In accordance with Resolution No II, adopted at the meeting of the Circle of Presidents on 13 June 2018 in Prague, the topic was chosen for the XVIIIth Congress of the Conference of European Constitutional Courts, which will take place from 26 to 29 May 2020 in Prague.

The topic is:

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, TRANSNATIONAL AND NATIONAL CATALOGUES IN THE 21ST CENTURY.

QUESTIONNAIRE FOR THE XVIIIth CONGRESS

OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

I. GENERAL PART - CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I International human rights catalogues (Convention, UDHR and ICCPR)

- What constitutional status / characteristics / legal force do international human rights treaties have in your country?

To introduce the answer to that question, it is appropriate to provide a short overview of related historic events. Until 1 June 2002, the Constitution of the Czech Republic (i.e. The Constitutional Act of the Czech National Council No 1/1993 of 16 December 1992, hereinafter also the "Constitution") only regulated the relationship of the Czech legal order to international treaties on fundamental rights, but not the relationship to other legal norms of international law. The original wording of Article 10 of the Constitution stipulated that "*the ratified and promulgated international treaties on human rights and fundamental freedoms by which the Czech Republic is bound are immediately binding and take precedence over the law*." Therefore, it was a direct incorporation of international

treaties on human rights into the Czech legal order and the said treaties were directly applicable and had application priority over the law.

As a result of relatively extensive and significant amendments to the Constitution by Constitutional Act No 395/2001 (the "Euro-amendment") the wording of Article 10 was changed and now it reads: "*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply*." The concept of "international treaties on human rights and fundamental freedoms", which in the past caused some interpretative difficulties, has been removed from the Constitution along with the distinction between international treaties on human rights and fundamental freedoms on one hand and other international treaties on the other hand; the dualist model was in general suppressed in favour of the monist model.

Before the Euro-amendment of the Constitution, the issue of the legal force of international human rights treaties in relation to the constitutional order was not explicitly addressed by the Constitution or the case-law of the Constitutional Court. However, the Constitutional Court had the power to abolish laws and other legal regulations not only for conflict with the constitutional order, but also for conflict with an international human rights treaty [see Article 87(1)(a) and (b) of the Constitution, as amended by 31 May 2002]. However, this has changed after the Euro-amendment and now the Constitutional Court abolishes laws and other legal regulations only for conflict with the constitutional order. Nevertheless, the Constitutional Court responded to the change in the wording of the Constitution in its case-law by referring to the need to preserve the essentials of a democratic rule of law (i.e. the material core of the Constitution) and stating that ratified and promulgated international human rights treaties remain a part of the constitutional order [Judgment of the Constitutional Court no. Pl. ÚS 36/01 of 25 June 2002 - *Bankruptcy Trustee*].

Thus, if a judge of an ordinary court encounters a conflict between a law and an international treaty on human rights, he or she has three options. The judge may choose to interpret a law in a manner conforming to an international treaty. He or she may also, under Article 10 of the Constitution, apply this Treaty directly, irrespective of the law, provided that its relevant provision is self-executing. Finally, he or she can turn to the Constitutional Court with a petition to annul the law for violating the constitutional order, which, according to the aforementioned case-law, is a preferred procedure by the Constitutional Court. It remains unclear what status do the international human rights treaties have in relation to the Charter, since both of these sources of law are now part of the constitutional order.

- What is the mechanism of "incorporating" an international treaty into national application practice?

As mentioned above, international (human rights) treaties adopted in accordance with Article 10 of the Constitution are directly applicable and in the event of conflict between a law or other legal regulation and such an international treaty, they shall prevail. In addition, the Constitutional Court is entitled to review the compliance of laws and other

legal regulations with international human rights treaties in proceedings for the annulment of such laws and other legal regulations (the scope and discriminatory criteria of which are not explicitly specified anywhere). If the Constitutional Court is convinced that a law or other legal regulation is in conflict with an international treaty, the Constitutional Court has the power to annul this national legal regulation or its part [*Bankruptcy Trustee*, cit. above].

- Can you invoke direct application of international human rights catalogues in your country? If so, please describe this practice.

Provided that the said international (human rights) treaty has been adopted in accordance with Article 10 of the Constitution and is self-executing, this is possible. In such case, it has application priority and it may be directly applied not only by all courts, but also, for example, by administrative authorities (see details above). However, the case law of the Constitutional Court emphasizes that, in the event of a clear contradiction between an international human rights treaty and the law, the general courts are obliged to refer the matter to the Constitutional Court for review under Article 95(2) of the Constitution, instead of simply applying the treaty; in the event of a contradiction, the Constitutional Court is entitled to annul the relevant law or part thereof (see above for details).

I.II **Transnational Human Rights Catalogues (the Charter of Fundamental Rights of the European Union)**

- Is the CFREU a reference point for reviewing the constitutionality of legal rules and/or individual decisions of public authorities, whether direct (formal, in some EU Member States) or mediated - by "radiating" to national catalogues (material, in other states)?

The Charter of Fundamental Rights of the European Union dost not find its way into case-law of the Constitutional Court very often. This is mainly because the complainants themselves do not refer to this EU catalogue. The reason behind this tendency may be that the (Czech) Charter of Fundamental Rights and Freedoms already contains most of the rights embodied into the CFREU.

