings, or if this cannot be achieved in relation to one of the parties, to rule in accordance with the principles of justice. The courts are faced with a difficult task in their effort to ascertain what is lawful in accordance with the principles of justice. The Constitutional Court quoted the German legal scholar Gustav Radbruch, who considers expediency, justice and legal certainty to be the ultimate objectives of law which, however, do not conveniently co-exist in agreement with each other, but are rather in stark mutual contradiction. In many cases, therefore, the requirement for individual justice for the complainant may appear to be in contradiction to the requirement for legal certainty.

Judgement File No. I. ÚS 3943/14: Interpretation of legal regulations of the communist regime conforming to the Constitution with regard to discontinuity with the previous regime

The complainant submitted a claim for determining that his grandparents on his father's side, who had lost their lives in a concentration camp, had been the owners of the relevant real estate. His grandparents purchased the relevant real estate in 1906 and the real estate was subsequently confiscated without justification – first in 1944 by the Greater German Reich on the grounds of their Jewish nationality, and once again in 1949 by the Czechoslovak state as "German property", again without justification. The vast majority of the complainant's relatives died a violent death in connection with racial persecution during the war. The complainant learned about the relevant real estate only when searching the archives, an activity he took up after his retirement. The district court agreed with the complainant's assertion as to the existence of circumstances deserving special consideration, objectively preventing him from exercising his rights in restitution proceedings, and satisfied his claim. However, the regional court dismissed the action, stating that there was no objective circumstance preventing the complainant from exercising his property claims dating from the period of oppression based on restitution regulations, as he could and should have taken interest in the property of his ancestors earlier. The Supreme Court dismissed the complainant's application for appellate review of the judgement of the regional court.

After having summarised the facts of the case, the Constitutional Court concluded that the complainant was not lax or negligent in exercising his claims. Due to circumstances deserving special consideration, he did not learn of the property left by his grandparents until it was too late, i.e. after expiry of the deadlines set by restitution regulations.

The Constitutional Court admitted that it could seem to be in line with common good for the relevant real estate to remain in the ownership of

the State. However, the circumstances under which the complainant's grandparents were deprived of their property did not allow such interpretation. Given the horrific nature of the crimes committed against Czechoslovak citizens under occupation, often in the very name of common good (of the Aryan race, of the Third Reich, etc.), no courts of any self-respecting country which value human rights of its own citizens (and also of others) can accept such arguments.

The situation would likely have been different if individual justice for the complainant was achieved in violation of the rights of other individuals who may have since acquired the real estate in good faith. However, this was not the case in the matter at hand, which is why the Constitutional Court also accepted the complainant's plea regarding the absence of substantial legal certainty.

In conclusion, the Constitutional Court also criticised the common courts for not reviewing the matter through the prism of the right to family life. First, as a consequence of racial persecution, the complainant was deprived not only of his closest relatives and family property, but also of everything that shapes family history, awareness of one's family roots, an emotional anchor in time, as well as firm conviction of the continuity of memory passed on from ancestors to their descendants. And second, while the complainant was left with nothing else to remember his grandparents by, the house owned and occupied by them still exists. In essence, the complainant's claim not only purports to remedy proprietary injustice, but also encompasses a request for restitution of a part of family identity.

In its judgement File No. Pl. ÚS 3/14 of 20 December 2016, on making the archives containing files of the former State Security service accessible to the public, the Constitutional Court noted on the concept of material rule of law that its fundamental attribute lay in respect for the rights and freedoms of the individual. The material concept of the rule of law is characterised by the public authorities' respect for the free (autonomous) sphere of the individual as defined by fundamental rights and freedoms; as a matter of principle, public authorities do not interfere with this sphere except where justified by the necessity to resolve a conflict with other fundamental rights or with constitutionally sanctioned public interests clearly defined by law, provided that such interference anticipated by the law is proportionate to the intended objectives of such interference and to the extent to which a fundamental right or freedom is to be curtailed. The imperative that independent ways of life be respected, which aims primarily – along with protecting the traditional spatial dimension of privacy and undisturbed building of social relations – to provide a safeguard in the form of the right to personal data protection, is central to the autonomy of the individual under human rights. It was alleged interference with this right as an integral part of the right to privacy that was subject to review by the Constitutional Court.

In judgement File No. I. ÚS 3324/15 of 14 June 2016, the Constitutional Court pointed out that any differences in the decision-making practice of courts are to be avoided if the subject matter is identical. Material rule of law is founded, *inter alia*, on the confidence of citizens in law and legislation. Such confidence is conditional on stability of the legislation and sufficient legal certainty on the part of the citizens. Stability of the legislation and legal certainty are influenced not only by the legislative activities of the State (formation of law), but also by activities of the governmental authorities applying law, because only application and interpretation of legal norms creates public awareness of what is and what is not law. Stability of law, legal certainty of individuals and, ultimately, also the degree of the citizens' confidence in law and in the concepts of the rule of law as such are therefore also influenced by the way how the bodies applying law, and thus especially the courts, approach the interpretation of legal norms. The principle of equality before law means that laws ought to be interpreted in the same way in all cases that meet the same criteria (see below for particulars).

In judgement File No. I. ÚS 2394/15 of 26 April 2016, the Constitutional Court noted that if a State is indeed to be considered as embodying material rule of law, it must assume objective liability for the actions of its bodies, or rather for the actions by which public authorities directly interfered with the fundamental rights of an individual. While, on the one hand, it is the duty of prosecuting

bodies to investigate and prosecute crimes, on the other hand, the State may not renounce its liability for the procedures adopted by these bodies if such practices later prove to be erroneous and in violation of fundamental rights (see below for particulars).

The Constitutional Court also dealt with security interests of the State as one of the fundamental constitutional values. In judgement File No. Pl. ÚS 5/16 of 11 October 2016, concerning the reasons provided in decisions on refusal to grant citizenship on the grounds of threat to national security, the Constitutional Court stated that the interest of an individual in being informed of the grounds for a decision adopted by a public authority must be weighed against the security interest of the State laid down explicitly in Art. 1 of the Constitutional Act on the Security of the Czech Republic, under which it is the basic duty of the State to ensure sovereignty and territorial integrity of the Czech Republic, protection of its democratic foundations and protection of lives, health and property values. The interest of the State in its security is also a value protected by the Constitution (protection of the interests of the Czech Republic as a sovereign State under Art. 1 (1) of the Constitution). This interest of the State is indeed an existential interest, giving legitimacy to certain limitations of the legal sphere of individuals; after all, the State is the one responsible for protecting the position of individuals. If the Constitutional Court held that the Constitution of a modern democratic State governed by the rule of law is a social contract based on minimum consensus regarding values and institutions, then this notion can be understood, *inter alia*, as the interest of both the State and the persons subject to its protection in ensuring the State's safe existence; in order to protect this interest, the State must possess the relevant instruments. The protection of confidential facts represents one of such instruments.

Obligations under EU law and international law

The duty to meet the obligations following for the Czech Republic from international law and its membership in international organisations is laid down in Art. 1 (2) of the Constitution. The priority of application of international treaties follows from Art. 10 of the Constitution. Art. 10a of the Constitution then allows for delegation of certain powers of the Czech Republic's authorities to an international organisation or institution, i.e. primarily to the European Union and its bodies.

Along with judgement File No. IV. ÚS 2370/15 of 14 June 2016, which was based on earlier case-law concerning claims raised by clients of a bankrupt travel agency for a full refund of the price of a package tour, the primary judgement concerning EU law was judgement File No. II. ÚS 443/16 of 25 October 2016, on the conditions for registering a graduate from a foreign law school in the list of trainee attorneys-at-law. The complainant graduated from a master's study field of law at Jagiellonian University in Krakow and despite being issued by the Ministry of Education, Youth and Sports of the Czech Republic with a certificate of recognition of higher education as equivalent to education acquired in the Czech Republic, the Czech Bar Association (hereinafter also the "CBA") refused to register him in the list of trainee attorneys. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, was particularly relevant in this case, among other sources of law. Having regard to Art. 51 of the Charter of Fundamental Rights of the European Union, which lays down the principle that "where EU law applies, the Charter of Fundamental Rights of the European Union also applies", Art. 15 thereof must also be taken into account. The latter grants everyone the right of free choice of profession and stipulates that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. It adds that every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Art. 45 of the Treaty on the Functioning of the European Union provides for freedom of movement for workers within the Union, which entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. It entails the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or

administrative action, and (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. Last but not least, the Constitutional Court drew attention to the wording of Art. 49 (2) TFEU enshrining the freedom of establishment, which includes the right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected. It also follows from Art. 52 of the Charter of Fundamental Rights of the European Union that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." These conditions are binding not only on the Member States themselves, but also on non-state entities (corporations, unions and individuals). The Constitutional Court then assessed the interference with the right of free choice of profession in terms of its proportionality. As the CBA's interference did not meet the second criterion of the proportionality test (when assessing the complainant's level of education, both CBA and subsequently also the common courts focused only on the complainant's knowledge in several select areas of law, and completely failed to take account of other decisive factors, such as the high quality of legal education in Poland, the several years' worth of professional experience and the very good quality of the complainant's pleadings submitted with respect to the case at hand), the complainant's right of free choice of profession was violated, given that his rights were not given sufficient protection, even subsequently by the common courts.

Another interesting judgement was judgement File No. II. ÚS 143/16 of 14 April 2016, on the application of the *ne bis in idem* principle in criminal proceedings within the Schengen area and on respecting the objective of the summons based on which a person from another State appears in the territory of the Czech republic; in this judgement, the Constitutional Court recalled that the prohibition of *ne bis in idem* applies only to prosecution in criminal proceedings that is subject to the jurisdiction of the same State, and the given person may therefore be prosecuted in a different State for the same act. However, among the Member States of the EU, this restriction is weakened by Art. 50 of the Charter of Fundamental Rights of the European Union, which enshrines the extraterritoriality of *ne bis in idem* on the Union level when applying EU law in relation to Art. 54 of the Convention Implementing the Schengen Agreement of 1985. This principle is regulated in many international documents [in particular, in Art. 4 of Protocol 7 to the Convention, in Art. 50 of the Charter of Fundamental Rights of the European Union, and finally also in Art. 14 (7) of the International Covenant on Civil and Political Rights (hereinafter also the "Covenant")]. In conclusion of the judgement, the Constitutional Court stated that the prosecuting bodies had failed to sufficiently verify and explain to the Constitutional Court whether criminal prosecution of the complainant for the individual acts listed in the resolution on initiation of criminal proceedings was permissible under Section 11 (2) of the Criminal Code, in which this principle was specified.

The Constitutional Court also noted the various international obligations in judgement File No. II. ÚS 3436/14 of 19 January 2016, in which it dealt with the right to effective investigation of crimes. In the case at hand, the complainants reported a particularly serious crime of human trafficking and a very high number of persons claimed protection. The incorrect procedure of the prosecuting bodies may have been at variance with the international obligations of the Czech Republic (Art. 1 (2) of the Constitution) concerning effective protection of human freedom and dignity; furthermore, these obligations may have been violated on a long-term basis, on a larger scale and with respect to entire groups of persons. It was not possible, either, to overlook important obligations following for the Czech Republic from EU law at the time when the contested decisions were issued – in particular, based on Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims. The prohibition of slavery and forced or compulsory labour is also enshrined in Art. 5 of the Charter of Fundamental Rights of the European Union. The State's obligations in this area following from international law were recently expanded when the United Nations Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing this Convention (see below for particulars) entered into force with respect to the Czech Republic.

In judgement File No. III. ÚS 1716/16 of 9 August 2016, the Constitutional Court recalled the commitment – following from the nature of public authority – to protect aggrieved parties in criminal proceedings (the case in question involved a petition for permitting renewal of proceedings to the detriment of the accused). This principle also follows from provisions of a majority of international treaties which, considering the role of the State, are aimed precisely at ensuring that the individual countries undertake to protect the rights of aggrieved parties and ensure effective investigation and remedying of their violation (e.g. Art. 8 of the Universal Declaration of Human Rights; Art. 2 of the Pact; Art. 2 to 4 and Art. 39 of the Convention on the Rights of the Child; Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 12 to 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The monopoly of power and the State's *ius puniendi* associated with it are therefore manifested in the Constitution and the Charter in the form of the State's commitments, which – within the legislation – correspond to the rights of individuals that they may invoke in various forms against prosecuting bodies. This is true not only of the State's duty to protect these values through legislation (i.e. the body of law), but also by providing certain means for their protection to the affected persons (i.e. their "subjective" rights), and in case of homicide also to immediate survivors having the status of aggrieved parties or, if applicable, to the victims of crimes, especially in accordance with Victims of Crime Act, i.e. where the interference with the aggrieved party's right to life also constitutes infringement on the fundamental rights of the survivors, ensuing – among others – from Art. 1 and 13 of the Convention and from the case-law of the European Court of Human Rights.

In judgement File No. III. ÚS 525/15 of 8 November 2016, on the constitutional conditions of application of the prohibition of the *reformationis in peius* principle, the Constitutional Court referred, *inter alia*, to Art. 1 (2) and to Art. 10 of the Constitution, which establish the duty to fulfil obligations following from international treaties and simultaneously give these obligations – if they are self-executing – priority over laws if the given international treaty is in contradiction with a national law (the so-called application priority of international treaties), while nonetheless adhering to the principle of more favourable treatment (e.g. Art. 53 of the Convention, Art. 5 of the Covenant), meaning that the situation of the individual in question may not deteriorate as opposed to his/her situation under more convenient provisions of national law. This includes, in particular, the right of appeal guaranteed to each convict by Art. 2 of Protocol 7 to the Convention, although – on the constitutional level – no such privilege follows from the Convention or from the requirement for the provision of effective means for the protection of fundamental rights and freedoms. Due to its proximity to the constitutional principles of fair trial and the courts' duty to protect fundamental rights and freedoms, this principle must be viewed primarily in material terms. In its case-law, the Constitutional Court has often emphasised that a violation of this principle usually has unacceptable consequences in terms of constitutional law.

Judicial independence

The independence of courts and of the judicial branch belongs among substantial constitutional principles inferred both from the notion of rule of law and from the principle of separation of powers. As early as in judgement File No. Pl. ÚS 13/99 of 15 September 1999, the Constitutional Court stated that by establishing the principle of separation of powers, the Constitution followed on from the intellectual tradition formed by Charles Montesquieu and, on the institutional level, the French and American Revolution, which emphasised and also institutionalised the necessity of independent judiciary.

In judgement File No. Pl. ÚS 7/02 of 18 June 2002, the Constitutional Court noted that a democratic State is quite distant from the idea of a "judicial state", as the bodies of State power also include the legislative and executive branches. That is why, in a democratic system, State power can only be functionally implemented if all of its bodies are in place and operable. On the other hand, each democratic State is required to create institutional prerequisites for the creation and establishment of true independence of courts, serving as not only a formative, but also a significant polemic element, important to stabilise the position of the courts, and indeed the entire democratic system, in relation to the legislative and executive branches. True independence of the courts is a specific and irreplaceable attribute of the judicial branch, which is justified and also required by Art. 4, as well as by Art. 81 and 82 of the Czech Constitution.

Having regard to its earlier case-law, the Constitutional Court emphasised in judgement File No. Pl. ÚS 20/15 of 19 July 2016 that assessment of the constitutionality of judges' pay restrictions for a specific period of a specific year falls within the framework delimited by the principle of judicial independence.

Judgement File No. Pl. ÚS 20/15: Judges' pay XVI – claim for allegedly outstanding balance of pay

In proceedings before common courts, a judge of the Brno-suburb District Court claimed the allegedly outstanding balance of her pay on the grounds of incorrectly calculated pay base and due to a long-term reduction of the coefficient for determining judges' pay. The Supreme Court ordered the complainant, the Czech Republic – Brno-suburb District Court, to pay the amount of CZK 35,100 towards the complainant's claim for payment of an allegedly outstanding balance of "frozen" or, more specifically, generally reduced pay from 3 times to 2.5 times the average nominal salary of natural persons in the non-business sector for the given time period. The complainant asserted that the Supreme Court should have considered to a greater extent whether or not there was any public interest which would prevail over the right to payment of the allegedly outstanding balance of judges' pay.

As a preliminary point, the Constitutional Court recognised the complainant's locus standi to lodge a constitutional complaint; indeed, although an organisational component acting on behalf of the State was a public authority by nature, it was acting in the dispute at hand as a party to a private-law legal relationship, and private law should therefore apply to the complainant in the same manner as to other employers. The State, therefore, did not have the position of "authority", but rather a position equal, or more precisely comparable to that of any other employer, and thus enjoyed fundamental rights and freedoms.

The Constitutional Court concluded that the constitutional complaint was justified, since the contested decision of the Supreme Court showed signs of unacceptable arbitrariness not conforming to the Constitution. Indeed, the legal conclusions of the Supreme Court to the effect that the judges' pay base should be recalculated in accordance with Section 3 (3) of the Pay of Public Officials Act, in the repealed version previously applicable until 31 December 2010 (i.e. 3 times the average salary), could not be inferred from the Constitutional Court's earlier case-law regarding this issue.

The Constitutional Court also explained that its conclusions could only be used pro futuro and were not applicable to disputes between judges and the State conducted from January 2013 before the common courts. In this respect, the Court pointed out that retroactive payment of these amounts would constitute an unexpected interference with the State budget, which would necessarily increase the tension between judges and society.

One of the conditions that complements and strengthens judicial independence is the right to a statutory judge, which also encompasses the matter of establishing transparent and pre-defined general rules for assignment and reassignment of cases within the schedule of work. The Constitutional Court dealt with this issue in its judgement File No. I. ÚS 2769/15 of 15 June 2016. The Constitutional Court based its considerations on the case-law of the European Court of Human Rights, according to which the right to access an independent and unbiased court encompasses not only judges' independence of the executive branch and other entities outside the judiciary (external judicial independence), but also independence of judicial officers and other entities within the judiciary (internal judicial independence). Indeed, the discretion available in initial assignment of cases or in their subsequent reassignment can be abused as a means of exerting pressure on individual judges, e.g. by overloading them with work or by assigning only uninteresting cases, or perhaps by assigning certain politically sensitive cases exclusively to certain selected judges, thus preventing their assignment to others.

The right to a statutory judge, which complements and strengthens judicial independence, was also invoked in judgement File No. II. ÚS 2430/15 of 3 August 2016, on selection of lay judges in criminal proceedings (see below for particulars).