The Constitutional Court labeled the CFREU as a part of the reference framework of judicial review or as a standard of judicial review. The interpretative basis may be foundd in Article 1(2) of the Constitution (The Czech Republic shall observe its obligations resulting from international law) which means that domestic legal regulation, including the Constitution, is to be interpreted in accordance with the principles of European integration and cooperation between the EU and Member State authorities. If there are several interpretations of the provisions of the constitutional order, and only some of them lead to the achievement of the obligation assumed by the Czech Republic in connection with its membership of the European Union, it is necessary to choose a Euro-conforming interpretation supporting the execution of the commitment, not an interpretation not supporting the execution. In the field under the scope of competence of the EU law, it interprets constitutional law taking into account the principles of the EU

law. All this applies while maintaining the limit, which is the material core of the constitutional order, i.e. the essential elements of a democratic rule of law within the meaning of Article 9(2) of the Constitution. While EU law is not a reference criterion for assessing the constitutionality of a national legal regulation and a contradiction with a norm of EU law alone cannot lead to a derogation of a law, it is necessary to take into account the EU law and the CJEU case-law when interpreting constitutional law. (For example, recently Judgment no Pl. ÚS 45/17 of 14 May 2019 – *Data retention III*)

- Is the case-law of the Court of Justice of the EU a guide in the interpretation and application of your national catalogue by ordinary courts or a source in the judicial completion of the law?

Yes, the Constitutional Court often refers to the case-law of the Court of Justice of the EU. For example the following – Judgment no III. ÚS 3289/14 of 10 May 2017 (personal liberty and family life of detained foreigners), Judgment no. Pl. ÚS 45/17 of 14 May 2019 (data retention) or Judgment no I. ÚS 111/12 of 28 November 2013 (the european arrest warrant and the principle of specialty).

- Is the domestic influence of the CFREU constitutionally linked to its, at least comparable (equivalent) level of protection, or – in EU Member States – verified by submission for preliminary ruling to the Court of Justice of the EU?

The Constitutional Court has not yet submitted case for preliminary ruling to the Court of Justice of the EU. The position of the Constitutional Court vis-à-vis the Court of Justice of the EU and EU law generally underwent a dynamic development during the ten years of the Czech Republic's membership of the Union. In particular, the preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union is the main instrument of "judicial dialogue" in the field of EU law. In the Judgment no. Pl. ÚS 50/04 of 8 March 2006, the Constitutional Court considered for the first time whether to initiate the preliminary ruling procedure. However, there was such extensive, consistent and long-established case-law in the matter in question that there was no need to refer to the Luxembourg court. Nevertheless, the Constitutional Court has reserved the possibility to provide a clear answer to this question in the future, i.e. to refer a case to the Court of Justice of the EU for consideration in individual types of proceedings.

In Judgment no. Pl. ÚS 66/04 of 3 May 2006 (European Arrest Warrant) the Constitutional Court also did not rule out the possibility of referring to the Court of Justice of the EU for a preliminary ruling. However, the Constitutional Court refrained from taking this step, because a preliminary ruling on the same matter had been previously already requested by the Belgian Arbitration Court. The Constitutional Court held that it was not entirely appropriate to wait for a decision by the Court of Justice of the EU, as the contested provisions would remain effective and could lead to the surrender of a person under a European arrest warrant. In this situation, the Constitutional Court considered it absolutely necessary to decide whether or not the fundamental rights of such persons were threatened. In an effort to resolve this dilemma, the Constitutional Court has decided to assess whether the provisions implementing the relevant framework decision can be interpreted in accordance with the Czech constitutional order. Since it ruled that such an interpretation was possible, it was not necessary to wait for the Court of Justice of the EU to clarify the problematic issues of EU law.

In other decisions, the Constitutional Court has also applied classic doctrines of EU law, such as the *acte clair* doctrine, according to which, when the proper application of EU law is so obvious that it leaves no room for reasonable doubt, there is no need to seek interpretation from the Court of Justice of the EU. Thus, the possibility of submitting a case for preliminary ruling by the Constitutional Court remains open, as it has not yet been expressly excluded by the Constitutional Court. However, at the same time, the Constitutional Court often emphasizes that it is not competent to review the conformity of national law with EU law within the framework of the review of constitutionality of laws under Article 87(1)(a) of the Constitution. According to the Constitutional Court, the application of EU law as an immediately applicable law falls within the competence of the ordinary courts, which, in case of doubt about the application of this law, have the possibility or an obligation to refer the question to the Court of Justice of the EU for a preliminary ruling. However, the Constitutional Court is not part of the ordinary justice system and the criterion of its review is only the issue of constitutionality, i.e. examining compliance with the norms, values and principles of the Constitution.