Fundamental rights and freedoms

Right to life

Protection of one of the most important human rights, the right to life, was long outside the spotlight of the Constitutional Court. Although complainants did plead violation of Art. 6 of the Charter in some rare cases, the Constitutional Court never granted any such complaint until the year 2015. In several judgements of 2015, the Constitutional Court expressed its opinion on the duty to conduct effective investigation in case of a possible threat to the right to life. The procedural framework safeguarding the protection of the rights following from Art. 6 (1) of the Charter and Art. 2 of the Convention was again subject to scrutiny by the Constitutional Court in 2016, namely in judgement File No. III. ÚS 1716/16 of 9 August 2016. In the relevant proceedings before the Municipal Court in Prague, the complainants – relatives of the aggrieved, whose remains were discovered at the bottom of the Orlík reservoir many years after he was declared missing – were not advised of ongoing renewal of criminal proceedings. The Constitutional Court admitted that, with regard to Art. 80 of the Constitution in conjunction with Section 280 (2) of the Criminal Code, the complainants were not entitled to apply with a court for renewal of proceedings to the detriment of the accused, as this falls within the monopoly of public prosecution. However, where an application for renewal of proceedings had already been filed by the public prosecutor, the complainants had the right to be informed of this fact, to appoint a representative for the proceedings and to participate in the public hearing with the procedural status of aggrieved parties. Yet in the case at hand, the Municipal Court prevented the complainants from taking advantage of the procedural framework guaranteeing the protection of their rights following from Art. 6 (1) of the Constitution and Art. 2 of the Convention.

In the past year, the Constitutional Court also expressed its opinion on the issue of safeguards against exposing an individual to realistic danger of being killed, tortured or ill-treated in some other way in the context of administrative expulsion. Although the Constitutional Court – in judgement File No. I. ÚS 630/2016 of 29 November 2016 – did not grant the constitutional complaint in question, it ruled *obiter dictum* on the inappropriate practice of the Ministry of the Interior in issuing binding opinions on the permissibility of a foreigner's departure within the meaning of Section 120a of the Foreigners Act. The Iraqi complainant advised the authorities that he was a Sunni and that he had co-operated with the U.S. Army in Iraq, as a result of which he was in danger of persecution and potential death inflicted by the Shia militias. The Constitutional Court noted that the first-instance decision on the complainant's expulsion raised some serious questions as to whether the Ministry of the Interior – which had drawn up the binding opinion on the permissibility of the complainant's departure – had fulfilled its duty not to expel a person who could face the danger of death or ill-treatment in the country of destination in violation of Art. 6 and Art. 7 (2) of the Constitution, or Art. 2 and 3 of the Convention. The binding opinion had completely ignored information on the danger of the complainant's persecution and limited itself to a single concise, catch-all paragraph. However, the Ministry must carefully consider the individual circumstances of each person and justify that there indeed exist no serious grounds to believe that a foreigner might face the danger of treatment contrary to the right to life, prohibition of torture and other ill-treatment, or of a violation of some other fundamental rights, in case of expulsion to the country of destination.

Prohibition of torture and cruel, inhuman or degrading treatment or punishment

Similar to the right to life, there has so far been little case-law of the Constitutional Court on the prohibition of torture. As in the unique case of 2015, the Constitutional Court again concluded in 2016 that the prohibition of degrading treatment laid down in Art. 7 (2) of the Charter had been violated in the territory of the Czech Republic as a result of a breach of the duty to conduct effective investigation. This occurred in the well-known case concerning protests against tree felling in the Šumava National Park in August 2011, where the complainant tied himself to a tree marked for felling. He was subsequently removed from the place by the police and taken to a police station. While still at the station, he claimed that he had sustained an injury and required medical treatment. An official record was drawn up of an explanation provided by the complainant; in the record, the latter stated, *inter alia*, that he had been choked by the police

officers. Two criminal complaints filed against the steps taken by the police officers were set aside and the complainant was not even allowed to inspect the file. The Constitutional Court recalled the "minimum standard" requirements applying to investigation conducted by prosecuting bodies: thoroughness, conclusiveness and promptness, independence, impartiality and the possibility to access a file by any aggrieved party. According to the Constitutional Court, the prosecuting bodies had not met any of the said requirements (File No. I. ÚS 1042/15 of 24 May 2016)

Right not to be subjected to forced labour or service

In the past year, the Constitutional Court built on its first ever judgement of 2015, in which it granted a constitutional complaint on the grounds of violation of this and other related rights. This occurred in a closely followed case of foreign nationals forced to hard work in a forest without actually being paid the agreed salary. As in the previous year, the Constitutional Court again focused in its judgement File No. II. ÚS 3436/14 of 19 January 2016 on the procedural duty to conduct effective investigation. The Court admitted that although it did exercise self-restraint in relation to prosecuting bodies, this would not be appropriate in the case at hand given the extraordinary importance of the protected interests, the high number of persons who should have been granted protection by governmental authorities and the possible conflict with the international commitments of the Czech Republic. The Constitutional Court found it unacceptable that inquiries into the suspicion of long-term and systematic violation of fundamental rights of a number of foreign workers were closed by merely setting the case aside on the grounds of catch-all reasoning, without the competent bodies having considered, even briefly, the actual substance of the suspicion. It was contrary to the prohibition of arbitrariness in the exercise of public authority if the police body and the public prosecutor *de facto* refused to address and settle the complainants' pleas. Moreover, the Constitutional Court recalled that in case of human trafficking and other forms of criminal exploitation of workers, it was also necessary to reflect on the fact that – in view of their economic and social position – the aggrieved persons are usually unable to claim effective protection in civil proceedings; it might be excessively difficult, or even factually impossible, for the victims to exercise their rights before a civil court without previous criminal proceedings.

Protection and guarantees of personal liberty

Art. 8 of the Charter of Fundamental Rights and Freedoms further specifies the guarantees of personal liberty in the form of, *inter alia*, the principle of mandatory prosecution, both in terms of its substantive grounds and the manner of its procedural implementation. In judgement File No. III. 525/15 of 8 November 2016, the Constitutional Court also followed the principle of lawfulness of prosecution to infer protection under constitutional law for the prohibition of *reformationis in peius*, as enshrined in the Code of Criminal Procedure; this principle safeguards that a legal remedy filed by prosecuted persons cannot result in deterioration of their status or situation in the proceedings to date. In the given judgement, the Constitutional Court came to the conclusion that when a court of higher instance reduces a suspended prison sentence and simultaneously extends a ban from driving motor vehicles, such a change must be properly justified. Indeed, if the public prosecutor's office does not make use of its right to file an appeal to the detriment of the convicted person, it is not up to the courts to assume the role of public prosecution. Such approach would equate to unacceptable interference with the concept of separation of powers in criminal proceedings.

Last year, the Constitutional Court yet again elaborated on its extensive case-law in matters of remand. In judgement File No. I. ÚS 356/16 of 17 March 2016, the Constitutional Court rejected the procedure taken by a common court which substantiated remanding the complainant in custody by the mere possibility of a long prison sentence, where moreover, the complainant would only face the threat of such imprisonment if the legal qualification of the act changed, and not for the crime he was accused of at that time.

The Constitutional Court also places great emphasis on differences between decision-making on remanding a perpetrator in custody, on the one hand, and deciding on prolongation of remand, on the other hand, since the grounds for

remand tend to develop in time, as the Court stated in judgement File No. I. ÚS 2652/16 of 14 September 2016. In this judgement, the Court also expressed its opinion on the need for preliminary assessment by the remand court of permissibility of police provocation.

Judgement File No. I. ÚS 2652/16: Passage of time and permissibility of police provocation in deciding on justification of prolongation of remand

The complainant was prosecuted for preparing the crime of terrorist attack and preparing the crime of violence against a public official, which he had intended to commit together with other perpetrators with the participation of two police agents. As of the date of adoption of the Constitutional Court's judgement, the complainant had spent one year and four months in remand and his applications for release from remand had repeatedly been dismissed. While the threat of a long prison sentence may justify concerns over avoiding prosecution and thus fulfil the requirements for remanding a person in custody as laid down by the Code of Criminal Procedure, these grounds may become less significant or convincing over time, and may not be sufficient to substantiate further deprivation of the accused of his or her personal liberty.

The Constitutional Court also questioned the fact that none of the remand courts had taken account of the complainant's constantly repeated plea regarding unauthorised police provocation. There is no doubt that this issue should be comprehensively and unambiguously resolved during the trial. However, it is unacceptable if an accused person is remanded in custody, and his or her fundamental rights are thus so significantly interfered with, if this person, in fact, fell victim to police provocation. The courts were therefore required to consider the complainant's argument regarding police provocation even when deciding on the complainant's placement on remand, albeit not as carefully as when deciding on guilt or innocence.

Finally, unlawful initiation of criminal prosecution together with unacceptable limitation of personal liberty were both invoked in the case of a Czech complainant who was placed on remand after having voluntarily travelled from Germany based on a summons to testify as a witness before the regional court. The Constitutional Court cancelled the resolution on initiation of criminal prosecution by its judgement File No. II. ÚS 143/16 of 14 April 2016 with reference to international agreements on the avoidance of dual prosecution and the International Judicial Co-operation Act, since it had not been sufficiently examined whether or not the complainant had already been prosecuted for the same act in Germany, where she had her permanent residence. In follow-up judgement File No. II. ÚS 688/16 of 26 April 2016, the Constitutional Court found unlawful the complainant's remand in view of disappearance of the grounds for criminal proceedings.

Protection of personal life and inviolability of the person, dwelling and other premises

Protection of personal life and human dignity guaranteed by Art. 10 of the Charter of Fundamental Rights and Freedoms and the protection of inviolability of a dwelling guaranteed by Art. 12 of the Charter encompasses a wide range of matters falling within the most intimate sphere of life of an individual. The Constitutional Court was confronted with this issue quite frequently in 2016, where its crucial decisions undoubtedly include the Plenum's judgement File No. Pl. ÚS 7/15 of 14 June 2016, on inadmissibility of individual adoption of a child by a civil (registered) partner, and also the Plenum's judgement File No. ÚS 3/14 of 20 December 2016, on the question of making archive materials of the former security services accessible to the public.

In proceedings conducted under File No. Pl. ÚS 7/15, the Constitutional Court granted the petition of the Municipal Court in Prague seeking to annul Section 13 (2) of the Civil (Registered) Partnership Act, as the said provision prevented a person living in civil (registered) partnership from becoming an adoptive parent. The Constitutional Court concluded that the contested legislation unjustifiably excluded a group of people (civil partners) from being able to adopt

children, and that this infringed on their human dignity, was at variance with their right to equal treatment and also led to violation of their right to the protection of private life.

Judgement File No. Pl. ÚS 7/15: Civil (registered) partnership as a preclusion to individual adoption of a child

The Constitutional Court stated that it understands the notion of "family" primarily not as a kind of artificial social construct, but essentially as a biological construct, based on the blood kinship of people who live together, or possibly as a nonfamily relationship imitating the biological relationship (adoption or foster care). Although the Civil Code permits individual adoption, it favours adoption by spouses (or by one of them). Nevertheless, it does not a priori exclude a person living in a civil (registered) partnership from becoming an adoptive parent; this option is unambiguously prohibited only by the contested provision of the Civil (Registered) Partnership Act. In the opinion of the Constitutional Court, the course of the legislative process when adopting this Act does not clearly imply the actual intention of the legislature. However, the Constitutional Court perceives the preference of institute of marriage as conforming to the Constitution, as it corresponds to the closest form of cohabitation of two persons of different sexes, which takes place on the basis of their own free decision, associated not only with a number of rights, but also duties. As a result, marriage clearly differs from other forms of cohabitation, and therefore the very institute of marriage provides the biggest prerequisite for fulfilling the purpose of adoption, which is and must primarily be the best interests of the child.

In the opinion of the Constitutional Court, however, the contested statutory provision prefers the formal legal status (a civil partnership) to reality. On the one hand, the legislature admitted that an individual who does not live in a marital relationship could adopt a child, and did not, in fact, even lay down any restrictions in terms of whether that person would have to be heterosexual or homosexual. On the other hand, the legislature prohibited this individual from living in a civil partnership. At the same time, however, in paragraph 3 of the contested provision, the legislature imposed on the other partner duties concerning the protection of the child's development and upbringing. This particular solution seems illogical, irrational, and ultimately discriminatory in relation to persons who have entered into a civil partnership.

Beyond the scope of arguments concerning infringement of the right to equal treatment, the Constitutional Court found the contested provision to be in violation of human dignity as a fundamental objective value of humanity and the focal point of other fundamental rights. In fact, if a certain group of persons is excluded from a certain right (even if stemming not from the constitutional order but from sub-constitutional law) solely owing to the fact that they have decided to enter into a civil (registered) partnership, it thus turns them into *de facto* "second-rank" individuals and stigmatises them groundlessly in a certain manner, which evokes the idea of their inferiority, fundamental differences from others, and probably also of their inability – as opposed to other persons – to properly take care of children. Furthermore, the Constitutional Court found that the contested statutory provision also violated, in its consequences, the right to protection of private life. However, the contested statutory provision could not violate the right to protection of family life, as there is no fundamental right to adoption of a child, and thus a negative decision in an adoption case cannot violate the right to family life either.

Another example of a decision rendered in the area of protection **of private life and informational self-determination** was judgement File No. Pl. ÚS 3/14 of 20 December 2016, in which the Constitutional Court dismissed the Supreme Court's petition to declare unconstitutional Section 37 (6) of Act No. 499/2004, on archives and the filing service, in the version effective until 30 June 2009. Section 37 of the cited Act lays down conditions under which it is possible to peruse archive materials, including the requirement to obtain prior consent of a living natural person whose sensitive personal data are contained in these

materials. The contested provision (i.e. Section 37 (6) of the cited Act) exempts from these conditions archive materials created before 1 January 1990 based on the activities of security forces, social organisations and political parties of the former totalitarian State, as well as materials that had already been publicly accessible before the application for access to these materials was filed or that had already been publicly accessible before being declared as archive materials.

Judgement File No. Pl. ÚS 3/14: On making the archives containing files of the former State Security service accessible to the public

In the case at hand, the Constitutional Court concluded that protection of personal data within the regime of the Archives Act was shifted to the stage of their further processing, where any researcher was obliged to obtain consent of the affected persons, especially before publishing the thus-obtained information. The proportionality of interference with the right to private life and informational self-determination – guaranteed by Art. 10 of the Charter of Fundamental Rights and Freedoms – which takes place within the "open regime" under the Archives Act, is guaranteed under the Personal Data Protection Act, specifically by interpreting the term "perusal" –meaning granting access to archive materials based on a researcher's individual application for his or her own needs, i.e. only for an individual specific case – in conformity with the Constitution; materials are therefore not "made accessible to the public". Such restrictive interference does not automatically entail the researcher's right to further process the information obtained and is incomparably less significant than any publication of the data for the benefit of an unknown and unlimited number of users. It therefore does not reach such intensity that harm would be caused to human dignity, honour or goodwill, and is balanced against the right of access to information, and in this specific area, also justified by the significant social interest in gaining authentic knowledge of one's past. The contested provision does not favour any of the fundamental rights in question over the other in a manner not conforming to the Constitution.

The permissibility of interference with the right to personal data protection is subject to effective supervision of compliance with the limitations associated with such interference by an independent body. If, therefore, the archive as a personal data controller breaches its duty – imposed in Sections 5 and 11 of the Personal Data Protection Act – to lay down in the research rules specific conditions of perusal of archive materials in a manner respecting the above-specified limitations and precluding any unauthorised processing, and to ensure that these conditions are complied with in application of the research rules, or if these conditions are violated by the researcher, it is the primary task of the Office for Personal Data Protection to remedy the situation through its own supervisory activity and by imposing penalties in case of infractions and administrative offences. The same role is also played by instruments of the judicial branch, such as civil actions for protection of personal rights or criminal liability of natural and legal persons for unauthorised disposal of personal data. This applies, in particular, to the protection of the most intimate personal sphere of the affected persons, which encompasses stigmatising information on sexuality, on the state of health or mental handicaps, on minor children or on similarly vulnerable persons with respect to which it is necessary to pay extraordinary attention to the protection of their privacy and dignity. The Constitutional Court therefore came to the conclusion that, in terms of the fundamental right to personal data protection, mere perusal under the contested provision of archive materials containing information on the activities of security forces of the totalitarian regime was a lawful, legitimate and proportionate interference with this right, balanced against the fundamental right of access to information and justifiable with regard to the significant social interest in gaining authentic knowledge of the past. This restrictive interference does not reach such intensity that harm would be caused to human dignity, honour or goodwill, since it does not imply any right of the researcher to publish the obtained data or process the data in any other manner without prior consent of the affected person.

In relation to the issue of **inviolability of dwelling and protection of privacy** in criminal proceedings, the Constitutional Court noted – in its judgement File No. III. ÚS 905/13 of 7 June 2016 – when examining the constitutionality of contested warrants for search of other premises and land, that the prosecuting bodies have not only the duty to prosecute crimes, but also the duty to protect individuals from any negative impacts of provoked, purpose-driven criminal proceedings; this also implies their duty to investigate with sufficient care, and at least generally, the credibility of information gained not in the course of their own investigation, but from criminal complaints or other instigations. At the same time, they cannot be released from this duty on the grounds of alleged lack of knowledge regarding the issue being inquired. In the case at hand, the Constitutional Court reached the conclusion that if a warrant was issued for search of other premises and land without proper investigation of the facts suggesting that a crime had been committed, this constituted undue interference with the complainant's right to privacy guaranteed by Art. 8 of the Convention and with his right to protection from forcible entry into dwelling under Art. 12 of the Charter. This conclusion can be in no way prejudiced by the fact that the prosecuting bodies acted in good faith as to the veracity of information stated in the criminal complaint, since they could have prevented the unjustified interference with the complainant's fundamental rights if they had directed reasonable effort toward verifying the information.

Another interesting case in the area of criminal proceedings – especially in terms of facts – was undoubtedly the case in which the Constitutional Court rendered its judgement File No. II. ÚS 1221/16 of 13 October 2016, where it ruled that shortcomings in terms of stating the reasons for issuing a search warrant did not necessarily constitute an irregularity in terms of constitutional law, provided that all the circumstances of the case convincingly indicated that the conditions under which it could be ordered, moreover in the form of an urgent and unrepeatable act, had actually been met. A warrant for the search of a motor vehicle – against which the complainant's constitutional complaint was directed – was issued in a situation where the complainant (with a criminal past) ignored a police order to stop his vehicle and attempted to drive off, but lost control of his car, punctured a tyre and, lastly, attempted to escape, leaving the vehicle behind. However, he managed to lock the car before escaping. After having captured the complainant, the police spotted a syringe containing an unknown substance in the vehicle. Nonetheless, the complainant did not allow the police to search the vehicle, and neither did the complainant's mother, who was the actual owner of the vehicle. The police officers therefore confiscated the vehicle and the district court judge subsequently issued a warrant for search of the vehicle. Despite having certain reservations to the issued warrant, the Constitutional Court held that the aforesaid shortcomings in terms of insufficient reasoning did not represent such a significant defect that the Court would be forced to quash the warrant.

Protection of proprietary rights

In the past year, the Constitutional Court was yet again presented with **restitution cases**, which seem to have become a sort of judicial evergreen. In judgement File No. I. ÚS 3943/14 of 2 August 2016, the Constitutional Court stated that a claim for determination was an admissible manner of exercising claims for reparation of proprietary and non-proprietary injustices inflicted by the Third Reich authorities in the years 1938–1945, so long as the claims in question were directed towards the State and did not affect any third-party rights. Thus, it cannot be considered a circumvention of the restitution regulations if the complainant exercised his claims through a claim for determination, since he was – through no fault of his own and due to the existence of a serious obstacle – unable to invoke his claims based on restitution regulations in time, and exercised them without undue delay once the given obstacle ceased to exist.

Another group of restitution cases which the Constitutional Court was repeatedly called on to resolve in 2016 concerned the issue of compensation for property left in the Zakarpattia Oblast (Carpathian Ruthenia).

Judgement File No. I. ÚS 3964/14: Interpretation conforming to the Constitution of legal regulations of the communist regime with regard to expiry of deadlines set by restitution regulations

The complainant sought from the Czech Republic financial compensation in the amount of CZK 5,170,000 for property left by her grandmother in the territory of the former Carpathian Ruthenia. She inferred her claim from the restitution regulations issued during the communist regime on the grounds that the administrative proceedings conducted at that time on a claim for compensation raised by the complainant's mother were not formally closed and were merely set aside. Indeed, no administrative decision was issued and the Ministry of Finance merely informed the complainant's mother through a letter that she would not be granted any compensation, as she did not participate in farming as a member of the United Agricultural Co-operative (JZD), nor did she farm on her own as a small-scale employee. The Ministry of Finance of the Czech Republic therefore decided, upon the intervention of the Public Defender of Rights, to issue the missing decision now, in order to enable the parties to the still pending proceedings to potentially defend their rights by standard means of judicial protection. However, the Ministry resolved the matter in a manner identical to that stated in the letter of 1962. The condition of JZD membership necessary for recognising the claim was laid down by a decree, which the claimant perceived as discriminatory, since it made a distinction between "personal" and "private" ownership.

The Constitutional Court recalled the doctrine formulated in its very first judgment (File No. Pl. ÚS 19/93) regarding continuity with the "former laws", with simultaneous discontinuity with the "previous regime" (in terms of values), implying the duty of the courts to reflect on the modern concept of material rule of law, however outdated the applicable laws may be. In the view of the Constitutional Court, the common courts thus erred when they noted that the relevant decree clearly conformed to the totalitarian times, when socialist ownership was given preference, but nonetheless reached the conclusion that it was not possible to adopt an overly extensive line of interpretation and thus devise by interpretation rights that are, in fact, not established by any legal regulation, and that it was not up to the courts to construct any claims for indemnification that have no basis in any restitution regulation. In the case at hand, the Constitutional Court determined the existence of overt discrimination against the complainant resulting from the application of the given decree, which preferred – in violation of the Constitution – socialist or co-operative ownership to other forms of ownership, as the protection of ownership is now guaranteed without any exception whatsoever. Moreover, the given restitution regulation did not, in fact, lay down any such condition and the discriminatory criterion in question was only brought about by the implementing decree, which is not binding for courts in accordance with Art. 95 (1) of the Constitution. The Constitutional Court therefore yet again drew attention to the sense and purpose of restitution legislation, i.e. to alleviate the wrongs caused by former regimes, and to the importance of interpreting restitution norms in the very light of their sense and purpose.

The Constitutional Court also had to deal repeatedly with the question of **acquisition of the ownership title to real estate recorded in the Land Registry from a non-owner** and protection of the acquiror's good faith, since the common courts continued to fail to respect its settled case-law on this issue at variance with Art. 89 (2) of the Constitution. In its judgements File No. III. ÚS 247/14 of 28 January 2016, III. ÚS 705/16 of 19 April 2016, IV. ÚS 405/16 of 19 July 2016 and III. ÚS 1594/16 of 1 November 2016, the Constitutional Court therefore yet again recalled that if the common courts failed to evaluate the good faith of the real estate's acquiror when assessing the question of acquisition of the ownership title from a non-owner recorded in the Land Registry, they violated not only the acquiror's right to protection of property within the meaning of Art. 11(1) of the Charter, but also his or her right to a fair trial under Art. 36 (1) of the Charter and Art. 6 (1) of the Convention.

Another group of rulings in the area of protection of proprietary rights concerned the issue of **rent regulation**. For example, in judgement File No. III. ÚS 3219/15 of 7 June 2016, the Constitutional Court stated that it was not contrary to the constitutional guarantee under Art. 11 (4) of the Charter if compensation for forced limitation of the ownership title – to which a person had become entitled as a consequence of rent regulation (or rather the absence of legislation regulating unilateral rent increases) in the period from 1 January 2002 to 31 December 2006 or in any part thereof – was awarded only to an extent not exceeding the difference between the rent which the landlord in question would have been entitled to as of 1 January 2007 under Act No. 107/2006 Coll. and the rent the complainant had been entitled to under the previous regulation.

In another of its judgements, the Constitutional Court concluded that a plea of limitation raised in court proceedings by the State was at variance with good morals if the State itself had caused and further maintained the unlawful state of affairs as a result of which the given claim had become time-barred (unconstitutional rent regulation).

Judgement File No. II. ÚS 2062/14: Raising a plea of limitation by the State; variance with good morals

In common court proceedings, the complainants claimed from the Ministry of Finance compensation for damage incurred by them as a consequence of unconstitutional rent regulation. However, their action was dismissed on the grounds of a plea of limitation filed by the Ministry; the common courts of all higher instances subsequently upheld this ruling. In the constitutional complaint under scrutiny, the complainants claimed that the plea of limitation had been raised at variance with good morals, since it had been the Ministry itself that had prevented the complainants by its inactivity from disposing freely of their property and that had created and maintained this unlawful state from the very beginning. One of the complainants filed with the Supreme Court an application for appellate review of the judgement issued by the regional court; however, the Supreme Court accepted the regional court's conclusions and dismissed the application.

The Constitutional Court first noted that the principle of conformity of the exercise of rights with good morals was of great importance as it permitted the courts, in justified cases, to alleviate the harshness of the law and gave the judge a leeway to ensure justice and decency. It has already been inferred in the Court's earlier case-law that the aforementioned principle also applies to the exercise of the right to raise the plea of limitation, since there could be situations where such a plea would represent abuse of a right to the detriment of a party that did not cause the period of limitation to expire to no effect and in respect of which the extinguishment of the claim as a result of expiry of the period of limitation would constitute an inappropriately harsh punishment. A specific group is formed by cases where the State raised a plea of limitation although it has the duty to act so as not to interfere with the fundamental rights of individuals, but rather actively provide protection to these rights.

In the case at hand, the common courts took the view that a plea of limitation could be found at variance with good morals only if the plea was raised with the sole objective of harming another party to a legal relationship; this, however, had been neither claimed nor proved in that case. In their view, other circumstances – such as the State's inactivity or lack of uniformity among the courts – could not cause variance of a plea of limitation with good morals. According to the Constitutional Court, however, the conditions for invoking the principle of good morals cannot be restricted in such a formalistic manner. On the contrary, it is necessary to take into account a broader context of the case, i.e. the reasons why the right was not exercised in time, where the complainants claimed and proved a number of such circumstances in the relevant court proceedings.

The Constitutional Court stated that, on the one hand, the State had tolerated for years the existence of a situation giving rise to extensive repeated

violations of fundamental rights – consisting in unconstitutional rent regulation – and, on the other hand, had subsequently failed to provide adequate protection to these rights through courts. Moreover, due to long-existing inconsistency in the courts' case-law regarding this matter, it was entirely uncertain whether or not a filed action would be successful, which can be perceived as the State's failure. In such a case, however, the State must be the one to bear the burden of its failure, and this burden cannot be shifted to an individual who defended his or her rights with sufficient care, as was the case of the complainants. That said, nonetheless, the executive branch ultimately raised – through an intervening party – a plea of limitation, which was accepted by the common courts, even though all the above-listed circumstances together warranted a finding that the plea was at variance with good morals. The Constitutional Court therefore could not but conclude that the contested rulings issued by the common courts had infringed on the complainants' fundamental right to a fair trial and the right to property.

Another interesting ruling made in the area of protection of proprietary rights was undoubtedly the judgement on **claims raised by clients of a bankrupt travel agency** for a full refund of the price of a package tour. In judgement File No. IV. ÚS 2370/15 of 14 June 2016, the Constitutional Court followed up on its earlier ruling (judgement File No. III. ÚS 1996/13 of 16 July 2015), where it held that when deciding on claims raised by clients of a travel agency against the insurance company with which the travel agency had concluded a bankruptcy insurance policy within the meaning of Act No. 159/1999 Coll., it was necessary to interpret the relevant provisions of the Act in a manner conforming to the constitutional order and to the obligations of the Czech Republic ensuing from its membership in the European Union, where only interpretation resulting in a full refund of the price of the package tour paid by the customer could be considered compliant with the Constitution.

Another judgement of equal importance concerned a **distraint** procedure against a non-distrainable part of retirement pension deposited in a bank account. In its judgement File No. IV. ÚS 121/16 of 20 October 2016, the Constitutional Court upheld the Supreme Court's case-law regarding this matter. Decisions issued by of common courts which are based on the view that funds paid into the bank account of an obliged party by a retirement pension payer lose their status of non-distrainable amount of pension once they become a "deposit receivable" and that distraint ordered against these funds does not affect the non-distrainable amount of pension, but rather the right to draw the funds from the account, suffer from excessive formalism, not taking into account the purpose of the legislation on non-distrainable amounts of pension. Such interpretation, however, leads ultimately to violation of the obliged party's fundamental right to protection of property under Art. 11 (1) of the Charter and to undisturbed use of property under Art. 1 of the Additional Protocol to the Convention.

Political rights

Freedom of expression

Judgements rendered by the Constitutional Court in 2016 in respect of the constitutionally guaranteed freedom of expression share one common feature: the judge. In two cases, the Constitutional Court considered the degree of freedom of expression that could be granted to a judge; in contrast, in a different case, it dealt with comments directed against a judge. Both judgements concerning the judges' freedom of expression were issued on instigation of judges who themselves had been subject to disciplinary proceedings for having expressed their opinion. In judgement File No. I. ÚS 2617/15 of 5 September 2016, the Constitutional Court expressed its opinion on whether or not judges could freely comment on political competition, and in judgement File No. II. ÚS 2490/15 of 8 November 2016, it expressed its opinion on the nature of judges' correspondence using their private e-mail address. On the other hand, in judgement File No. I. ÚS 750/15 of 19 January 2016, the Court dealt with insulting comments addressed to a judge by the representative of a party to proceedings.

In the case heard under File No. I. ÚS 750/15, the complainant objected against a procedural fine imposed on him in civil proceedings on the grounds that his written statement of the reasons for his plea of bias of the judge had been found grossly insulting. However, the Constitutional court agreed with the arguments of the common courts and dismissed the complainant's constitutional complaint.

Judgement File No. I. ÚS 750/15: Procedural fine for extremely insulting comments directed against a judge expressed in a written pleading

In relation to the criticism of courts and judges, the Constitutional Court emphasised the following factors when assessing whether or not the comments in question were exaggerated in the light of the proved factual basis: (1) against whom the criticism was directed; (2) who made the critical statements; (3) what the object of criticism was; and (4) where and (5) in what form the critical statements were issued.

When applying these criteria to the case at hand, the Constitutional Court stated that it was true that the complainant had acted in the capacity of a general attorney (the "who" factor), and was therefore in a similar position to that of an attorney-at-law, whose freedom of expression before courts enjoys special protection. On the other hand, though, general attorneys must comply with the requirement for professional conduct and emotion management before the court, especially as they are not parties to proceedings personally affected by the case.

The Constitutional Court further stated that in the case at hand, the criticism was not public (the "where" factor), as it was expressed in correspondence with the court. Nevertheless, the fact that the complainant had criticised a specific judge (the "against whom" factor), rather than the judiciary as such or a specific court ruling based on the court's decisions, spoke against the complainant. Furthermore, a majority of the complainant's comments had nothing to do with the judge's professional activity, but was rather directed against the judge's private sphere and family (the "what" factor). Moreover, the complainant's comments were expressed in writing (the "form" factor) and could not be considered a spontaneous verbal expression, which – given its immediacy and possible impulsiveness – enjoys a higher degree of protection.

In judgement File No. I. ÚS 2617/15, the Constitutional Court dismissed the petition of the complainant – a judge – for annulment of a decision rendered by a disciplinary tribunal, whereby he was found guilty of allowing – during the electoral campaign before municipal elections – the preparation of a leaflet (in his name and stating his status of a judge) and its distribution into post office boxes of voters in the municipality in question where he owns a cottage; in the leaflet, he evaluated the municipal assembly electoral campaign and subsequently publicly expressed his opinion on the outcome of the elections and on the possible coalition options, including the position of the mayor of the municipality.

File No. I. ÚS 2617/15: Limitation of judges' freedom of expression when commenting on political competition

The Constitutional Court primarily noted that although the judges' freedom of expression enjoyed protection under Art. 17 of the Charter of Fundamental Rights and Freedoms and Art. 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms, this freedom was nevertheless subject to specific limitations due to the nature of judges' status of public officials. These limitations include, in particular, the duty of loyalty and self-restraint.

When evaluating to what degree a judge complied with the duty of loyalty and self-restraint in his or her expression, it is necessary to take into account whether or not the expression in question was in stark contradiction with

the fundamental values of democratic society governed by the rule of law and whether or not public trust in the independence and impartiality of the judiciary has been impaired. Judges are subject to these duties even in their private lives; however, this depends on the specific circumstances in which any given expression is made. An expression in which an individual expressly refers to his or her office, or which he or she addresses to a specific group of people who are aware that the individual is a judge, must be assessed more strictly. In contrast, judges' expressions regarding matters related to the management and organisation of the judiciary enjoy a high level of protection.

Having applied the aforementioned principles to the case at hand, the Constitutional Court came to the conclusion that the disciplinary tribunal's decision had been issued with the legitimate objective of protecting the independence and impartiality of the judiciary. In doing so, the Constitutional Court reproached the complainant, not for breaching the duty of loyalty, but rather for breaching the duty of self-restraint. Indeed, the distributed leaflets expressly mentioned the complainant's office of judge in order to aid the campaign of a specific political party, and the complainant also entered the public debate in a significant manner by publishing an article in the local magazine, while there was a reason for linking such an expression with his office. The Constitutional Court therefore held that, with respect to this expression, the complainant breached his duty of self-restraint, applicable to him as a judge, since he – on his own and based on his own initiative, actively, openly and with excessive intensity – took part in political competition by making the expression in question.

In constitutional complaint File No. II. ÚS 2490/15, the complainant – a judge – challenged the decision of a disciplinary tribunal in which he was found guilty of forwarding – at variance with his duties of a judge and on the first day of municipal and Senate elections – from his private e-mail address to 32 different addresses (including journalist addresses), a message with the subject being "KUBERA conversations – part", which created the impression of being a transcript of conversations among ODS *(Civic Democratic Party)* politicians and which contained a number of vulgar expressions and indicated unlawful conduct of the persons mentioned therein; the complainant forwarded this document despite being aware that it was fictional. The Constitutional Court did not accept the complainant's arguments to the effect that his actions were of a strictly private nature and dismissed the constitutional complaint.

Regarding the contended interference with the freedom of expression, the Constitutional Court fully agreed with the conclusions of the disciplinary tribunal and did not find any violation of this right with respect to the complainant. The Constitutional Court noted that if the complainant forwarded the e-mail in question, without adding any comments, to a circle of persons who also included several representatives of the Czech media, and in some cases even to their work e-mail addresses, he must have been fully aware that the content of the e-mail in question could be disclosed to the public, where the complainant would be known as the sender of the message. Consequently, in the light of this fact, the e-mail correspondence cannot be viewed as purely private, despite being forwarded from the complainant's private e-mail address. The Constitutional Court therefore concluded that through this conduct, the complainant had impaired the respectability of judges, if only with respect to the persons to whom he forwarded the e-mail.

Economic and social rights

Last year, the Constitutional Court again issued a number of important decisions dealing with the protection of economic, social and cultural rights, which are enshrined in Art. 26 to 35 of the Charter and which therefore enjoy the protection of the Constitutional Court.

Free choice of profession and the right to acquire the means of one's livelihood by work

These rights include the right to free choice of profession and to receive training for that profession, enshrined in Art. 26 of the Charter. The Constitutional Court ruled on violation of this very right in its judgement File No. II. ÚS 443/16 of 25 October 2016, on the conditions for registering a graduate from a foreign law school in the list of trainee attorneys-at-law kept by the Czech Bar Association, which had refused to register the complainant.

Judgement File No. II. ÚS 443/16: Conditions for registering a graduate from a foreign law school in the list of trainee attorneys-at-law; right to free choice of profession

In proceedings before common courts, the complainant claimed that the Czech Bar Association be ordered to register him in the list of trainee attorneys. The complainant graduated from a Master programme in Law at Jagiellonian University in Krakow and despite being issued by the Ministry of Education, Youth and Sports of the Czech Republic with a certificate of recognition of higher education as equivalent to education acquired in the Czech Republic, the CBA refused to register him in the list of trainee attorneys.

The Constitutional Court reviewed the contended interference with the complainant's right to a free choice of profession based on the proportionality test. First, the Constitutional Court assessed whether or not the refusal to register the complainant on the grounds of alleged non-fulfilment of the conditions laid down by the Legal Profession Act could possibly achieve the legitimate objective of ensuring that only highly qualified persons are allowed to practice law as attorneys, which would in turn ensure that legal services are provided in a professional manner. As far as this criterion is concerned, the Constitutional Court found the interference in question appropriate, as this very procedure helps the CBA prevent someone who might not be able to provide legal services of adequate quality from becoming a trainee attorney. According to the Constitutional Court, the first criterion of the proportionality test was therefore met.

The Constitutional Court subsequently addressed the issue of whether or not the contested interference was actually necessary and whether or not an alternative solution would have been less invasive with respect to the complainant's rights. In this respect, the Constitutional Court did find any fault on the part of the CBA. When assessing the complainant's level of education, both the CBA and subsequently also the common courts focused only on the complainant's knowledge in several select areas of law, and completely failed to take account of other decisive factors, such as the high quality of legal education in Poland, the several years' worth of professional experience and the very good quality of the complainant's pleadings submitted with respect to the case at hand, as well as a number of other circumstances. It became evident from the aforementioned facts that the CBA, as well as the common courts, had assessed the level of the complainant's knowledge and skills in an unduly restrictive manner.

The Constitutional Court further emphasised that in the process of taking evidence, the common courts should also focus on the availability of extraordinary study options. When assessing whether or not the education achieved by an applicant for registration in the list of trainee attorneys meets the conditions laid down by the Legal Profession Act, it is

necessary to consider not merely the applicant's knowledge of the relevant areas of law, but also the legal skills and other experience he or she has acquired.