Probably the biggest controversy concerning the relationship between the Constitutional Court and the Court of Justice of the EU was the result of Judgment no Pl. ÚS 5/12 of 31 January 2012. In this case, the different points of view of the Constitutional Court, the Supreme Administrative Court and the Court of Justice of the EU on the issue of the Czechoslovak pensions were escalated. In its ruling, the Constitutional Court emphasized that it remains the supreme protector of Czech constitutionality, even against possible excesses of EU bodies. The Constitutional Court declared that such an excess occurred in connection with the impact of the judgment in Case no. C-399/09: Judgment of the Court (Fourth Chamber) of 22 June 2011 — *Marie Landtová v Česká správa socialního* zabezpečení, namely, deficits concerning the principles of a fair trial. Although the Constitutional Court was not a party to the preliminary ruling, it provided the Court of Justice of the EU with additional information and arguments for preliminary ruling submitted by the Supreme Administrative Court. According to the Constitutional Court, the Czech Government stated in its observations that the case-law of the Constitutional Court violated EU law, contrary to Article 89(2) of the Constitution. The Constitutional Court expressed the expectation that, at least in order to preserve the appearance of objectivity, the Court of Justice of the EU will acquaint itself with arguments respecting the case-law of the Constitutional Court and the constitutional identity of the Czech Republic. The Constitutional Court stressed the common constitutional tradition with the Slovak Republic, the more than seventy years of history of the common state and its peaceful disintegration, i.e. a completely specific and historically conditioned situation, which in itself is unprecedented in Europe. However, the statement of Constitutional Court was not accepted by the Court of Justice of the EU, which, according to the Constitutional Court, constituted an abandonment of the *audiatur et altera pars* principle. Thanks to this decision, the Constitutional Court entered the history of European law as the first constitutional court of an EU Member State to conclude that the Court of Justice of the EU acts *ultra vires* as regards the competences that have been transferred to the EU under Article 10a of the Constitution.

I.III National human rights catalogues

- Is your country's catalogue of fundamental rights a part of the Constitution? If so, in what form? (special constitutional charter, a certain chapter of the constitution, part of the constitutional order). What is its structure?

Article 112 of the Constitution defines the concept of constitutional order or its individual components. The concept of constitutional order (i.e. a constitution in the broader sense of the word, as opposed to "the Constitution" in the narrower sense of the word) denotes an open set of applicable regulations of the highest legal power. In addition to the Constitution itself, the constitutional order of the Czech Republic comprises the Charter of Fundamental Rights and Freedoms (hereinafter the "Charter") and other constitutional acts. Thus, there is no single constitutional document containing a comprehensive regulation of constitutional issues. In accordance with Czech historical traditions, the constitution is poly-legal.

The nature and place of the Charter in the legal order is also determined by Article 3 of the Constitution, according to which the Charter is a part of the constitutional order of the Czech Republic. This article was a response to the fact that the Charter constituted a "supra-constitutional" legal regulation of the defunct Czechoslovak Federation. The Charter was never approved by the Czech constitutional legislature as a constitutional act. The constitutional body confirmed by Articles 3 and 112 of the Constitution that the Charter is, as a constitutional law, a valid and effective regulation. From the very beginning of the Constitutional Court, the constitutional power of the Charter has been clearly declared by the Constitutional Court, and it is accepted in legal practice without any problems.

The Charter itself is preceded by a preamble and consists of six chapters. Chapter One contains general provisions (e.g. over-positive values of the type of liberty, equality in dignity and rights, the relationship between the state and individuals, prohibition of discrimination or limits on the restriction of fundamental rights); the last chapter (the sixth) contains common provisions (limitations on the enforcement of certain second-generation rights, personal scope of powers of the Charter, the right of asylum and limitations on certain rights). Chapter Two essentially deals with first generation rights and it consists of two divisions. Division One covers human rights and fundamental freedoms, Division Two covers political rights. A very brief Chapter Three deals with rights of national and ethnic minorities, while the relatively large Chapter Four regulates the second generation rights (i.e. economic, social and cultural rights). Finally, Chapter Five contains provisions on the right to judicial and other legal protection.

- What are the historical circumstances of the creation of your national human rights catalogue? Does your national legislation follow any other (historical, foreign) legislation or is it entirely original?

The Charter was adopted at the time of the existence of a federal state by the Federal Assembly, on the basis of proposals from the national parliaments (i.e. the Czech National Council and the Slovak National Council). Due to the disagreement of the national councils, two proposals were submitted to the Federal Assembly and they were processed by the Federal Assembly in the form of a comprehensive amendment. The Charter was adopted as part of Constitutional Act No 23/1991 Sb. of 9 January 1991 which introduces THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a constitutional act of the Federal Assembly of the Czech and Slovak Federal Republic. Although this constitutional act has been deconstitutionalised by Article 112(3) of the Constitution, the legal force of the Charter has been unchanged since 1991. It is treated as a constitutional act and produces effects pertaining to the law of constitutional legal force. The Charter of Fundamental Rights and Freedoms was, as part of the constitutional order of the Czech Republic pursuant to Articles 3 and 112(1) of the Constitution,

published again for informative purposes under No 2/1993 Sb. on the basis of the Resolution of the Presidium of the Czech National Council of 16 December 1992 on the proclamation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic. However, this resolution cannot be regarded as a source of law - the Presidium of Czech National Council apparently had no constitutional power - but it was only a republication of a (constitutional) act.