Another important decision was made by the Constitutional Court in its judgement File No. Pl. ÚS 18/15 of 28 June 2016, where the Court again dealt with the issue of retirement pensions. This time it was up to the Constitutional Court to determine whether or not the fact that tax applied only to pensions paid out to high-income working pensioners with an income exceeding CZK 840,000 in a calendar year was contrary to the principles of equality and non-discrimination guaranteed by Art. 1 of the Charter and Art. 26 of the Covenant, both separately and in conjunction with the fundamental right to protection of ownership under Art. 11 (1) and 11 (5) of the Charter and in conjunction with Art. 26 (1) of the Charter enshrining the right to operate a business and carry out some other economic activity. The Constitutional Court noted that the entire pension was actually subject to tax when the pensioner's income exceeded CZK 840,000 per year (i.e. exceeded the average of CZK 70,000 per month). In view of the economic state of affairs, it is apparent that even after taxation of the income, or rather of the entire pension, the tax burden is not one that would have a "throttling" or "strangling" effect, and the contested legislation therefore does not violate the right to own property. Similarly, the legislation does not negatively affect the very core of the right to operate a business, the right to a free choice of profession or the right to acquire the means of one's livelihood by work and the legislation has no "throttling effect". The Constitutional Court eventually annulled the contested legislation on the grounds of unequal treatment (see also sub-chapter Rule of law).

The last judgement worth mentioning in this sub-chapter is judgement File No. I.ÚS 848/16 of 13 September 2016, in which the Constitutional Court dealt with the question of whether or not an attorney-at-law was entitled to a fee from the State also for representation preceding an application for granting entitlement to free defence. A defence counsel appointed by the accused prior to being awarded entitlement to free defence is entitled to reimbursement of costs from the State, in principle, from the date when a justified application for awarding the entitlement to free defence is filed. However, according to the Constitutional Court, reimbursement of costs of urgent acts immediately related to the defence of the accused may be awarded – in justified cases – even if they had been performed earlier, since the manner of determining a defence counsel's fee must not negatively impact the fundamental rights and freedoms of the accused. Documenting the accused's lack of assets can take time, which is why, in some cases, full application for awarding the entitlement to free defence can only be lodged after the accused, who does not have the required assets, has been forced to appoint a defence counsel in view of ongoing acts within criminal proceedings. If, therefore, it is necessary in the interest of preserving the right of the accused to legal counsel and defence that the defence counsel performs certain acts even before such an application is lodged, he or she is entitled to a fee and reimbursement of out-of-pocket expenses.

Right to fair remuneration for work

The principle of fair remuneration for work and equal pay was already guaranteed in the Universal Declaration of Human Rights of 1948, followed by the International Covenant on Economic, Social and Cultural Rights. In the past year, the Constitutional Court dealt with the right to fair remuneration for work in a number of high-profile cases.

The first of such cases was case File No. Pl. ÚS 20/15 of 19 July 2016, on the claim for allegedly outstanding balance of judges' pay. In the respective judgement, the Constitutional Court elaborated on its earlier case-law regarding the issue of judges' pay, the most recent being annulment judgement File No. Pl. ÚS 28/13 of 10 July 2014, in which the Court concluded that the judges' pay base, which had been reduced from 3 times to 2.75 times as of 2013, did not correspond to the moderate increase in average salary in the non-business sector and thus constituted a disproportionate interference with the material safeguard of judicial independence.

Judgement File No. Pl. ÚS 20/15: Judges' pay XVI – claim for allegedly outstanding balance of pay

In proceedings before common courts, a common court judge claimed the allegedly outstanding balance of her pay for January and September of 2011 and January of 2012 on the grounds of incorrectly calculated pay base and due to a long-term reduction of the coefficient for determining judges' pay. The proceedings eventually ended up before the Supreme Court, which ordered the complainant (the common court) to pay the amount of CZK 35,100 to satisfy the complainant's claim for payment of the allegedly outstanding balance of her "frozen pay".

In the view of the Constitutional Court, the decision of the Supreme Court shows signs of unacceptable arbitrariness not conforming to the Constitution. Indeed, the legal conclusions to the effect that the judges' pay base should be recalculated in accordance with Section 3 (3) of the Pay of Public Officials Act, in the repealed version previously applicable until 31 December 2010 (i.e. 3 times the average salary), could not be inferred from the Constitutional Court's earlier case-law regarding this issue. In particular, the Constitutional Court referred to its judgement File No. Pl. ÚS 28/13, where it explained that its conclusions could only be used *pro futuro* and were not applicable to disputes between judges and the State conducted from January 2013 before the common courts. In this respect, the Constitutional Court pointed out that retroactive payment of these amounts would constitute an unexpected interference with the State budget, which would necessarily increase the tension between judges and society.

Related to the cited judgement adopted in the past year and also to the aforementioned annulment judgement of 2014 is judgement File No. Pl. ÚS 14/15 of 2 February 2016, in which the Constitutional Court dealt with the pay belonging to members of the Supreme Audit Office (hereinafter the "SAO"). A member of the SAO sought to annul the phrase "2.75 times" in Section 3 (3) and in Section 3a of Act No. 236/1995 Coll., on pay and other requisites connected with performance of duties by representatives of the State, as had previously been done with respect to judges in aforementioned judgement File No. Pl. ÚS 28/13. However, in this case, the Constitutional Court dismissed the petition for annulment of this provision, primarily on the grounds of an extensive comparative analysis of the specific nature of judicial independence, as opposed to the status of members of the Supreme Audit Office. The status of judges, on the one hand, and that of SAO members, on the other, differs in view of the constitutional guarantee of judicial independence, which results in narrower discretion enjoyed by the legislative branch in terms of imposing salary restrictions with respect to judges as compared to the discretion related to the members of the SAO.

The final judgement that ought to be mentioned it this part is judgement File No. I. ÚS 190/15 of 13 September 2016. In that case, the Constitutional Court dealt with the issue of contractual freedom and concurrence of the office of chairman of the board of directors and chief executive director of a joint-stock company, where the offices were discharged in a labour-law relationship, and the related necessity for the common courts to bring forward convincing arguments in judicial development of the law with respect to private-law relationships.

Judgement File No. ÚS 190/15: Contractual freedom and concurrence of the office of chairman of the board of directors and chief executive director of a joint-stock company, where the offices are discharged in a labour-law relationship

The Constitutional Court emphasised that concurrence of the office of governing body with a labour-law relationship had never been expressly prohibited by Czech laws and that such a ban had only been developed through the case-law of common courts, which are authorised to develop the law only to a limited extent. The Supreme Court's case-law, advocating the prohibition for a member of the governing body to discharge his

or her office in a labour-law relationship, is based on two reasons: the fact that the Labour Code does not provide for any such activity, and also the incompatibility of discharge of any such office in a labour-law relationship with the very nature of corporations.

The Labour Code, however, does not preclude the parties from agreeing to subject themselves to the Labour Code of their own will, even with respect to other legal relationships which do not concern the performance of dependent work. In the absence of an express prohibition contained in the Labour Code for a member of the governing body of a corporation to perform the tasks of the governing body through a labour-law relationship, the only interpretation conforming to the Constitution is one that respects the *pacta sunt servanda* principle.

The general reference to the nature of corporations was also found insufficient. Case-law should always describe the considerations that led to a specific legal opinion. If the grounds for a specific legal assessment are not evident from the wording of the decision in question, and not even from the case-law cited therein, the persons subject to legal regulations have no means of ascertaining on which arguments the court based its decision. If judicial development of the law goes against private-law interests of individuals, the courts must bring forward especially convincing arguments. However, the Constitutional Court did not find any such arguments in the rulings rendered by the Supreme Court. Furthermore, judicial development of the law is subject to strict constitutional review, as it may result in violation of the complainant's fundamental rights, as well as in impairing the principle of separation of powers. In conclusion, the Constitutional Court considered it not appropriate to tie up the loose ends of the common courts' reasoning and left it to the common courts to bring forward sufficiently strong arguments in subsequent proceedings, should they decide to maintain their legal opinion held to date.

Protection of parenthood, family and children

The protection of children and parenthood is enshrined in various universal and regional human rights mechanisms. The Constitutional Court, too, has recently often dealt with this issue, last year being no exception. Such rulings included, e.g. File No. IV. ÚS 3035/15 of 12 April 2016, where the Constitutional Court assessed whether a fee for the father's presence at birth constituted a violation of the father's right to the protection of family life.

Judgement File No. IV. ÚS 3035/15: Fee for father's presence at birth

In terms of the legal nature of payments for the father's presence at birth, the Constitutional Court found that while these payments were called "fees", they could not be considered fees by definition – i.e. pecuniary performances of a public-law character – but rather a simple private-law consideration (price) for services provided by a health-care facility, albeit associated with the performance of the statutory (public-law) duties of such facility. The Court further stated that the father's presence at birth as such could not be subject to any "fee". Nor could it be conditional on payment of usual costs associated with the operation of a health-care facility, not even the costs of – among other things – (disposable) sanitary clothing, disinfectants, face masks or shoe covers, which must be provided in general to all persons present in a health-care facility.

Any payments associated with the presence of another person at birth (not necessarily just the father of the child) may only be collected as consideration for services provided beyond the scope of statutory duties; with respect to such services, each person must be given the opportunity to decide whether or not he or she is interested in receiving the service. Only specific services or procedures which must be provided due to their nature may then be subject to payment without any further conditions; however, the amount to be paid must be at least generally reasonable and must not be diametrically disproportionate to the acquisition price,

necessary scope and the procedures actually performed. If the payment is not made in advance, this must not affect the exercise of the right to be present at birth. According to the Constitutional Court, lump-sum payments primarily may not become a means of disguised generation of profit, substitution of income from public health insurance or discouraging other persons from being present at birth.

In judgement File No. II. ÚS 3489/15 of 19 April 2016, the Constitutional Court expressed its opinion on the nature of fines imposed by courts for failing to hand over a child to the other parent, even if the obliged person could not fulfil the obligation imposed by the court despite his or her evident and reasonable effort to comply. According to the Constitutional Court, the purpose of this instrument is primarily to enforce the fulfilment of a duty imposed by a court on the obliged person for the benefit of the entitled person. It is therefore not its objective to penalise the obliged person for failing to fulfil his or her duty voluntarily, and the fine imposed therefore cannot be perceived primarily as a punitive measure for breaching the law, but rather as a means to force the obliged party to respect the legal relations established by the title being enforced. Thus, if it is clear based on the ascertained circumstances that the obliged person is unable fulfil his or her duty imposed by the court, despite his or her evident and reasonable effort to comply, the conditions stipulated by the law for imposing a fine cannot be considered to be met.

The Constitutional Court was yet again faced with the issue of joint custody in 2016. In proceedings conducted under File No. I. ÚS 153/16 (judgement of 26 July 2016), the complainant objected against a decision issued by the regional court, where the court not only upheld the operative part of the district court's ruling on dismissal of joint custody, but more importantly, changed the operative part on child contact arrangements by reducing the extent of contact, without the regional court properly substantiating such a change by the child's best interests and without taking into account that neither of the parents disputed the arrangements.

Judgement File No. I. ÚS 153/16: Assessing best interests of the child in case of alleged change in circumstances and deciding on arrangement of parents' contact with children

According to the Constitutional Court, it is indisputable that children have the right to maintain regular personal contacts with both their parents, and both parents share a joint responsibility for the education and development of their children. Consequently, any limitation of this aspect of family life (contact between parents and children) must be properly and carefully substantiated, i.e. must pursue a legitimate objective in the form of the children's best interests, and must be proportionate to this objective. The regional court's argument that the arrangements on contact with the children established by the district court resembled joint custody was prejudicial in this respect. Firstly, the scope of the complainant's contact with his children as determined by the district court's decision equalled 24% of time within the period of two weeks. And secondly, in the Constitutional Court's view, such a consideration generally cannot represent a relevant argument in favour of limiting the contact. The Constitutional Court pointed out that, *a priori*, there is nothing wrong about contact resembling, in terms of its extent, joint custody.

The regional court was thus criticised by the Constitutional Court for failing to explain why it had found the child contact arrangements within the scope determined by the district court to be at variance with the children's best interests. The approach taken by the regional court seemed even more unfathomable given that the mother had not raised any objections to the original arrangements and that the guardian *ad litem* also suggested that the first-instance judgement be upheld. The regional court was undoubtedly authorised to resolve the matter differently than the district court, even of its own motion, but only on the condition that it properly justified such a change by the child's best interests and also took account of the fact that neither of the parents disputed the arrangements.

In the past year, the Constitutional Court also encountered several cases that shared common factual and legal aspects, all concerning the court's duty to appoint a guardian *ad litem* for a party to proceedings who is a minor. Substantively, the cases concerned "fare beating" in public transport and the associated orders to pay the unpaid fare and the related costs of the fact-finding proceedings and enforcement. Yet another common feature lay in the fact that the fines were imposed on the complainants when they were still minors and when, furthermore, their legal representatives were neglecting due care (including their failure to provide financial means for the fare), which eventually led to institutional care. The poor care taken of the complainants by their legal representatives logically also entailed insufficient protection of their interests in the proceedings conducted against them.

In its judgements regarding these complaints (e.g. judgement File No. I. ÚS 3598/14 of 21 April 2016 or judgement File No. II. ÚS 2748/15 of 31 May 2016), the Constitutional Court repeatedly reached the same conclusion – that the mere fact that the parents of a minor were treated as legal representatives in proceedings before common courts where the minor was a party to the proceedings in no way excluded that there might be situations where such representation could not be considered proper in terms of the best interests of the minor. This will particularly be the case where the legal representative represents the minor only formally, and in fact in no way communicates with the court and does not collect documents sent to any of his or her known address. Such a representative does not perform any procedural acts to protect the rights of the minor, and thus acts at variance with the minor's best interests and also with the very purpose of legal representation. Moreover, given the limited ability of minors to understand the proceedings, they might not be able to advise the court of the inactivity of their legal representative or defend themselves against it, although they will eventually be the ones to bear the potential negative outcome of the proceedings. This, in substance, is comparable to the situation of a minor who is not represented at all. For these reasons, it is the duty of the common courts to consider in each and every case whether or not such a situation has arisen, and whether or not the conditions for appointing a guardian *ad litem* have been met. The Constitutional Court maintained that the proceedings in question should not have continued without the individual complainants being properly represented by a guardian *ad litem* (preferably an attorney-at-law). As a result of the failure to appoint a guardian *ad litem* the complainants were prevented from acting in the proceedings before the common court in any way.

Right to judicial and other legal protection

Right to a fair trial

The right to a fair trial is the pivotal right within the legislation of any democratic State. It encompasses a number of individual rights, such as the right to equality of parties to proceedings, everyone's right to have their case considered without unnecessary delay, the right to be heard, as well as a number of other rights; it is therefore no wonder that the alleged violation of this very right has traditionally been the most frequent subject of complainants' pleas in proceedings before the Constitutional Court. It is thus difficult to choose several representative decisions from such a great number. The following overview both describes entirely new trends and elaborates on previously established principles.

In the past year, the Constitutional Court dealt in several of its rulings with the legal notion of judgement on recognition. In its negative judgement File No. Pl. ÚS 13/15 of 31 May 2016, the Constitutional Court expressed its opinion on the claimed variance of the legal provisions concerning judgement on recognition with the constitutional order, reaching the conclusion that this legal notion had to be employed very carefully. Nonetheless, the Court inferred that Section 153a (3) of the Code of Civil Procedure, which lay down the legal fiction of acknowledgement (recognition) of a claim by the defendant, was not at variance with the constitutional order, since the provision in question did not limit the defendant's autonomy of will, and could also be construed in a manner conforming to the Constitution. At the same time, the Court emphasised the duty of the common courts to proceed with careful deliberation when assessing the fulfilment of the conditions for issuing a judgement on

recognition, in order to prevent situations in which the defendant's right to a fair trial could be violated simply due to his or her inexperience or inability to obtain legal aid.

Judgement File No. IV. ÚS 842/16 of 19 July 2016 is also worth mentioning. In that case, the Constitutional Court found fault on the part of a common court which had issued a judgement on recognition without having notified the defendant in advance and in a suitable manner of the fact that the court considered the defendant's statement delivered to the court following a prior "qualified invitation" under Section 114b (1) of the Code of Civil Procedure insufficient, when – moreover – it was clear from the given statement that it was incomplete due to an administrative error. In cases where it is apparent from the defendant's actions that he or she does not agree with the relevant claim and intends to defend himself or herself, the Constitutional Court finds formalistic application of the fiction of recognition of the claim – without providing the defendant with the opportunity to correct or supplement his or her pleadings – incompatible with the principles of fair trial, and therefore in violation of Art. 36 (1) of the Charter (the Constitutional Court ruled analogously also in judgement File No. I. ÚS 1024/15 of 1 August 2016).

In proceedings conducted under File No. III. ÚS 3713/15 (judgement of 30 June 2016), concerning primarily assessment of the validity of termination of employment, the Constitutional Court found that the common courts had erred by failing to take into account, in a convincing manner, the purpose-driven nature of the steps taken by the employer, who had aimed to hire another employee instead of the complainant, and by interpreting the applicable legal provision in a manner not conforming to the Constitution. Through the above-described procedure, the common courts had interfered with the complainant's right to a fair trial.

Furthermore, in judgement File No. II. ÚS 1847/16 of 1 September 2016, the Constitutional Court reviewed alleged interference with the complainant's fundamental rights by an injunction ordered by the appellate court. By virtue of this judgement, the Constitutional Court satisfied the complainant's complaint and ruled that in appellate proceedings, courts were obliged to provide the party against whom an application for a preliminary injunction was directed with the opportunity to provide a statement before the injunction was ordered. By denying the complainant any opportunity to oppose the submitted application for a preliminary injunction, the appellate court interfered with the complainant's right to provide a statement on the evidence taken, guaranteed by Art. 38 (2) of the Charter, as well as with the principle of equality of parties to proceedings within the meaning of Art. 37 (3) of the Charter.

Another important component of fair trial is the process of taking evidence. The question of taking evidence, or rather the use of evidence, in disciplinary proceedings conducted before a disciplinary tribunal, was addressed in the negative judgement rendered by the Constitutional Court's second panel under File No. II. ÚS 2490/15 of 8 November 2016, where no interference with the complainant's constitutionally guaranteed rights was found despite an error made by the disciplinary tribunal (see also subchapter Political rights).

Judgement File No. ÚS 2490/15: On procedural (in)admissibility of evidence obtained prior to filing a disciplinary motion

By virtue of a decision rendered by the Supreme Administrative Court in the position of a disciplinary tribunal, the complainant was found guilty of forwarding – at variance with his duties of a judge and on the first day of municipal and Senate elections – from his private e-mail address to 32 different addresses, (including journalist addresses) a group message, which created the impression of being a transcript of conversations among Civic Democratic Party politicians and which contained a number of vulgar expressions and indicated unlawful conduct of the persons mentioned therein; the complainant forwarded this document despite being aware that it was fictional. In his constitutional complaint, he pleaded, *inter alia*, violation of his right to refuse a testimony, which had allegedly occurred in the form of an unlawfully obtained statement made by the complainant prior to the commencement of the disciplinary proceedings.

The Constitutional Court concluded that the statement had to be considered complainant's testimony instigated by the investigating authority, which however cannot be used under any circumstances in proceedings before the disciplinary tribunal, as it had been made before the complainant was notified of the accusation. The disciplinary tribunal therefore erred by taking the statement as evidence in the proceedings.

However, it cannot be neglected that the disciplinary tribunal also had at its disposal a statement made by the complainant at a later date, after the disciplinary accusation had been issued against him, where this later statement was identical in its content to the aforementioned statement and was admissible as evidence in the oral hearing before the disciplinary tribunal. Therefore, despite the fact that the Constitutional Court did find an error in the procedure of the disciplinary tribunal, in the context of the matter at hand, the error did not reach such dimensions as to violate the complainant's fundamental rights. The Constitutional Court thus concluded that the potential annulment of the contested decision would be a mere formalistic procedure which would not, in consequence, have any influence on the outcome of the proceedings in the complainant's case.

The diversity of issues dealt with in the system of guarantees constituting the right to a fair trial under Art. 36 (1) of the Charter is illustrated by judgement IV. ÚS 1580/16 of 5 December 2016, in which the Constitutional Court expressed its opinion on proceedings on assessing the legal capacity of individuals. The Court recalled that common courts are obliged to examine carefully the circumstances of each specific case and devise such limitation of the legal capacity that is in the best interests of the person in question. The assessment cannot be based on the premise that the primary interest of the person concerned is always to have his or her legal capacity limited as little as possible.

An interesting decision related to the right to a fair trial is undoubtedly judgement File No. IV. ÚS 3141/15 of 6 September 2016, which concerned the manner of assigning cases to insolvency trustees through measures adopted by the President of the Regional Court in Ostrava. In this judgement, the Constitutional Court arrived at the conclusion that the complainant's right to a fair trial had been violated by a measure adopted by the President of the Regional Court in Ostrava whereby she had appointed an insolvency trustee other than the complainant in specific insolvency proceedings, although the complainant should have been the one to be appointed on the grounds of her statutory order on the list of insolvency trustees within the "rotation system"; the President of the court placed the complainant at the end of the list and failed to state any convincing reasons for this decision.

Judgement File No. IV. ÚS 3141/15: Assigning cases to insolvency trustees by measures adopted by presidents of regional courts

The complainant perceived a violation of her fundamental rights especially in the fact the contested measure issued by the President of the Regional Court was adopted arbitrarily and without proper justification, as it consisted merely of the statement that the complainant had been placed at the end on the list of insolvency trustees "for the sake of ensuring even distribution of workload among insolvency trustees".

In the Constitutional Court's view, the reasoning of the measure adopted by the President of the court phrased in this way did not comply with the basic requirements on statement of the reasons why the complainant was not appointed an insolvency trustee, although she was next in line; such reasons need to be expressed in a comprehensible manner, albeit briefly, and must be envisaged by the law in Section 25 (5) of the Insolvency Act.

The Constitutional Court also rejected the arguments presented by the President of the Regional Court to the effect that she did not perceive the measure as an exception to the rotation principle, and that she would always adopt these measures generally, because she did not consider the current system right, and this approach was her way of fighting against the numbers of fictitiously founded establishments and the associated

multiplication of the number of cases assigned to individual trustees and uneven distribution of applications. According to the Constitutional Court, however, such reasons cannot stand, since not only they do not conform to the wording of the law, but also significantly limit the rotation system of appointing trustees anticipated by the law.

Recourse against fictitious establishments founded by insolvency trustees must therefore be exercised through procedures anticipated by the law, rather than through the aforementioned measures based on subjective and unjustified considerations of the President of the court. According to the Constitutional Court, the steps taken by the President of the Regional Court show signs of significant circumvention of the law and logically give the affected persons a reason to suspect an intentionally built clientelistic or downright corrupt environment. The measures adopted by the President of the court were therefore annulled on the grounds of their variance with Art. 36 (1) of the Charter.

An important set of cases that regularly appear before the Constitutional Court comprise cases concerning **appellate review**. Last year was no exception. In judgement File No. III. ÚS 3740/15 of 30 March 2016, the Constitutional Court criticised the Supreme Court for depriving the complainant of her right to access the courts, when it had paid no regard to the procedure of the first-instance court, which had incorrectly advised the complainant and, in an invitation to supplement the application for appellate review, set a deadline exceeding the one laid down by the law. Despite this fact, the Supreme Court did not admit the complainant's application submitted within the said deadline and did not hear the application for appellate review *in rem*, whereby it interfered with the complainant's right to a fair trial, or more specifically with her right to access the courts.

Furthermore, the Constitutional Court repeatedly spoke out against the Supreme Court's erroneous or inaccurate interpretation of the content of applications for appellate review, which had consequently led to the rejection of a number of such applications on the grounds of inadmissibility (see e.g. judgements File No. II. ÚS 1990/15 of 5 April 2016, File No. I. ÚS 3851/15 of 5 April 2016 or File No. II. ÚS 3316/15 of 31 May 2016). The Constitutional Court emphasised in the above-specified decisions that when deciding to reject an application for appellate review on the grounds of inadmissibility, the Supreme Court must carefully assess whether the submitted pleas merely question the established facts of the case, or whether they are rather directed at the legal evaluation of the case in terms of interpretation of the relevant legal norms, while simultaneously taking into account the established facts. If the Supreme Court rejects an application for appellate review on the grounds of inadmissibility in the latter case, it violates the principles of prohibition of denial of justice and of predictability of the courts' decisions.

As regards the requirements on reasoning of a resolution on rejecting an application for appellate review on the grounds of inadmissibility, these were outlined by the Constitutional Court e.g. in judgements File No. III. ÚS 1538/14 of 17 May 2016 and File No. I. ÚS 700/16 of 24 October 2016. Although the Constitutional Court accepts if a decision to reject an application for appellate review on the grounds of inadmissibility contains only a brief statement of reasons, such a resolution issued by the appellate review court must nonetheless comply with the requirements of predictability and comprehensibility. Each reasoning must comprise the key grounds based on which appellate review was found inadmissible, rather than a mere quote of the legislation or general references to earlier case-law, neither of which, in fact, gives any indication whatsoever to the applicant as to why his or her application was rejected. Indeed, such reasoning would render the given decision factually unreviewable.

The Constitutional Court's case-law related to the right to a fair trial in appellate review also includes judgement File No. I. ÚS 2804/15 of 19 July 2016, in which the Constitutional Court ruled that the Supreme Court had violated the complainant's right to judicial protection, or rather denied her justice.

Finally, we should at least briefly mention judgement File No. I. ÚS 3324/15 of 14 June 2016, in which, *inter alia*, the Constitutional Court again expressed its opinion on the question of admissibility of applications for appellate review based on the plea of violation of fundamental rights, namely the right to a fair

trial. In this judgement, the Constitutional Court stressed that any plea founded on alleged violation of constitutionally guaranteed fundamental rights and freedoms through a decision or procedure taken by the appellate court in civil proceedings was admissible as grounds for appellate review under Section 241a (1) of the Code of Civil Procedure.

Right to a statutory judge

The Constitutional Court's decision-making with respect to the right to a statutory judge included several important decisions in 2016. To begin with, mention can be made of negative judgement File No. Pl. ÚS 4/14 of 19 April 2016, in which the Plenum of the Constitutional Court ruled on the issue of determining local jurisdiction of the public prosecutor's office in preparatory criminal proceedings.

Judgement File No. Pl. ÚS 4/14: On determining local jurisdiction of the public prosecutor's office in terms of the right to a statutory judge

The proceedings were concerned with a petition of a group of Deputies seeking to annul Section 15 (3), second sentence, and Section 15 (5) of Decree of the Ministry of Justice No. 23/1994 Coll., on the rules of procedure of the public prosecutor's office, establishment of branches of some public prosecutor's offices, and on actions performed by judicial candidates. The Deputies argued primarily that the contested provisions of the Decree stipulating the local jurisdiction of public prosecutors in preparatory criminal proceedings could result in a change of the judge assigned to a given case, which would be at variance with the prohibition of removal of an individual from the jurisdiction of one's lawful judge, enshrined in Art. 38 (1) of the Charter.

After having evaluated all the circumstances of the case under review, the Constitutional Court rejected these arguments and stated, on the contrary, that special jurisdiction of the public prosecutor's office stipulated in the contested provisions did not apply to cases where the public prosecutor acted before a court in preparatory criminal proceedings as a party to the proceedings within the meaning of Section 12 (6) of the Code of Criminal Procedure and where he or she was authorised to lodge motions with the court (e.g. to lodge a motion for remand in custody, a motion for issuing a house search warrant, etc.), as the special jurisdiction only applied to the exercise of supervision under Section 174 of the Code of Criminal Procedure. By interpreting Section 26 of the Code of Criminal Procedure, which lays down the rules for determining the jurisdiction of courts to perform acts in preparatory proceedings, in conformity with the Constitution, one must necessarily reach the conclusion that if the relevant motion is lodged by a public prosecutor of one of the regional or superior public prosecutor's offices, it is necessary to apply the general provisions concerning local jurisdiction of courts in criminal proceedings and determine the local jurisdiction of the district courts based on the criteria laid down in Section 18 of the Code of Criminal Procedure, i.e. to select, from all the district courts in the territorial districts of which the regional or superior public prosecutor's offices operate, the court that best meets these criteria in terms of local jurisdiction.

Judgement File No. I. ÚS 2769/15 of 15 June 2016 concerned the requirements that must be met by a system of assignment and reassignment of cases determined by a court's schedule of work. The Constitutional Court emphasised in this respect that when interpreting Art. 38 (1) of the Charter, it is necessary to bear in mind that the purpose of the said provision is not merely to guarantee that the judge will be appointed based on rules laid down by law, but first and foremost that he or she will be appointed based on rules which have been defined in advance, which are transparent, available and comprehensible to the parties to proceedings and to the public, and which are enshrined directly in the schedule of work of the court in question. The given schedule of work must contain rules for appointing a specific judge or a panel of judges who will rule on the given case, the rules for their substitution in the event of

justified short-term absence or bias, as well as rules applicable in the event of their long-term absence. This applies both to the initial assignment of a case and to any potential subsequent reassignment of the same case. The schedule of work therefore cannot leave this decision to court officials, since such an arrangement would threaten the independence of judges and the public trust in the judiciary, and would deprive the parties to the proceedings of effective protection against purpose-driven manipulation. No judge appointed on the grounds of any such decision made by a court official is, in the view of the Constitutional Court, a statutory judge within the meaning of Art. 38 (1) of the Charter.

The second panel of the Constitutional Court also dealt, in its judgement File No. II. ÚS 2430/15 of 3 August 2016, with the requirements on a court's schedule of work, this time with respect to the manner of selecting lay judges in criminal proceedings. In this case, however, the Constitutional Court did not find any violation of the complainant's fundamental rights, as opposed to the case described above.

Judgement File No. II. ÚS 2430/15 of 3 August 2016: Right to a statutory judge – selection of lay judges in criminal proceedings

In his constitutional complaint, the complainant stated as one of his main arguments that his right to a statutory judge had been violated in criminal proceedings conducted before the Regional Court in Brno, as the case had been heard by a panel consisting of the presiding judge and two lay judges, without however the work schedule of this court laying down any rules based on which it would be possible to infer, on the day when the court was presented with the case at hand, that precisely the lay judges in question, and no others, would be appointed members of the criminal panel. The said work schedule therefore did not meet the statutory requirements, since it merely referred to a list containing the names of lay judges, without indicating the manner in which these persons would be appointed to sit on the individual criminal cases.

The Constitutional Court stated that there could be no doubt that the relevant work schedule of the Regional Court indeed did not stipulate a clear procedure for the selection of lay judges. However, given that all the requirements in terms of both the manner of selecting judges and the work schedule (listed e.g. in the above-mentioned judgement File No. I. ÚS 2769/15) explicitly applied only to judges and not to lay judges, it was disputable to what extent the said rules could also be applied to appointment of specific lay judges. In this respect, the Constitutional Court reached the conclusion that, given the significant differences between the office of judge and that of lay judge, it was not at variance with the constitutional order if the requirements on a work schedule regarding the appointment of specific lay judges were less specific.

After taking evidence in an oral hearing before the Constitutional Court, it was established that, at the given time, the Regional Court maintained a fixed, rather than random or purpose-driven, internal system of assigning lay judges to individual cases. In the complainant's case, too, the lay judges were appointed based on pre-defined rules and it was therefore not possible to conclude that the case had been decided by a panel formed by unlawfully appointed lay judges. The complainant's right to a statutory judge was therefore not violated.

Another case worth mentioning is undoubtedly judgement File No. I. ÚS 794/16 of 21 June 2016, in which the Constitutional Court found that the complainant's fundamental right to a statutory judge had been violated by the appellate court, which had quashed the first-instance judgement and referred the case to a different sole judge within the meaning of Section 262 of the Code of Criminal Procedure, on the grounds of alleged disregard of the appellate court's legal opinion by the first-instance court, without the appellate court having properly and convincingly justified its conclusion with respect to the necessity of such procedure.

Judgement File No. I. ÚS 794/16 of 21 June 2016: Referring a case to a different judge within the meaning of Section 262 of the Code of Criminal Procedure due to disregard of a binding legal opinion

The complainant was prosecuted for the misdemeanour of forging a medical report. However, he was acquitted by the district court due to the public prosecutor's failure to prove the complainant's intent. The regional court quashed the judgement and referred the case to the first-instance court for a new hearing. The district court maintained its previous legal opinion in the new judgement. The regional court then once again quashed the acquitting judgement and referred the case to a different sole judge, on the grounds that the district court had disregarded the regional court's previous legal opinion. The appellate court did not provide any reasoning for this ruling.

The Constitutional Court emphasised primarily that in order to reach a conclusion on whether the application of Section 262 of the Code of Criminal Procedure was justified, it was necessary to evaluate whether or not it was possible to ensure that the current panel of judges or the sole judge observed the fundamental principles of criminal proceedings, and eliminate any doubts as to the impartiality of the court. Furthermore, the procedure under this provision must be duly justified by the appellate court, or otherwise it can be considered a manifestation of apparent arbitrariness.

In the present case, the Constitutional Court found the reservations made by the regional court relevant as to the inherent inconsistency and lack of logic in the evaluation of the evidence taken. However, the Court emphasised that these reservations could not serve to hide the appellate court's attempts to extend the sphere delimited by the law for enforcing its own opinions as to the procedure followed and conclusions made by the first-instance court. An appellate court simply cannot quash a first-instance judgement merely to make room for its own evaluation of evidence. The said shortcoming was all the more evident in the case at hand, as despite the fact that the district court used its second judgement to correct the errors it had previously been criticised for, the regional court nonetheless again reconsidered the evidence taken at first instance and inferred its own conclusions from the evidence taken, without however repeating or taking directly any evidence.

In light of the foregoing, the Constitutional Court thus concluded that the regional court interfered with the decision-making of the first-instance court in an unacceptable manner. The regional court's conclusions on the necessity to proceed according to Section 262 of the Code of Criminal Procedure were based on inadmissible grounds, which resulted in interference with the complainant's right to a statutory judge.

On a side note, we should briefly mention the negative judgement rendered by the Constitutional Court under File No. I. ÚS 2866/15 on 14 March 2016, in which the Court dealt with the duty of a Supreme Administrative Court panel to refer a case to the expanded panel with a view to unifying the legal opinion, or rather with exceptions from that duty. The Constitutional Court pointed out that if a panel of judges hearing a certain case intends to depart from previous case-law, it is, in principle, bound to refer the case to the expanded panel. If, subsequently, any panel later fails to take account of a legal opinion expressed by the expanded panel that is applicable to the given case, such a panel thus violates its duty to follow decisions made by the expanded panel. However, such a failure of one panel does not automatically give rise to a conflict in case-law and hence the next panel hearing an analogous case need not refer it to the expanded panel for deliberation, provided that the latter panel abides by the legal conclusions expressed in the previous decision of the expanded panel. According to the Constitutional Court, it would be purely formalistic and uneconomical to require that a matter be again referred to the expanded panel in the above-described case, where a legal opinion has already been expressed but subsequently not followed by one of the panels, e.g. by omission or due to apparent incomprehension on the part of that panel.

Specific features of criminal proceedings

Given the potential consequences of criminal conviction, those who are suspected, accused or indicted in respect of a crime (and based on the *ne bis in idem* principle, also convicted persons) enjoy further specific constitutional guarantees of fair trial in criminal proceedings.

One of the most significant specific features of criminal proceedings lies in the *in dubio pro reo* principle, and the associated **principle of presumption of innocence**. As the Constitutional Court noted in judgement File No. I. 1965/15 of 27 January 2016, a judge does not act in accordance with this principle when he or she, while trying a crime of which the complainant was accused, comments on his guilt with respect to another crime for which the complainant has not been convicted. The Constitutional Court also considers it a serious shortcoming for common courts to qualify an act as attempted murder while simultaneously deliberating on the possibility of exonerating the complainant on the grounds of self-defence. In such a case, the murderous intent cannot be inferred at all. This was ruled by the Constitutional Court in judgement File No. I. ÚS 3235/15 of 26 April 2016, drawing inspiration from, *inter alia*, the case-law of the German Federal Constitutional Court.

Judgement File No. I. ÚS 3235/15: Assessing fulfilment of the conditions of putative self-defence

By virtue of a judgement issued by the regional court, the complainant was found guilty of committing the crime of attempted murder. He allegedly committed this crime by firing a gun in his house outwards through a non-transparent entrance door, behind which there were members of the Rapid Reaction Unit of the Police of the Czech Republic (hereinafter also "URNA" – *Rapid Reaction Unit, the Czech equivalent of a SWAT unit*) who were attempting to enter the house to perform a house search. The complainant was a person legally staying in the Czech Republic, legally possessing firearms, and at the time of the case subject to review, he was not accused of any crime. Moreover, it was not proven in the criminal proceedings that he had been or could have been aware of the fact that the Police had interest in him.