Various human rights documents were mentioned when discussing the draft Charter, which provided inspiration for its drafting. The then Federal Assembly President Alexander Dubček described Magna Carta, the Declaration of Independence and the Universal Declaration of Human Rights (hereinafter the "UDHR") as a spiritual source. In this context, it is interesting that in the period of the First Republic, the Constitutional Charter of the Czechoslovak Republic included a catalogue of fundamental rights (specifically in Chapter Five, devoted to rights and freedoms and civil duties). Although there is some overlap with today's catalogue, the First Republic Catalogue was much more concise, and therefore its influence on the current legislation is limited. The current Charter contains the widest catalogue of rights in the history of Czech statehood. However, perhaps more importantly, as in the case of other Central European constitutions from the inter-war period, the catalogues of fundamental rights did not constitute a judicial right with direct legal effects. Thus, individuals could not invoke those rights in any way. This changed after the fall of totalitarian and authoritarian regimes (communism).

The situation today is different because, in the intellectual continuation of the German Basic Law (hereinafter the "GG"), fundamental rights apply as an immediately applicable law. We can consider the intellectual sources of our Charter to be the entire tradition of post-war constitutionalism, which can be associated, in addition to some of the above-mentioned documents (i.e. the UDHR, GG), in particular with the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "Convention"), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. Older sources can also be sought, as some of the wording in the introductory passages of the Charter originate in the French Declaration of the Rights of Man and of the Citizen.

- How have your national human rights catalogue changed over time? Is it changing, is it being amended with new rights? Is there a constitutional procedure that determines the conditions for its amendment or supplement?

The Charter was amended only once, by Constitutional Act No 162/1998 Sb., which extended the period for detention of a person. It changed the time limit in Article 8(3) of the Charter in relation to detention from 24 to 48 hours. Although attempts have been made to amend the Charter in various ways (e.g. by adding an additional criterion, namely health, to the prohibition of discrimination), they have not been successful.

When amending the Charter, the form of the constitutional act was chosen. The adoption of the Constitutional Act requires the consent of a qualified majority of the members of both Houses of Parliament. Thus, the Senate cannot be outvoted unless the Senate agrees with the draft Constitutional Act approved by the Chamber of Deputies. Article 39(4) of the Czech Constitution stipulates that the adoption of the Constitutional Act requires the consent of a three-fifths majority of all Deputies and a three-fifths majority of the Senators present.

I.IV Relationships between individual human rights catalogues

- Can you give examples from the case-law of your court which are linked to the use of one of the international catalogues?

In its case-law, the Constitutional Court regularly refers to the full range of international human rights conventions. In the case of decisions on constitutional complaints, this is most often the case if the complainants themselves base their claims in the constitutional complaint on international conventions. Since the Charter of Fundamental Rights and Freedoms contains most of the rights governed by international catalogues, they serve as rather supportive references. The most common reference point in this respect is the Convention.

In Judgment no. III. ÚS 3289/14 of 10 May 2017, the Constitutional Court referred to the European Convention, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the CFREU. On the basis of these documents, it concluded that the detention of a foreigner with minor children for the purpose of returning them to another EU country constituted an unconstitutional interference with their right to personal liberty and family life.

In the judicial review of laws leading to Judgment no. Pl. ÚS 2/15 of 3 May 2017 on the Public Health Insurance of Foreigners, the Constitutional Court referred to the European Social Charter, the International Covenant on Economic, Social and Cultural Rights, the Convention on Human Rights and Biomedicine, the Convention on the Rights of the Child or the Convention on the Elimination of All Forms of Discrimination against Women.

- Has your court dealt with the relationship / hierarchy / competition of human rights catalogues with regard to the level of protection they provide?

The conflict between the constitutional order and an international treaty should be prevented by the procedure under Article 87(2) of the Constitution, i.e. by an a priori assessment of their compliance by the Constitutional Court. Until the Constitutional Court decides, such a treaty cannot be ratified. An example of this type of procedure is the review of the Lisbon Treaty by Judgment no. Pl. ÚS 19/08 of 26 November 2008 (*Treaty of Lisbon I.*) and Judgment no. Pl. ÚS 29/09 of 3 November 2009 (*Treaty of Lisbon II)*.

After the abovementioned Euro-amendment to the Constitution, it remains unclear what status do the international human rights treaties have in relation to the Charter, since both of these sources of law are now part of the Czech constitutional order. Usually, the Constitutional Court prefers legal regulation more favourable to the complainants; however, the assessment of citizenship as a condition for the release of property in restitution proceeding has become a well-known exception to this rule. While acknowledging that Article 26 of the International Covenant on Civil and Political Rights forbids discrimination in all circumstances and that the UN Human Rights Committee considered the citizenship condition in these Czech disputes to be discriminatory, the Constitutional Court referred, inter alia, to the more restrictive ECHR case-law on the matter and did not annul the contested legal regulation (Judgment no. Pl. ÚS 33/96 of 4 June 1997)

- Is there a process that determines how to choose a particular human rights catalogue if a particular right is protected in multiple catalogues? (Note: in EU Member States, the use of CFREU – subject to Article 51(1) - is mandatory, i.e. not subject to choice)

In particular, the Constitutional Court relies on catalogues to which the complainant or entity proposing the annulment of a law or other regulation refers in its submission. In doing so, the Constitutional Court usually prefers legal regulation that is more favourable to the rights of the complainant. For example, the Charter does not contain the equivalent of Article 5(4) of the Convention, guaranteeing anyone deprived of their liberty the right to submit an application whereby the court would swiftly rule on the legality of the deprivation of liberty and order the release if the deprivation of liberty is unlawful. Therefore, in these cases the Constitutional Court applies the Convention.