The Constitutional Court concluded that not even the utmost respect for the necessity of protecting the members of URNA and other police officers made it permissible for the State to "fashion" a convicted murderer (by a judgment which has the force of *res judicata*) out of a person who did not commit any crime, did not harbour any things important for criminal proceedings in his house, had never been suspected, accused of or indicted for any criminal case, had no record in the Criminal Register (register of sentences and misdemeanours), and merely at one point, after having been suddenly woken up in the early hours of the morning by an unusually intense violent attempt by a group of persons to break down the door and enter the house, and with the intention to protect himself, his wife and their three minor daughters from alleged criminals, once fired his legally held gun inside his own house against the entrance door, causing a non-serious injury to one of the intervening members of the URNA unit.

Similarly to the last mentioned case, the Constitutional Court also criticised, in judgement File No. I. ÚS 520/16 of 22 June 2016, the courts' tendency to lean towards the version presented by the intervening police officers when taking evidence in "statement against statement" cases, and thus award them an *a priori* higher credibility to the detriment of the complainant. Here, the Constitutional Court prompted the common courts to exert special caution and care when assessing two contradictory statements and inferring factual conclusions based on which the complainant was to be convicted, while strictly adhering to the principle of presumption of innocence, especially if the given statement was the only direct incriminating piece of evidence.

The principle of presumption of innocence, together with the principle of subsidiarity of criminal repression, represents a sensitive aspect of assessing the

criminal-law dimension of traffic accident cases. Last year, the Constitutional Court had the opportunity to rectify two unfortunate cases in which drivers of a motor vehicle were found guilty by the common courts despite the fact that the accidents had been caused as a consequence of a breach of obligations by other persons participating in the accident. In judgement File No. III. ÚS 2065/15 of 31 May 2016, the Constitutional Court ordered the common courts to re-evaluate the guilt of a driver who was reversing out of a car park by a shopping centre when an unattended one-year-old child got in the way of the vehicle and died on the spot from the impact. Similarly, the Constitutional Court defended a driver who, when turning left, collided with a motorcycle rider who had been unlawfully overtaking him and who had been seriously injured in the accident with lifelong consequences. By virtue of judgement File No. IV. ÚS 3159/15 of 25 October 2016, the Constitutional Court cancelled the complainant's conviction for a crime of grievous bodily injury and ordered the common courts to examine in more detail whether it was – in the given case – objectively possible to assume that the injured party had been overtaking the complainant and whether the complainant had had the duty to assume that another driver would intentionally violate the traffic rules, in order for the complainant's guilt to be proven beyond reasonable doubt and to decide if it could be justly required of the complainant to bear any and all criminal and civil-law consequences (compensation for non-pecuniary personal injury).

The principle of equality of parties and adversarial proceedings guarantees a fair trial not only in criminal proceedings; however, in these proceedings, strict adherence to this principle becomes all the more important in the view of what is at stake for the individual. That is why there has been a certain shift in the case-law of the Constitutional Court concerning publicity/non-publicity of proceedings on permitting renewal of proceedings and on potential complaints against decisions on not permitting the renewal, which was also confirmed by last year's judgement File No. I. ÚS 1377/16 of 14 September 2016. The Constitutional Court concluded in that judgement that since the court dealing with a complaint can also take and evaluate evidence in order to subsequently rule on the merits of the case (in the sense of permitting renewal of the proceedings), it must do so in a public hearing in order to adhere to the principles of adversarial proceedings and equality of parties.

Another specific safeguard of adherence to these principles lies in the right of the accused to provide a statement on the evidence taken and to cross-examine witnesses. The complainant had been denied this right in the case decided by the Constitutional Court's judgement File No. I. ÚS 1860/16 of 3 November 2016, in which the Court followed on from the extensive case-law of the European Court of Human Rights in this area. On the other hand, as the Constitutional Court stated in its resolution File No. II. ÚS 2548/16 of 4 October 2016 or resolution File No. I. ÚS 1875/16 of 19 December 2016, there may exist circumstances which justify denying this right.

Judgement File No. I. ÚS 1860/16: Violation of the right of the accused to provide a statement on the evidence taken and to cross-examine witnesses

The Constitutional Court noted that the complainant had been convicted on the grounds of testimonies provided by three witnesses, whom the complainant had no opportunity to cross-examine. There was no satisfactory reason for these witnesses not to appear in the proceedings. And yet their testimonies were of at least considerable authority as evidence. Furthermore, the common courts did not treat the testimonies of these witnesses with sufficient prudence. They failed to deal with evidence adduced by the complainant, who had suggested that a part of a German file comprising the testimony of one of the witnesses be read out, whereby the complainant intended to question the trustworthiness of the witness. The testimonies of the three witnesses were not sufficiently supported by other evidence. These shortcomings could not be outweighed by the fact that the complainant's defence counsel had had the opportunity to participate in interrogation of two of the witnesses at the time when the complainant escaped.

There were therefore no sufficient counterbalancing factors or procedural safeguards in the criminal proceedings conducted against the complainant which would compensate for the fact that the testimonies of

witnesses not appearing in the proceedings were used as evidence. As a result, the criminal proceedings as a whole could not be considered just. The complainant's right to a fair trial and her right to provide statements on the evidence taken, together with her right to cross-examine witnesses who had testified against her, had therefore been breached.

Finally, we should also recall judgement File No. I. ÚS 3456/15 of 9 August 2016, in which the Constitutional Court emphasised the necessity for criminal courts to proceed with the same degree of care in terms of reasoning of their decisions taken in an adhesion procedure as that exerted by civil courts deciding on indemnification in civil matters. Only careful consideration of all criteria relevant for determining the amount of compensation for non-pecuniary damage will enable the court to set the appropriate amount. Simultaneously, it is left to the aggrieved parties or their representatives to assert and prove the relevant facts, and the courts need not prove these facts to an extent that would be contrary to the requirement for expediency and economy of criminal proceedings.

Compensation for damage caused by an unlawful decision and maladministration

The Constitutional Court was again asked to review matters of **compensation for non-pecuniary damage arising during the Communist regime** in 2016, i.e. dealt with complainants claiming compensation for deprivation of personal liberty as a consequence of refusing to perform military service prior to 1989. The Constitutional Court followed up on Plenum opinion File No. Pl. ÚS-st. 39/14 of 25 November 2014, according to which an entitlement to compensation for non-pecuniary damage under Art. 5 (5) of the Convention arises under the precondition that the State's interference with personal liberty of the given person occurred after the Convention became binding for the Czech Republic, i.e. as from 18 March 1992. Consequently, the time of participation in judicial rehabilitation is no longer considered decisive. Nonetheless, this legal opinion will not apply in cases where the action for compensation for non-pecuniary damage was filed before the said opinion was adopted. Following this line of case-law, the Constitutional Court granted the complainants' petitions in judgements File No. IV. ÚS 856/15 of 7 June 2016 a II. ÚS 823/15 of 23 August 2016.

The Constitutional Court modified certain decisions of the common courts concerning claims for compensation for non-pecuniary damage caused by **delays in proceedings**. In judgement File No. II. ÚS 19/16 of 1 August 2016, the Constitutional Court rejected the argument put forth by the common courts that the minor complainant could not have suffered any harm as a consequence of protracted proceedings. First, the Constitutional Court recalled the established presumption that unreasonable length of proceedings would cause such harm without the applicant having to present any evidence, and that financial compensation may only be denied under absolutely exceptional circumstances. The Constitutional Court further stated that at a young age, children primarily perceive emotions, and that the uncertainty of their parents caused by unreasonably long proceedings (in this case, residence proceedings regarding the complainant) must have had a negative impact on the general atmosphere in the family. According to the Constitutional Court, the assertion that the complainant could not have suffered any harm therefore could not stand.

The Constitutional Court also dealt with claims for compensation in relation to **criminal proceedings conducted without justification**. In judgement File No. I. ÚS 2394/15 of 26 April 2016, the Constitutional Court noted that the very fact of being criminally prosecuted represents a burden for everyone who is accused of crime. It is primarily the duty of the courts to determine the amount of compensation with regard to the specific circumstances of each individual case and assess the relevant criteria formed by the Supreme Court's case-law, including, in particular, the nature of the criminal case, the length of the criminal proceedings and the personal consequences with respect to the individual. In judgement File No. IV. ÚS 3183/15 of 27 September 2016, the Constitutional Court also placed emphasis on individual assessment. According to that judgement, no case may be evaluated solely based on pre-defined tables and algorithms. It is the courts' task to verify all circumstances that could potentially influence the amount of compensation, be it loss of prestige, impairment of family and social ties, health issues, limitation of work opportunities, or the duration of criminal

and any subsequent proceedings. In judgement File No. I. ÚS 1532/16 of 14 September 2016, the Constitutional Court accentuated that if the written counterpart of a final decision on a claim for compensation for unlawful criminal prosecution to be paid by the State was served on the aggrieved party only after expiry of the six-month limitation period and if the aggrieved exercised his or her claim within a reasonable period of time (not exceeding six months) of such service, it was contrary to good morals to invoke a plea of limitation.

Asylum, extradition, expulsion

In the past year, the issue of asylum and foreigner law was again the subject of a broad debate throughout society. However, the issue of migration had – just like in 2015 – little to no effect on the number of complaints and the decision-making of the Constitutional Court. And even the few cases that did appear before the Constitutional Court exhibited a common – and problematic – feature consisting in questionable compliance of the Czech legislation and practice concerning asylum law and extradition with the international commitments of the Czech Republic. The majority of cases concerned commitments following from Art. 3 and 5 of the Convention, which prohibit torture and inhuman or degrading treatment and which protect the personal security and liberty of individuals. Further obligations follow from the Geneva Convention Relating to the Status of Refugees, which prohibits expulsion or deportation of a refugee to the borders of countries in which the life or personal liberty of the refugee would be threatened due to his or her race, religion, nationality, membership of a particular social group or political opinion.

In the past year, for example, the Constitutional Court cancelled (by its judgement File No. I. ÚS 1015/14 of 23 August 2016) a decision on the permissibility of extraditing a citizen of the Russian Federation for criminal prosecution in the Russian Federation (Dagestan), since the Superior Court had insufficiently examined whether or not the complainant's criminal prosecution, for the purpose of which he was to be extradited, was based on reasonable grounds, and whether the request for extradition and the associated extradition documents sufficiently eliminated the danger of its potential arbitrariness. Compared to its previous ruling in this matter, the Constitutional Court established even greater demands with respect to court review of the permissibility of extradition.

Judgement File No. I. ÚS 1015/14: Assessing possible risks of denying justice as grounds for impermissibility of extradition of a person for prosecution in the Russian Federation

The Constitutional Court disagreed with the conclusion reached by the Superior Court, where the latter ruled out a ground for impermissibility of the complainant's extradition under then-effective Section 393 (k) of the Code of Criminal Procedure, i.e. due to a justified concern that the criminal proceedings in Dagestan might not adhere to the principles laid down in Art. 3 and 6 of the Convention. The Superior Court was right not to limit itself to merely assessing the situation in the Russian Federation, and focused on the specific situation prevailing in Dagestan; it then made the general conclusion that the situation was not critical enough to completely rule out the permissibility of extraditing any person, even if such proceedings were to be conducted in the territory of the Republic of Dagestan. According to the Constitutional Court, however, the Superior Court incorrectly applied these general conclusions to the specific case of the complainant. The evidence taken indicated a real danger that the criminal proceedings conducted by the competent authorities of the Republic of Dagestan would be, for various reasons, influenced to the detriment of the complainant, and that the safeguards of fair trial would not be respected in the proceedings.

It was therefore the role of the Superior Court to evaluate whether criminal prosecution of the complainant, for the purpose of which he was to be extradited, was based on reasonable grounds (without simultaneously evaluating the future prosecution in terms of whether the evidence at hand was sufficient to reach a conclusion as to the complainant's guilt, which the court was indeed not authorised to do in view of the purpose of

the extradition proceedings), and whether the request for extradition and the associated extradition documents sufficiently eliminated the danger of potential arbitrariness. As for the absence of any real grounds for the suspicion referred to in the extradition documents, the Constitutional Court stated that the extradition documents failed to place the alleged act in any context whatsoever, i.e. did not specify the business activity within which the complainant had allegedly acted in the asserted manner; from which facts it was inferred that he indeed was the one to commit the alleged crime; what the circumstances were of his alleged stay in the Republic of Dagestan (place, time); etc. The Constitutional Court thus satisfied the constitutional complaint and cancelled the Superior Court's decision on the permissibility of extradition.

In judgement File No. I. ÚS 630/16 of 7 December 2016, the Constitutional Court expressed its opinion on the issue of access to legal aid in facilities for the detention of foreigners, and in general on the issue of effective legal aid as such; as a matter of fact, this topical issue has recently been increasingly debated among experts and also addressed in the case-law of the Constitutional Court in view of the insufficient legislation (see also subchapter on the right to life). In the mentioned judgement, the Court importantly reaffirmed the positive obligations of the Czech Republic *vis-à-vis* detained foreigners in view of the state of affairs which has prevailed especially over the last two years in facilities for the detention of foreigners.

Judgement File No. I. ÚS 630/16: Duty of the State to provide effective access to legal aid to detained foreigners in proceedings on administrative expulsion

The Constitutional Court first noted that effective access to legal aid was one of the inherent features of the right to an effective remedy, which was applicable when a well-founded assertion was made as to the existence of serious grounds to assume that the person being extradited would face a real danger of killing, torture or some other ill-treatment in the country of destination. The crucial safeguard, necessary to ensure that the possibility – despite the short five-day deadline – to lodge an appeal against a decision on administrative expulsion was indeed an effective legal remedy available prior to expulsion within the meaning of Art. 13 of the Convention, lies in the provision of qualified legal aid to the affected person which will help that person to fully comprehend the consequences of default.

It is therefore the duty of the State, when conducting proceedings on administrative expulsion of a foreigner who is detained in a facility for the detention of foreigners and with respect to whom there is a well-founded danger of violation of Art. 2 or 3 of the Convention in the country of destination, to provide that foreigner with effective access to legal aid. The State must guarantee that a foreigner who does not yet have legal counsel will, at some point before the deadline for filing an appeal against the decision on his or her administrative expulsion, personally meet with a person capable of providing qualified legal aid in matters of international protection and foreigner law. The absence of an effective access to legal aid at a time when a foreigner detained in a facility for the detention of foreigners could file an appeal against the decision on expulsion constitutes a ground for granting his request for waiver of the deadline in accordance with Section 41 of the Code of Administrative Procedure. The Constitutional Court added that the same conclusions also applied to the seven-day deadline for lodging an application for international protection. Not even such an application presents an effective remedy against a real danger of violation of Art. 2 or 3 of the Convention if the foreigner lacks effective access to qualified legal aid during that period of time.

Of no less importance is judgement File No. I. ÚS 425/16 of 12 April 2016, in which the Constitutional Court admitted the existence of a number of justifiable reasons (trauma, shame or other inhibitions) why asylum applicants would not disclose all relevant circumstances before the administrative authority.

Judgement File No. I. ÚS 425/16: On interpreting Section 75 (1) of the Code of Administrative Justice in the case of applicants for international protection

When assessing the question of whether or not the common courts were obliged to address *in rem* any grounds for granting asylum which the complainant stated only in court, the Constitutional Court examined the procedural obligations following from Art. 43 of the Charter, in conjunction with Art. 36 (2) of the Charter and Art. 13 of the Convention. Given the close link of asylum proceedings to the principle of *non-refoulement,* the Constitutional Court also took into account the case-law of the ECHR. This principle requires that any concerns regarding a potential violation of human rights in the country of destination be subject to careful review when deporting a person to another State. This requirement reflects the fundamental principle that substantive law (i.e. the prohibition of *refoulement* and the right to asylum) must be effectively protected. Therefore, the Constitutional Court considers that the corresponding procedural protection under Art. 43 of the Charter encompasses a wide and thorough judicial review of denied asylum applications. The effectiveness of this instrument, as well as the general effectiveness of the right to asylum in practice, requires that newly asserted grounds for asylum be admitted, under certain circumstances, even in the stage of proceedings before an administrative court of first instance.

According to the Constitutional Court, there is a number of justifiable reasons (trauma, shame or other inhibitions) why applicants will not disclose all the relevant circumstances before the administrative authority; objective impossibility to introduce these grounds earlier is therefore not the only justifiable reason, as the common courts considered in the present case. Consequently, the Constitutional Court concluded that Section 75 (1) of the Code of Administrative Justice could not be interpreted in the sense that new pleas could be introduced in court within proceedings on international protection only if the applicant for international protection had not been able to introduce them in the proceedings before administrative authorities through no fault of his/her own. The nature of these new facts and the situation of the individual applicant need always be taken into account. Only such evaluation will comply with the right to effective remedy and, where applicable, ensure the effectiveness of the right to asylum under Art. 43 of the Charter.

Finally, another judgement which deserves a brief note in this part is judgement File No. I. ÚS 469/16 of 22 March 2016, where the Constitutional Court again expressed its opinion on the duty to properly advise foreigners of their right to defence in criminal proceedings conducted against them, thus elaborating on its recent judgement File No. IV. ÚS 2443/14 of 18 March 2015 concerning a similar case. In simplified proceedings before a sole judge, in which the complainant – a Ukrainian national – could use an interpreter, but did not have defence counsel, waived her right to file a protest against a criminal order in which she had been found guilty of the misdemeanour of obstructing the enforcement of an official decision on the grounds that she had remained in the Czech territory even after having been sentenced to expulsion. In the case at hand, the Constitutional Court repeatedly emphasised that in order to ensure compliance with the constitutionally guaranteed right to legal aid in criminal justice, it was necessary to provide individuals facing criminal prosecution with enough time to defend themselves and with real, rather than merely formal, access to legal aid. The same is all the more true in respect of persons deprived of personal liberty and placed at a disadvantage by not speaking the Czech language and being of third-country origin. In the given case, the complainant did not have a defence counsel in court proceedings and was not advised by the court of the possibility to obtain one. According to the Constitutional Court, the record of the hearing does not indicate that the complainant was fully aware of the procedural implications of her acts. Given the complainant's vulnerable status, she should have been duly advised of the significance and implications of her statements and also of her right to consult a defence counsel, who would be appointed *ex officio* should she fail to request one.

5. STATISTICAL DATA ON DECISION-MAKING

2016

Statistical data on Constitutional Court's decision-making in 2016

Total number of decisions in 2016		
4 349		
Judgements	Resolutions	Opinions of the Plenum
250	4 097	2

Decisions of the Plenum in 2016[iii]	
35	
Judgements	Resolutions
18	17

Judgements in 2016[i]		
250		
Application granted (at least partially)	Complaint/application dismissed (at least partially)	Complaint/application both granted and dismissed
220	33	3

Panel decisions in 2016	
4 312	
Judgements	Resolutions (including procedural)
232	4 080

Resolutions in 2016 (including procedural)[ii]						
4 097						
Complaint/application clearly unfounded	Complaint/application defective	Belated	Lack of *locus standi*	Lack of jurisdiction	Inadmissibility	Discontinued
3 015	403	137	54	44	567	62
73.6%	9.8%	3.3%	1.3%	1.1%	13.8%	1.5%

Explanatory notes:

i) Some of the judgements comprise several operative parts and, therefore, the aggregate number of judgements where the complaint or application was at least partially granted and of judgements where the application was dismissed is not equal to the total number of judgements. There were a total of 3 "combined" judgements (both granting and dismissing the complaint/application), which fact is recorded in the table.

ii) A considerable number of resolutions comprise several operative parts. The table shows the number of individual operative parts, where the aggregate total is not equal to the total number of resolutions adopted (the same applies to the percentages, where the sum is not 100% and the number of individual types of operative parts is linked with the total number of resolutions, including procedural).

iii) Apart from opinions of the Plenum (a total of two in 2016).

Proceedings on annulment of laws (statutes) and other regulations – number of decisions			
24			
Application granted (at least partially)		Application dismissed	
9		15	
Applications for annulment of a law (statute)	Applications for annulment of some other legal regulation	Applications for annulment of a generally binding edict	Applications for annulment of a regulation issued by a municipality/region
15 (10 judgements)	6 (3 judgements)	3 (2 judgements)	1 (1 judgement)
Application granted at least partially	Application granted at least partially	Application granted at least partially	Application granted at least partially
4	2	2	1

Proceedings on constitutional complaintsiv) – number of decisions											
4 322											
Application granted (at least partially)			Complaint dismissed (decisions in rem and quasi-decisions in rem; procedural decisions and instances where the proceedings were discontinued are not included)								
212			3 969 (69 judgements, of which 23 dismissing the complaint and 0 simultaneously dismissing and granting the complaint)								
Constitutional complaint directed against:v)											
Court decision	Administrative decision	Other decision	Other interference	Law (statute)	Other legal regulation	Generally binding decree	Regulation of a municipality/region	Decision of the Constitutional Court	Measure of general nature	Internal regulation	Miscellaneous
4 027	76	203	181	117	20	1	1	0	0	0	32

Proceedings on measures required to enforce an international court ruling – application for renewal of proceedings – number of decisions	
1	
Granted	Not granted
0	1

The Constitutional Court did not make a decision in any other types of proceedings in 2016.

iv) Also includes proceedings on municipal complaints pursuant to Art. 87 (1)(c) and proceedings on an application of a political party or movement pursuant to Art. 87 (1)(j) of the Constitution.

v) Certain pleadings are directed against several types of acts; therefore, the aggregate number of decisions made in proceedings on constitutional complaints does not correspond to the number of pleadings given in this part of the table.

Average duration of proceedings in cases completed in 2006–2016

		in days	in months and days	
Average duration of proceedings in all cases		169	5 months	19 days
	in matters dealt with by the Plenum	363	12 months	3 days
	in matters dealt with by panels	167	5 months	15 days
	in matters resolved by a judgement	393	13 months	3 days
	in matters where the complaint/application was dismissed on the grounds of being clearly unfounded	173	5 months	23 days
	in all other manners of discontinuation of the proceedings	119	3 months	29 days

Average duration of proceedings in cases completed in 2016

		in days	in months and days	
Average duration of proceedings in all cases		154	5 months	4 days
	in matters dealt with by the Plenum	309	10 months	9 days
	in matters dealt with by panels	152	5 months	2 days
	in matters resolved by a judgement	318	10 months	18 days
	in matters where the complaint/application was dismissed on the grounds of being clearly unfounded	154	5 months	4 days
	in all other manners of discontinuation of the proceedings	139	4 months	19 days

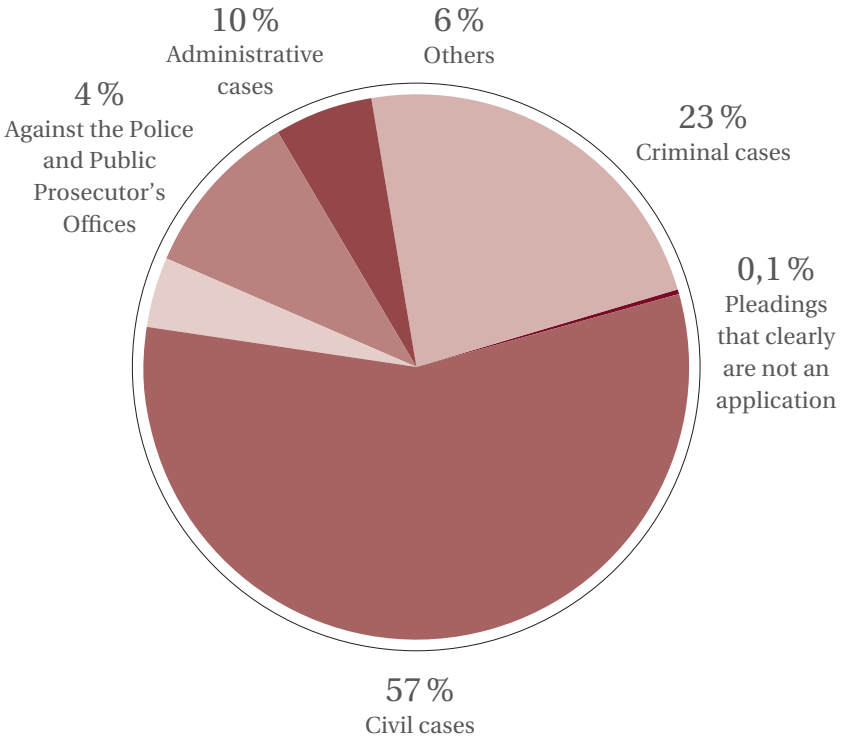
Public oral hearings

Numbers of public oral hearings

year	matters dealt with by the Plenum	matters dealt with by panels
2010	7	18
2011	8	20
2012	2	17
2013*	1	1
2014*	0	0
2015*	0	0
2016*	0	1

* the number of public oral hearings was reduced based on a legislative amendment

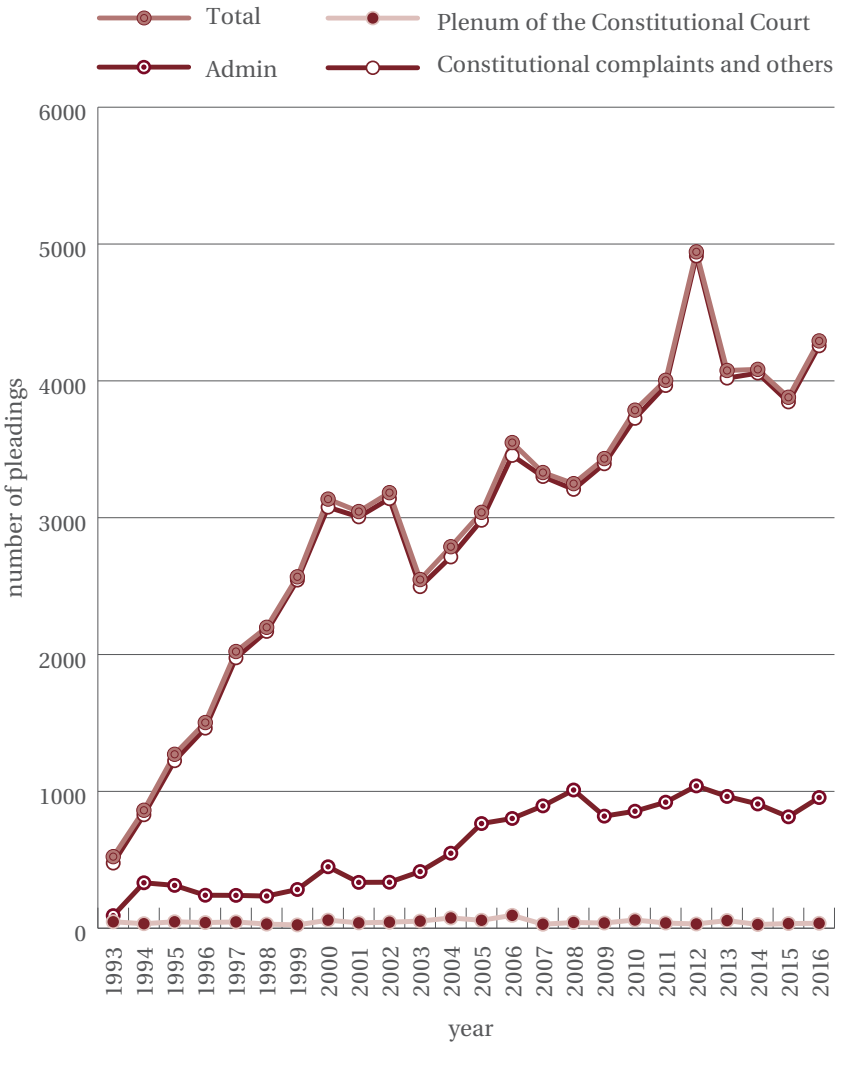
Structure of applications to initiate proceedings in 2016



Statistical data on applications to initiate proceedings and other pleadings

Number of pleadings				
YEAR	Total	Plenum of the Constitutional Court	Constitutional complaints and others	Admin.
1993	**523**	47	476	92
1994	**862**	33	829	332
1995	**1 271**	47	1 224	313
1996	**1 503**	41	1 462	241
1997	**2 022**	46	1 976	240
1998	**2 199**	30	2 169	235
1999	**2 568**	24	2 544	283
2000	**3 136**	59	3 077	449
2001	**3 045**	39	3 006	335
2002	**3 183**	44	3 139	336
2003	**2 548**	52	2 496	414
2004	**2 788**	75	2 713	548
2005	**3 039**	58	2 981	765
2006	**3 549**	94	3 455	802
2007	**3 330**	29	3 301	894
2008	**3 249**	42	3 207	1 010
2009	**3 432**	38	3 394	819
2010	**3 786**	60	3 726	855
2011	**4 004**	38	3 966	921
2012	**4 943**	31	4 912	1 040
2013	**4 076**	56	4 020	963
2014	**4 084**	27	4 057	908
2015	**3 880**	34	3 846	814
2016	**4 292**	36	4 256	955
Total	**71 312**	**1 080**	**70 232**	**14 564**

Trends in the numbers of pleadings in 1993–2016



SUPPLEMENT: SEMINAR CONTRIBUTIONS

2016

Constitutional Court of the Czech Republic together with the Institute of State and Law of the Academy of Sciences of the Czech Republic organized a seminar on Restriction of Human Rights and Freedoms as a Consequence of Fight against Terrorism.

The Seminar was held in November 2016 in the seat of the Court. The participating speakers were Professor Eli M. Salzberger from the University of Haifa and Professor Miroslav Mareš from the Masaryk University in Brno. We are proud to present their contributions as a supplement of this Yearbook.

Counter-Terrorism Law and the Rule of Law Under Extreme Conditions: Theoretical Insights and the Israeli Experience

Eli M. Salzberger,
professor of the Faculty of Law of the University of Haifa;
Director, The Haifa Center for German and European Studies;
Director, The Minerva Center for the Rule of Law Under Extreme Conditions

2016 was a record year of terrorism in Europe. Although other parts of the world suffer more from terrorism, the number of terror attacks committed on European soil and the number of fatalities and casualties reached a worrying peak. The current threat of terrorism is greater than in the past. Technological developments extend the range and threats of terror activities to include not only physical attacks, but also the use of sophisticated technologies operated from far to inflict chaos and potential physical harm. While some terror attacks are committed by sophisticated well-organized and well funded, transnational organizations, increasing number of terror attacks are committed by "lonely wolves", who are captured by fanatic ideas which include inflicting violence on those who do not accept certain beliefs or way of life. Europe had enjoyed the longest ever period of peace and security and the constitutional traditions and legal systems of European countries reflect these circumstances. How should European legal systems adjust to the new terror threatening reality? In this short essay I will try to address the legal challenges on a theoretical level, with some insights from Israel that has lived with terrorism since its establishment, but nevertheless managed to maintain an uninterrupted democracy and ranks high on the rule of law indexes.

The Rule of Law

The rule of law is one of the fundamental concepts of the modern theory (and practice) of the state. It denotes that every member of the polity is subject to the law and hence it negates the idea that rulers are above the law (such as expressed

by the theory of divine right, which was the dominent political theory before the Enlightenment). It also means governing by laws, as opposed to ruling case-by-case, a practice that can lead to arbitrariness, and it implies that all citizens are equal, as they are all subject to the same laws and their uniform enforcement.

The rule of law comprises two layers: formal and substantive. The formal layer means that, on the one hand, individuals are free to pursue any activity they wish, save those activities explicitly prohibited by law, and on the other hand, that governments and other authorities are not entitled to pursue any activity save those that they are explicitly permitted to undertake by law. Substantiation of this formal layer means that governments and other officials cannot prevent or sanction individuals' actions, save when they have violated the law, and, likewise, governments and other officials can only use the powers explicitly granted to them by law. Thus, prerogative powers, for example, which rulers assume in the course of extreme conditions, violate the rule of law. A structural condition for substantiating the formal facet of the rule of law is the establishment and operation of independent and efficient enforcement agencies, primarily prosecution agencies and courts, without which equal enforcement of the law could not be achieved.

However, laws can impose far-reaching prohibitions on individuals, as well as endowing state authorities with extensive powers, all of this in full compliance with the formal facet of the rule of law. To prevent this, the substantive facet has to be incorporated. It denotes substantive limits to prohibitions on individual conduct and to the empowerment of state authorities or officials. While the formal facet of the rule of law only requires that prohibitions on individuals or the empowerment of government be anchored in a prospective, general, clear and equally enforced laws, the substantive facet requires that such prohibitions or empowerment do not violate various content-based values. One such substantive limit is a concept of individual rights, which constrain prohibitions on individuals as well as the extensive empowerment of the government. Another constrain is the doctrine of separation of powers, which may (by law) limit the delegation of powers from the legislature to the executive or other officials, and is meant to foster deliberation and prevent decision-making of raw majorities. A common mechanism to achieve the substantive facet of the rule of law is judicial review of legislation, either by a special constitutional court (the Continental European tradition) or by the general court system (the Anglo-American tradition). The independence (especially from the other branches of government), trustworthiness and quality of judges are, therefore, essential preconditions for the substantive layer of the rule of law.

The Rule of Law under Extreme Conditions

The ideal type of the rule of law and especially the balance struck by its substantive segment are prescribed for normal times and might require an adjustment under extreme conditions. When a major disaster (earthquake, fire, epidemic) occurs, when a war is launched against a state, or when a sudden fierce economic crises erupts, the regular laws, institutions and decision-making process might be ill equipped to achieve a quick return to normality with minimal casualties and damage. Terror acts can constitute an extreme condition, but not all terror attacks are such. An act of terror is a criminal offence committed for ideological reasons and intended to create fear or impact state policy. Minor acts of terror by unorganized individuals do not differ from regular crime and the regular legal framework should be sufficient. But terror can be on a large scale with the planning of a well funded and sophisticated global organization and such acts might indeed be parallel to a launch of a war. Likewise, a wave of small terror acts might constitute extreme conditions. In any case, the later point highlights a key issue of the resort by politicians to declare emergency, which in a good legal system should itself be checked and balanced and perhaps even reviewed by judges.

From the perspective of the rule of law, conditions that justify a departure from the normality should be unpredictable, imminent, with vast magnitude in terms of harm, population spread or geographical reach. The European Court of Human Rights ruled long ago that a legitimate public emergency should constitute "an exceptional situation of crisis or emergency, which afflicts the whole population and constitutes a threat to the organized life of the community of which the State is composed" (*Lawless v. Ireland,* (1961) 1 EHRR 15)

One can distinguish between three basic models regarding the rule of law under extreme conditions, from both positive analysis (models that are in fact practiced by different countries) and normative analysis:

1. Business as usual – no recognition in the need for emergency laws and procedures. The ordinary legal system provides the necessary answers to any potential crisis and can be adjust according to the changing circumstances to incorporate and mitigate various extreme conditions. The USA PATRIOT Act and the UK Prevention of terrorism legislation can be classified as part of this model.

2. Emergency constitution – originating from the Roman model, emergency constitution is common in many countries. A declaration of emergency brings into force special laws and/or special procedures/institutions for enacting additional legal norms, bypassing the regular legislative process. With the termination of the emergency the substantive laws and collective decision-making procedures of normality are reinstituted.

3. Stepping outside the rule of law in order to mitigate the extreme condition effectively, with ex-post political scrutiny. Originating from the political philosophy of John Locke, the USA uses this model through prerogative Presidential powers. One can argue that article 16 of the French Constitution, which was utilized last year, should also be considered as part of this category (as at least violates the substantive facet of the rule of law).

Many countries practice more than one of these models.

Each of the models has advantages and disadvantages. While the "business as usual" looks as the best model in which the regular decision-making process with deliberation and checks and balances mechanisms yield the best rules balancing security concerns with human rights, it suffer two major flows: first, reality undermines theory and some extreme conditions are unpredictable. Lacking a real emergency mechanism may foster total departure from the rule of law. Second, accommodating laws for extreme conditions into the regular legal system may constitute a new normality in which there are more powers to the authorities and less rights to the individuals. This is the consequence of counterterrorism legislation in various liberal democracies (e.g. USA and UK)

The "emergency constitution" model is veteran. It was practiced already by the Roman Republic, in which a dictator was appointed for six months in times of emergency. It is constructed on the basis of a clear separation between the rule of law under normality and the rule of law under extreme conditions, enabling the delegation of some powers, most importantly law-making, to the executive (either the President of the Cabinet), preserving some features of normal times rule of law. This separation can prevent a slippery slope departure from the rule of law in times of normality. However, its main drawbacks are the potential abuse of emergency declaration, the boldest example of which was the cause for collapse of the Weimar Republic and the rise to power of the Nazis, and the prolonging of emergency declaration for long periods, so it becomes a new normality. Well known is Carl Schmitt critic that the one who can declare the state of exception is the sovereign.

Some scholars have argued that in light of the dangers of the aforementioned two models the preferred model is stepping outside the rule of law. The model assumes that, even if the constitution does not grant the president or the executive additional powers during extreme conditions, such powers exists on the basis of the very rationale of the establishment of the state or its social contract. This model characterizes the actual practice of the US during emergencies from the times of President Lincoln until the present. Its supporters stress the post extreme condition process of deliberation and decision whether to legitimize the departure from the rule of law, but such legitimization might bring also legislation, bringing like in the other models to a new emergency normality, as might be argued is the US case. In addition, while non-democratic countries will not be able to conduct ex-post legitimation process, it is doubtful whether even democracies can conduct such ex-post scrutiny regarding the legitimacy of extra-legal measures taken during extreme conditions. The actual history of such ex-post practices does not reveal truly effective deliberation, monitoring and prosecution of those who took non-legitimate or excessive extra-legal measures.

Israeli Counterterrorism Law vis-à-vis the Rule of Law

Terrorism is not a new phenomenon in Israel, and the types of terrorism that attacks Europe today have been practiced in Palestine for the last hundred years. Despite an effective fight against terrorism, Israel managed to maintain uninterrupted democracy since its establishment, and to uphold the formal facet of the rule of law effectively.