The Constitutional Court does not hesitate to refer to the soft law (e.g. Judgment no. III. ÚS 2204/17 of 12 February 2019), but it does so only in a supportive manner, it treats it as material to be taken into account (e.g. Judgment no. I. ÚS 860/15 of 27 October 2015 or Resolution no. I. ÚS 3784/17 of 23 January 2018).

II. SPECIAL PART - SPECIFICS OF CERTAIN FUNDAMENTAL RIGHTS

II.I Right to life

- What is the original text of the protection of this right in your national catalogue?

The right to life is enshrined in Article 6 of the Charter as the first of every person's fundamental rights:

1. Everyone has the right to life. Human life is worthy of protection even before birth.
2. Nobody may be deprived of her life.
3. The death penalty is prohibited.
4. Deprivation of life is not inflicted in contravention of this Article if it occurs in connection with conduct which is not criminal under the law.

- Can this right be limited? If so, how and under what conditions?

The absolute nature of the right to life concerns the prohibition of the death penalty; it is up to the legislator to specify the legal conditions under which the right to life may be limited. Individual limitations may concern the permitted use of force (e.g. by armed forces) or even individuals – e.g. extreme emergency, doctrine of necessity. Commenting on Article 6 of the Charter, Marian Kokeš states: "*The acceptable level of limitation of the right to life, given its fundamental nature, must be set to be more strict than in the case of most other fundamental rights. Therefore, even the laws in question, which impose such restrictive conditions and conduct, must be subject to the strictest requirements in terms of both their formal and substantive requirements."* Regarding the conflict between the rights of the unborn child and the rights of its mother, the Czech legal order (Act No 66/1986, on Abortion) allows a woman to undergo an abortion in a medical facility until the twelfth week of pregnancy.

- Has your court dealt with this right / its interpretation / enshrining in more detail? If so, please provide practical details and information about which human rights catalogue have been applied.

The Constitutional Court's case-law provides an interpretation of the various aspects of this fundamental right. In connection with the state's positive obligations under the right to life, the Constitutional Court commented on the obligation to conduct effective investigations in, for example, Resolution no. I. ÚS 2886/13 of 29 October 2013. In this decision, the Constitutional Court concluded that it is generally not up to the Constitutional Court to review, based on the initiative of the injured party, the actual decision of the bodies in charge of criminal proceedings as to the substantive reasons and the merits of commencing or not commencing the criminal prosecution. However, if the complainant's right to life under Article 2 of the Convention is affected, the Constitutional Court must review whether the conduct of the bodies in charge of criminal proceedings in reaching their decision complied with the requirements of this provision for effective investigation. The obligation to conduct effective investigation shall consist of the following separate aspects: investigations shall be (a) independent and impartial; (b) effective; (c) prompt; (d) subjected to public scrutiny and (e) commenced by the

bodies in charge of criminal proceedings on their own initiative. This resolution was subsequently followed by a number of decisions.

In addition to the national human rights catalogue (Charter), the Constitutional Court also relies on international human rights documents, in particular the Convention. Regarding the right to life, the Constitutional Court also applies other international treaties, such as the Convention on the Rights of the Child and the Convention on Human Rights and Biomedicine. The Constitutional Court explicitly mentioned the latter treaties in relation to the right to life in Judgment no. III. ÚS 459/03 of 20 August 2004, in which it decided on the constitutional complaint of complainants - parents, who did not agree with the medical treatment of their child. In this decision, the Constitutional Court emphasized that: "*the protection of the health and life of the child, which was indeed the case given the specific circumstances (see above), is an entirely relevant and more than sufficient reason to interfere with the rights of the parents, as it is a value that has an unequivocal priority in the system of fundamental rights and freedoms.*"

The Constitutional Court has not yet meritoriously dealt with the issue of conflict between the rights of the unborn child and the rights of its mother in case of abortion at the request of a pregnant woman, nor has it reviewed the related legal regulation. The Constitutional Court dealt with three complaints in which it was proposed to abolish legislation enabling abortion (Resolution No. III. ÚS 169/94 of 15 December 1994, Resolution no. III. ÚS 1972/08 of 11 September 2008, Resolution no. III. ÚS 3444/17 of 16 January 2018), but it did not deal with any of the matters on substance. In the latter resolution which concerned illicit abortion with the consent of the woman outside a medical institution, the Constitutional Court merely stated that the interest in the protection of incipient human life protected by Article 6(1) of the Charter is a legitimate reason for criminalizing acts of unlawful abortion.

In Judgment no. I. ÚS 2078/16 of 2 January 2017, the Constitutional Court dealt with the question whether the failure to provide health care to an adult person with legal capacity with regard to his or her disagreement can be subordinated to the crime of failure to provide assistance. In terms of the right to self-determination, the Constitutional Court in this matter emphasized that the patient has the right to refuse health care even in a situation where there is a risk that his or her non-treatment may cause death. Doctors and other healthcare professionals may persuade such persons, may try to induce them to change their attitude if it is clearly harmful to them, but ultimately cannot prevent the decision to refuse care taken on the basis of the free and serious will of an adult person with legal capacity, solely because they consider that the decision harms the person.