The Israeli counterterrorism law can be characterized as a combination of the emergency constitution and the business as usual models. The legal framework provides for harsh punitive measures and draconic administrative powers to the authorities to combat terrorism, but the model adopted by Israel is a legislative one, rather than executive (i.e. prerogative or residual powers model) as is, for example, the situation in the US. In other words, Israel does not practice the "stepping outside the law" model.

A second important feature is the role the courts play in all levels of norm creation and enforcement. From the very establishment of the state, the actual use of the legal powers has been always scrutinized by the courts, which limited overuse of the powers and balanced them against the safeguard of human rights. The Israeli judiciary on all levels enjoy a very high degree of independence and since Israel in this respect belongs to the Common Law tradition in which there is one general courts system with a Supreme Court which serves also as a constitutional court, the Israeli jurisprudence is fairly coherent and judicial scrutiny is performed on all decision-making levels, including in security related maters (unlike courts in many other countries who tend to defer or limit their review when security or emergency issues are on stake).

While some of the Israeli counterterrorism law is contingent upon a specific declaration of a state of Emergency, another portion of counterterrorism law is part of the general legal system and is not contingent on such a declaration. But the general theoretical criticism against the emergency constitution and the business as usual models is vindicated in the Israeli case.

The Israeli emergency constitution is impressive on the books: it empowers the Parliament to declare a state of emergency for a period of up to one year. Such a declaration has two major legal consequences:

1. It brings into force pre-existing legislation (which are not applicable during "normal times", such as *The Emergency Powers (Detention) Law 1979* and until recently also *The Prevention of Terrorism Ordinance 1948*.

2. Emergency declaration also empowers the Government or individual ministers to issue regulations "for the defense of the State, public security and the maintenance of supplies and essential services" with the force to supersede any existing law. These regulations can be in force for a maximum period of three months, unless enacted as regular law by the Knesset. In other words, upon a declaration of emergency, the Government (i.e. the executive branch of government) assumes legislative powers. However, emergency regulations can impose neither retroactive punishment nor violation of human dignity and they are subject to judicial review.

The Israeli general constitutional framework regarding emergency periods seems reasonable vis-à-vis both facets of the rule of law. However, declaration of emergency was made with the establishment of the State in a midst of the Independence war and was extended by the Knesset almost automatically every year since. When the Supreme Court criticized this practice the Knesset, in preparation to end emergency, legislated just recently (2016) a new comprehensive counterterrorism law, which is not contingent on emergency declaration, i.e. a shift from the "emergency constitution" to the "business as usual" model. To the legislature credit, it must be said, that the new law is generally less draconic than the old one, it contains various mechanisms of checks and balances (e.g. the process of declaring an organization as a terror organization) and all the measures empowered by it are subject to judicial review.

The result is that the authorities in Israel has various effective legal tools to combat terrorism by the application of these tools is carefully and effectively monitored by courts, balancing according to the new constitutional jurisprudence security concerns with the protection of human rights.

Conclusion

Many of the issues discussed above are under-researched and merit more extensive study from both theoretical and empirical perspectives. A possible working framework for such further research might distinguish three possible modes of the rule of law vis-à-vis extreme conditions:

1. Normal times: substantive norms as well as procedures and institutional design for collective decision-making to enact or amend norms and their execution, enforcement and adjudication, all designed for regular or normal times. These will include some counterterrorism penal and administrative measures.

2. Times of emergency: specific – *sui generis* – norms, procedures and institutional design tailored for various types of irregular or extreme conditions that are envisaged ex ante and, hence, the legal arrangements (both substantive and procedural) exist before the occurrence of the extreme condition, which merely triggers them; An example in the counterterrorism field could be administrative detentions.

3. Times of exception: an option for a dramatic departure from (1) where a major non-envisaged crisis occurs and hence even (2) is not sufficient to take the appropriate measures – the real state of exception, in which effective decision-making procedures are installed.

Threat of terrorism in the Czech Republic and related select legal challenges in the Czech Republic

Miroslav Mareš, Department of Political Science, Faculty of Social Sciences of Masaryk University in Brno

1. Introduction

Terrorism is a serious threat to the contemporary world. Its manifestations pose a challenge for security policy, as well as for domestic and international law. This paper focuses on some select aspects of this issue in relation to the Czech Republic. It draws on the contribution titled "Crisis situations brought about by terrorism: select legal challenges in the Czech Republic", presented by this author at a workshop on "Restricting human rights and freedoms as a consequence of the fight against terrorism". The workshop took place on 23 November 2016 and was organised by the Constitutional Court of the Czech Republic in co-operation with the Institute of State and Law of the Czech Republic. The partial change in the topic was caused by discussions and further reflections on the said conference contribution and also by the amendments to anti-terrorism regulations adopted in late 2016.

2. Development of the threat of terrorism in the territory of the Czech Republic after 1989

The territory of the Czech Republic has been affected by a number of acts that were identified as terrorist in the context of the time and that may be considered as such even in today's view of terrorism (e.g. the attack on the Czechoslovak Minister of Finance, Alois Rašín, in 1923). However, it should be noted that there is still no generally accepted scientific definition of terrorism, nor has any such definition been agreed within international law (although the UN Security Council has agreed on one).

The current political regime has been evolving since the end of 1989. Immediately after the fall of communism, there were some concerns about possible terrorist activity of the former structures of the State Security forces, which, however, were fortunately unfounded (keeping in mind that the explosion on the Old Town Square in Prague on 2 June 1990 remains unresolved). At the same time, the possibility of false flag terrorist operations emerged as a consequence of the changes in Czechoslovak foreign policy in the Middle East. However, this threat was successfully eliminated.

In the following years, several acts were committed in the territory of the Czech Republic that, in a broader sense, can be understood as acts of terrorism, although they were not legally qualified as such at that time, or the perpetrator was not discovered (e.g. the unexploded booby traps in Kolín in 1992, where responsibility was claimed by telephone by Slovak nationalists, who took exception to the autograph session in relation to a book referring to the negative aspects of the so-called Slovak State of 1939–1945; the fire bomb in the control room of the cable car in the Moravian Karst in 1995, claimed by Animal Liberation Front; or the unresolved series of explosions in the Přerov area in the late 1990s, etc.). An individual bombing campaign pursuing not very clearly formulated political objectives was launched by certain Vladimír Štěpánek at the turn of the millennium. Another act questionable as to its terrorist nature and motivation was the act of a Russian citizen, Alexander Kruchnin, who murdered a police officer while preparing attacks on civilians in the Prague metro on 2 August 2002, using his own self-made weaponry. The largest number of lives lost due to political violence in the post-November era was caused by attacks of right-wing extremists against people targeted on racist or ideological grounds, which, however, are not commonly considered as terrorism (albeit some of them bear the signs of terrorist schemes). Moreover, terrorist methods were encouraged by representatives of the far right, especially in several distinct attempts to establish a Czech branch of Combat 18, and in its own way, in the neo-Nazi scene in Silesia and Northern Moravia.

However, the Czech Republic has also been a country of interest from the perspective of international terrorism. In 2003, the Security Intelligence Service prevented a planned missile attack on the Iranian broadcast newsroom situated in the then-headquarters of Radio Free Europe. Islamist terrorism has become – at least after 11 September 2001 – a dominant threat despite the fact that no terrorist attack has been successfully accomplished in the territory of the Czech Republic so far. There have been several times when information on the threat of an attack emerged, but the threat was always eliminated (e.g. the planned aircraft hijackings in Central Europe, thwarted by Pakistani security forces in 2003; the terror threats issued against the Prague Jewish Quarter in 2006; the speculations on attacks against the Prague airport by the same network that carried out the Glasgow Airport attack in 2007; etc.).

A number of members of terrorist groups moved across the territory of the Czech Republic, including the Burgas attacker of 2012 (who was likely a member of Hezbollah, a Shia militant organisation). In 2005, the Czech security forces detained terrorist Usama Kassir, whom they subsequently extradited to the United States. By the end of 2016, however, three Czech citizens fell victim to Islamist terrorism abroad, and several Czech citizens were kidnapped or came into contact with Islamist terrorism in some other way. Members of the Czech military and other security forces also fought terrorism in several operations abroad.

From the viewpoint of the current chief representative of Sunni Islamist terrorism, i.e. the Islamic State, the Czech Republic is a country belonging to the "Crusader Coalition", which fights against this quasi-State formation. The Czech Republic has been designated as such even in IS propaganda materials (the Dabiq magazine, the No Respite video). This further intensifies the threat. The anti-Islamic policy of some of the Czech key players also needs to be mentioned, as it could provoke a violent reaction (even from domestic radicalised individuals from amongst the local Muslims or Muslim students in the Czech Republic). Risk is also entailed in the presence of tourists from certain countries in the territory of the Czech Republic (especially Israeli and U.S. tourists and, in respect of Caucasian terrorism, also Russian tourists), who might become victims of attacks.

However, from the point of view of globally operating Islamic extremists and terrorists, the Czech Republic does not seem to be as attractive as certain countries of Western Europe (Germany, France, Scandinavian countries), where, furthermore, these terrorists can rely on logistic support in city wards with predominantly Muslim population. Other lines of terrorism have only a limited potential,

but individual attacks can nonetheless still be committed by other religious, far-left, far-right or ethno-territorial terrorists, and false flag operations might also be pursued with the aim to discredit an enemy political or religious ideology.

3. Overview of select legal challenges regarding terrorism in the Czech Republic

Terrorism has represented a long-term legal challenge for the legal system of the Czech Republic and its predecessor countries. This challenge manifests itself in various branches of law, specifically in substantive criminal law and criminal procedure, as well as in the consequences of criminal-law provisions at the constitutional level. The provisions of substantive criminal law took their current form after 11 September 2001 ,especially based on the "European amendment" to the Criminal Code, adopted under No. 537/2004 Coll. This legislation was carried over, with some individual changes, into the new Criminal Code, introduced by Act No. 40/2009 Coll. Due to the influence of international political crises and the increasing significance of so-called foreign fighters (in the Islamic State or in the fights in eastern Ukraine), it became apparent that the Czech law was not prepared to deal with the challenges of developing criminal activity and the associated bringing and taking of evidence (which was confirmed in 2016 by legal disputes regarding the so-called jihadist from Spálené Poříčí). This led to the adoption of Act No. 455/2016 Coll., amending Act No. 40/2009 Coll., the Criminal Code, as amended, and other related laws. The mentioned amendment also covers the issue of terrorist propaganda, where a specific challenge will be connected with interpreting the relevant amended provision.

In the area of criminal procedure, a specific problem is linked with the (im)possibility of using the findings of intelligence services for the purposes of criminal proceedings in cases related to terrorism. Furthermore, judgement of the Constitutional Court of 29 February 2008 (I. ÚS 3038/07) also represents an "interpretation riddle". In a case concerning the use of information procured by the Military Intelligence for the purposes of taking evidence when proving economic crime, the Constitutional Court stated that by using this information, the Corruption and Financial Crime Detection Department, the Criminal Police and Investigation Service, the branch in České Budějovice, "violated the complainant's fundamental right to privacy, guaranteed by Art. 13 of the Charter of Fundamental Rights and Freedoms". In the reasoning of the judgement, the Constitutional Court also dealt with opinions presented by institutions which it had addressed in relation to this issue. The Ministry of the Interior likely (the opinion remains confidential as of today) pointed out the problem related to a lack of evidence in cases related to terrorism should the only evidence available be information gained by intelligence services. In this respect, the Constitutional Court stated the following: "it ought to be noted that the Constitutional Court fully realises that terrorism (mentioned by the Ministry of the Interior in the opinion cited above in paragraph 8. (e)) poses a serious threat; however, in the case under review, the Czech Republic faced no immediate threat which would have warranted a broad infringement of constitutionally guaranteed fundamental rights in order to protect other values. The mere fact that the objective of criminal proceedings is in conformity with the Constitution cannot serve as a ground for any manner of acquiring, collecting and disposing of information not anticipated by the law. Last but not least, the Constitutional Court notes that the competence to interpret laws belongs solely to the judge ruling on a specific case. Legal opinions expressed otherwise than in such a decision lack the authority backed by the Constitution [see the arguments stated in paragraphs 4 and 8 (d) and 8 (e)]. The Constitutional Court did not deal with the remaining claims of violations, since the already established violations were sufficient for adopting the decision contained in the operative parts of this judgement..." Based on that judgement, it would be possible to reach the conclusion *a contario* that in the case of a serious threat of terrorism, the prohibition of using information obtained by intelligence services (i.e. gained otherwise than in criminal proceedings) could be breached for the purposes of taking evidence in the case of terrorist activity. However, there is no clear interpretation in this respect.

A terrorist attack also presents a challenge for the administrative-law segment of national security law. It is possible that several crisis measures anticipated by the Czech legislation might overlap (including secondary legislation and internal normative acts). This is not a problem of formalist interpretation of the law, but rather of how legislation is perceived and comprehended by the general public. Based on the initiative of the Ministry of the Interior, the Government

adopted a system of declaring levels of terrorist threat (this system is not directly enshrined in laws and also has no detailed legal basis in other legal regulations). It is a system based on several levels – level 0 (the ideal situation; it has no graphical symbol and is not declared separately); level 1 (requires increased vigilance); level 2 (unspecified risk directed at the Czech Republic); and level 3 (high degree of certainty about imminent attack).

In the event of a terrorist attack committed against a specific part of the infrastructure, states of emergency may be declared under special laws, such as the state of emergency in the electrical energy industry under Section 54 (1)(e), the state of emergency in the gas industry under Section 73 (1)(e), and the state of emergency in the heat production industry under Section 88 (1)(e) of Act No. 458/2000 Coll., *on the conditions for operating business and on performance of State administration in energy sectors and on amendment to some laws (the Energy Act), as amended. Finally, the "main" crisis legislature based on the Constitution of the Czech Republic and* Constitutional Act No. 110/1998 Coll., on the security of the Czech Republic, provides for the declaration of a state of crisis. As far as subversive non-State terrorism is concerned (i.e., e.g. not involving the use of nuclear weapons as an act of terrorism by a foreign State), the state of danger or a state of emergency may be declared separately on the grounds of a terrorist attack or campaign; declaration of the state of threat to the State or the state of war would tend to play a subsidiary role in this respect. Despite the possibility to restrict important rights envisaged in the individual laws concerning crisis legislature, both the government and the public would benefit from the existence of a clear and well-structured catalogue of rights that may be restricted with respect to each of the states declared. In general, another legal challenge is represented by the need to devise a legal response to each of the specific types of terrorist attacks (i.e., with a little exaggeration, a plan similar to the plans of type activities used by the IRS structures).

What seems impossible to transpose clearly into legal norms is a potential breach of fundamental human rights in the case of a threat of a particularly serious terrorist attack. A frequently used hypothetical scenario is that terrorists might place a nuclear bomb in a large city and set the timer. In this scenario, the intelligence services would become aware of this threat, but would not know where the bomb is located. The Police would apprehend the perpetrator and then they would face the moral and ethical question as to what means the State or a citizen can and should use in order to gain information regarding the bomb's location. Can such a situation justify torture? The provisions regarding necessity would come to mind in legal terms. However, there is still the question of supremacy of international law – the Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (143/1988 Coll.) and the impossibility to derogate from mandatory rules of international law. The jurisdiction of the International Criminal Court may come into play in respect of a presidential pardon, etc. Nevertheless, in such cases the applicable laws must take a back seat to deciding on the greater or lesser evil, employing the moral responsibility of the person deciding on using such extraordinary measures.

4. Conclusion

As indicated by the text above, the Czech Republic has faced various threats of terrorism in the past. In the contemporary era, Czech citizens may fall victim to terrorism when abroad. The danger of terrorism in the Czech Republic cannot be underestimated, despite the fact that – in view of the events in some other countries – it may seem to be smaller (as well as the issue of terrorist foreign fighters departing from the country). The legal system is able to adapt to some new challenges in the area of fighting terrorism, but is not always able to anticipate them (which has been demonstrated by the recently emerged necessity to lay down provisions on recourse against the aforesaid foreign fighters in terrorist groups). The issue of using information gained by intelligence services for the purposes of criminal proceedings remains unresolved in the context of the reasoning provided by the Constitutional Court in2007. It would be practical to develop a legal solution related to possible terrorist threats to the Czech Republic (if only due to the "overabundance" of the various states that may be invoked on the grounds of terrorism under the Czech laws). However, it seems that there are certain moral and ethical questions arising in extreme situations that cannot be regulated in detail by any legal instruments. Should such a regulation prove to be necessary, it would warrant complicated evaluation in terms of the general values of justice.

References

BÍLKOVÁ, Veronika (2014): Boj proti terorismu z pohledu ochrany lidských práv. *(Fight against Terrorism in Terms of Human Rights Protection.)* Plzeň: Aleš Čeněk, 2005

MAREŠ, Miroslav (2005): Terorismus v České republice. *(Terrorism in the Czech Republic.)* Brno: Centrum pro studium demokracie

MAREŠ, Miroslav (2011). Islamismus jako bezpečnostní hrozba pro Českou republiku. *(Islamism as Security Threat for the Czech Republic.)* Vojenské rozhledy, roč. 20 (52), č. 4, s. 118–128.

http://www.vojenskerozhledy.cz/kategorie/islamismus-jako-bezpecnostni-hrozba-pro-ceskou-republiku

MAREŠ, Miroslav (2015): Soudobé problémy a výzvy aplikace trestného činu teroristického útoku. *(Contemporary Issues and Challenges Related to the Crime of Terrorist Attack.)* Státní zastupitelství, roč. 18, č. 2, s. 16–23.

MAREŠ, Miroslav a Štěpán VÝBORNÝ (2015). Foreign fighters z pohledu českého trestního práva. *(Foreign Fighters in Terms of Czech Criminal Law.)* The Science for Population Protection, roč. 7, č. 2, s. 1–11.

VANÍČEK, Jiří a kol. (2006): Právní úprava krizového řízení v ČR. Vybrané problémy právní teorie a praxe. *(Legislation on Crisis Management in the Czech Republic. Select Issues of Legal Theory and Practice.)* Praha: Eurolex.

The seminar on Restriction of Human Rights and Freedoms as a Consequence of Fight against Terrorism

2016
YEARBOOK OF THE CONSTITUTIONAL COURT
OF THE CZECH REPUBLIC

Published by:
Constitutional Court of the Czech Republic
Joštova 8
660 83 Brno
Czech Republic

Contact person: Vlastimil Göttinger
vlastimil.gottinger@usoud.cz

Printed by: ASTRON studio CZ, a.s., Praha

First edition, Brno, 2017

ISBN 978-80-87687-12-3

CONSTITUTIONAL COURT
OF THE CZECH REPUBLIC