- Does the case-law of your court differ from that of international courts as regards the protection of this right?

The Constitutional Court interprets and applies the right to life in accordance with the interpretation of international courts, especially based on the case-law of the European Court of Human Rights. In relation to the right to life, the Constitutional Court often refers to individual judgments of the European Court of Human Rights, for example, in the cited Judgment no. I. ÚS 2886/13 of 29 October 2013, in which the Constitutional Court dealt with the positive obligations of the state in relation to the right to life, stating: "*One of the obligations of the State under Article 2 of the Convention is to establish an effective and independent judicial system capable of establishing the cause of death and possibly bringing the perpetrators to account…. In the absence of such an obligation, interference with the right to life would be exempt from punishment and therefore the protection*

guaranteed by this right would be merely theoretical and illusory, not practical and effective as required by the Convention." In this case, the Constitutional Court also referred to the case-law of the ECHR, for example *Rajkowska v. Poland,* judgment of 27 November 2007 No 37393/02 or *Anna Todorova v. Bulgaria,* judgment of 24 May 2011 No 23302/03.

II.II Freedom of expression

- What is the original text of the protection of this right in your national catalogue?

Freedom of expression is enshrined at the constitutional level in Article 17 of the Charter:
(*1) The freedom of expression and the right to information are guaranteed.*
(2) Everyone has the right to express her opinion in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the State.
(3) Censorship is not permitted.
(4) The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morals.
(5) State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law.

- Can this right be limited? If so, how and under what conditions?

Yes, freedom of expression can be limited. Article 17 (4) of the Charter contains a limitation clause according to which freedom of expression may be limited by law in the case of measures in a democratic society necessary for the protection of the rights and freedoms of others, national security, public security, public health and morality. Freedom of expression may also be limited as a result of a conflict with another fundamental right (typically for example the protection of personal rights).

- Has your court dealt with this right / its interpretation / enshrining in more detail? If so, please provide practical details and information about which human rights catalogue have been applied.

The Constitutional Court has repeatedly dealt with the possibility of limiting freedom of expression, both in proceedings on the annulment of laws or other legal regulations (abstract review of constitutionality) and in proceedings on constitutional complaints (specific review of constitutionality).

Proceedings on the annulment of laws or other legal regulations. Regarding the principle that freedom of speech may only be limited by law, the Constitutional Court has repeatedly handed donw judgments, for example, in relation to the anti-communist and anti-fascist regulations of municipalities, which limited the possibility of promoting these non-democratic movements and ideas in the municipality. Since these were legislative instruments limiting freedom of expression, the Constitutional Court annulled them for contradiction subject to the law [Judgment no. Pl. ÚS 68/04 of 6 June 2006]. The Constitutional Court commented on the need to limit freedom of expression in a democratic society for the above reasons, for example, when assessing the constitutional conformity of the offense of defamation of constitutional

bodies [Judgment no. Pl. ÚS 43/93 of 12 April 1994 - The Crime of Defamation of Constitutional Bodies]. With the latter cited decision, the Constitutional Court laid the foundations of the methodology for reviewing the compliance of legal regulations with the constitutionally protected freedom of expression by means of the proportionality test

Proceedings on constitutional complaints. The Constitutional Court has expressed its views on the scope and content of the constitutionally guaranteed freedom of expression many times. The case-law of the Constitutional Court is largely inspired by the case-law of the European Court of Human Rights, as reflected in, for example, the review methodology, the concept of balancing fundamental rights, distinguishing value judgments and factual claims or setting different limits to this right depending on the persons' position in the society (for example public figures, politicians, judges, etc.).

In general, the Constitutional Court often makes use of other, international human rights catalogues, which enshrine freedom of expression. This is particularly true in relation to Article 10 of the Convention which is often applied in parallel with Article 17 of the Charter and the case-law of the Constitutional Court. Other international human rights treaties, such as Article 19 of the International Covenant on Civil and Political Rights, are used more rarely.

- Does the case-law of your court differ from that of international courts as regards the protection of this right?

As stated above, the case-law of the Constitutional Court is largely comparable to that of the European Court of Human Rights.

II.III Right to privacy / respect for private life

- What is the original text of the protection of this right in your national catalogue?

The protection of the right to privacy is contained in the constitutional order of the Czech Republic as a result of it being contained in several provisions of the Charter.
In accordance with Article 7(1), the inviolability of the person and her privacy is guaranteed. They may be limited only in cases provided for by law
In accordance with Article 10(1), everyone has the right to demand that her human dignity, personal honour, and good reputation be respected, and that her name be protected.
In accordance with Article 10 (2), everyone has the right to be protected from any unauthorized intrusion into her private and family life.
In accordance with Article 10 (3), everyone has the right to be protected from the unauthorized gathering, public revelation, or other misuse of her personal data.
In addition, the protection of the right to privacy is complemented by other provisions of the Charter which protect the inviolability of a person's dwelling (Article 12), the confidentiality of letters or the confidentiality of other papers or records (Article 13).

- Can this right be limited? If so, how and under what conditions?

None of these rights is absolute and thus may be limited.
Article 7(1) directly states the possibility of limiting the inviolability of a person and his/her privacy only in cases provided for by the law. This right (as well as other rights guaranteed by the Charter) can thus be limited only by the law, while respecting the limits set in particular by Article 4 of the Charter. In accordance with Article 4(3), any statutory limitation upon the

fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions. In accordance with Article 4(4), when employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted.

Article 7(1) does not lay down legitimate objectives which must be pursued by the legislature in limiting the right to privacy. Accordingly, it follows that this right is inherently limitable, i.e. the legislator can limit it only in the event of a conflict with another fundamental right or a constitutionally guaranteed legal (or general) good. The objective is to keep the maximum of each conflicting right, i.e. the conflicting rights must be proportionately balanced in order to achieve their optimization.

The same applies to Article 10, i.e. this right is also limitable and while this Article does not explicitly provide for the possibility of limiting that right by the law, it does not make any difference. In both cases (concerning Articles 7 and 10), the limitation of a fundamental right must be proportionate. The principle of proportionality consists of three basic steps: 1) appropriateness and 2) necessity for limitation and 3) proportionality in the narrower sense of the word. A limitation of a fundamental right must be appropriate for the purpose of achieving a legitimate objective. Furthermore, this limitation must be necessary to achieve the objective, i.e. there is no less burdensome, but equally effective way to achieve the objective. Finally, the conflicting fundamental rights must be proportionately balanced.

- Has your court dealt with this right / its interpretation / enshrining in more detail? If so, please provide practical details and information about which human rights catalogue have been applied.

The Constitutional Court interprets the right to privacy quite broadly and does not consider the list of its aspects stated in the Charter to be exhaustive.

The core of Article 7(1) is the protection of physical and mental integrity (including, for example, the issues of the beginning and end of human life in connection with medical interventions). However, the Constitutional Court refers to Article 7(1) also in matters that concern not only physical and mental integrity, but also other concerns, such as unlawful prosecution.

Article 10(2) together with Article 10(1) of the Charter protects the private sphere, while privacy in the spatial dimension, i.e. in particular dwellings, is protected by Article 12 of the Charter and privacy as a confidentiality of communication is protected by Article 13 of the Charter.

Privacy issues include various specific issues such as house searches, wiretapping and other interference with the inviolability of the dwelling, the right to information self-determination, the establishment and maintenance of relationships of a detained person with others through correspondence, the collection and use of operational and localization data on telecommunication traffic, the right to reasonably high financial compensation for non-pecuniary damage resulting from the publication of defamatory and false information, limitation of legal capacity, contact of the child with biological parents, admissibility of secretly recorded recordings as evidence in criminal proceedings or in civil proceedings, the obligation to provide genetic material for the purpose of identifying or denying paternity, confidentiality of communication on social networks, breaking of secrecy, individual child adoption by a person living in a registered partnership, access to archives of former security services, urine

collection of a person placed in prison under the direct supervision of a nurse of the same sex, or artificial insemination.

In most cases, the Constitutional Court applies two catalogues - the Charter and the Convention (especially Article 8 of the Convention).

- Does the case-law of your court differ from that of international courts as regards the protection of this right?

In deciding whether the right to privacy has been violated, the Constitutional Court generally takes into account not only Articles 7(1) and 10 (or other articles) of the Charter, but also Article 8 of the Convention and the case-law of the European Court of Human Rights and it makes a decision in accordance with this case-law. Therefore, there is no direct conflict in the issue of the right to privacy between the case-law of the European Court of Human Rights and the case-law of the Constitutional Court. However, the test of assessing whether there has been a violation of the right to privacy is different in the case-law of the Constitutional Court than it is in the case-law of the European Court of Human Rights.

II.IV Freedom of religion

- What is the original text of the protection of this right in your national catalogue?

The constitutional enshrining of freedom of religion can best be understood on the basis of historical experience with the Communist regime. Religious and ideological indoctrination was typical of a state based on the ideology of atheism and the scientific worldview, as was the case during the authoritarian times. It was precisely in order to prevent this historical experience from being repeated that the concept of an ideologically and religiously neutral state was adopted by the Czech constitution. In accordance with Article 2 (1) of the Charter, democratic values constitute the foundation of the state, so that it may not be bound either to an exclusive ideology or to a particular religious faith.

However, Articles 15 and 16 of the Charter are key for the regulation of the religion itself:

Article 15
(1) The freedom of thought, conscience, and religious conviction is guaranteed. Everyone has the right to change her religion or faith or to have no religious conviction.
(3) No one may be compelled to perform military service if such is contrary to his conscience or religious conviction. Detailed provisions shall be laid down in a law.

Article 16
(1) Everyone has the right freely to manifest her religion or faith, either alone or in community with others, in private or public, through worship, teaching, practice, or observance.
(2) Churches and religious societies govern their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independently of state authorities.
(3) The conditions under which religious instruction may be given at state schools shall be set by law.

(4) The exercise of these rights may be limited by law in the case of measures necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others.

- Can this right be limited? If so, how and under what conditions?

Freedom of religion has an internal and external dimension. The first sentence of Article 15(1) of the Charter protects the *forum internum*, i.e. it guarantees the inviolability of the inherently private intellectual, value, evaluation and emotional activities of a man. *Forum internum* is of an absolute nature. Therefore, there are no justifiable reasons for its limitation. Thus, it is not possible to interfere in the sphere of the individual's autonomy. *Forum internum* covers all religious and worldview ideas of an individual, his or her identification with a religious or worldview system and membership of a particular religious community. However, not every external influence on an individual's internal autonomy causes interference with a fundamental right (e.g. missionary activity). However, public authority is much more limited in this regard, already because of the imperative of religious neutrality, while third parties can in principle be openly religious to individuals. However, no means of coercion that deprive individuals of their free choice or directly force them are permissible. Therefore, direct or indirect pressure, both de jure and de facto, is prohibited. Public authorities cannot lay an obligation on individuals to accept a particular religion or belief against their will, nor can they force them to reveal their beliefs or otherwise sanction them. Nor should individuals be exposed to manifestations that would grossly offend their religious feelings.

Article 15(1) of the Charter is followed by paragraph (3), which regulates the reservation of conscience in case of military service. This provision is not subject to any provision on the limits of a fundamental right (see Article 16 (4) of the Charter), but its possible limitation constitutes a constitutionally inherent limitation (i.e. the rights of third parties or other values and principles contained directly in the constitutional order).

However, the exercise of external manifestations of religion or belief under Article 16 of the Charter may be limited. Since this article regulates external manifestations of religion or belief, it is appropriate to refer to it as *forum externum*. Unlike the rights enshrined in Article 15 of the Charter, the rights guaranteed by Article 16 of the Charter cannot be considered absolute. The exercise of these rights may be limited by law in the case of measures necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others. However, limitations of fundamental rights have to be interpreted restrictively, limits can only be set by law and the legitimate purpose of the limitation can only be the objectives foreseen by this provision (i.e. public security, public order, health, morality and the rights and freedoms of others).

- Has your court dealt with this right / its interpretation / enshrining in more detail? If so, please provide practical details and information about which human rights catalogue have been applied.

The Constitutional Court dealt with the absolute nature of the rights enshrined in Article 15 (1) of the Charter in Judgment no Pl. ÚS 18/98 of 2 June 1999. For the application of the reservation of conscience in relation to the exercise of military service, see for example Judgment Pl. ÚS 42/02 of 26 March 2003, Pl. ÚS 18/98 of 2 June 1999 or I. ÚS 671/01 of 11 March 2003. In cases where Article 15 (3) was not directly applicable due to *ratione temporis*, the Constitutional Court relied on general guarantees of freedom of

conscience in international law (e.g. Judgment no. II. ÚS 285/97 of 7 October 1998, II. ÚS 674/01 of 1 April 2003).

In the case of a the right to free manifestation of religion, the Constitutional Court dealt with the issue of refusing blood transfusions (Judgment no. III. ÚS 459/03 of 20 August 2004) or compulsory vaccination (Judgment no. III. ÚS 449/06 of 3 February 2011). The Constitutional Court also ruled that public authority must not determine the date of a church celebration (Judgment no. Pl. ÚS 1/01 of 11 July 2001). Nevertheless, the extent of disputes resolved by the Constitutional Court in this area is more limited than in more religiously diverse countries. Disputes stemming from the fact that many countries use religion or religious symbols in their national and state symbols did not arise in the Czech Republic. These may represent ammunition for various legal disputes with non-religious inhabitants or with supporters of emerging religions, which are thus unrelated to national and state history. The disputes caused by the immigration of members of non-Christian religions whose religious rules may conflict with national laws are not yet common.

On the contrary, great attention was paid to the status of churches and religious societies (i.e. Article 16(2) of the Charter). The Constitutional Court considers churches and religious societies to be independent holders of fundamental rights (Judgment no. I. ÚS 146/03 of 18 June 2003, Pl. ÚS 6/02 of 27 November 2002, Pl. ÚS 9/07 of 1 July 2010). Issues falling within ecclesiastical autonomy are in principle excluded from judicial review. Regarding the decision-making process of the internal organs of the Church (Judgment no. I. ÚS 211/96 of 26 March 1997 and IV. ÚS 3597/10 of 20 October 2011), it is possible to mention from the recent times, for example, Judgment no. III. ÚS 3910/17 of 16 October 2018, according to which it is not unconstitutional if proceedings before ordinary courts are limited to proving the existence of a decision of a church or religious society to terminate a ministerial service without considering its content and reasons for its issuance. In Judgment no. III. ÚS 3591/16 of 30 August 2017, the Constitutional Court, in turn, stated that the prohibition of the interpretation of the standards of the internal regulations of churches and religious societies does not mean a prohibition of their application. If a rule of Czech law contains a term the content of which is filled in by an internal regulation of a church or religious society, the ordinary courts must use such an interpretation that is considered correct by the competent authority or achieved by appropriate procedure within the church or religious society.

Internal organizational autonomy of churches in general, or more specifically, the constitutionality of the registration of churches or religious societies and the issue of the emergence of derived church legal persons with their own personality were dealt with by the Constitutional Court in an important Judgment no. Pl. ÚS 6/02 of 27 November 2002 and subsequently also in another Plenary Judgment no. Pl. ÚS 2/06 of 30 October 2007.

Three decisions will be crucial for the economic autonomy of the churches. The Constitutional Court criticized the absence of property settlement with churches and religious societies after 1989 in Judgment no. Pl. ÚS 9/07 of 1 July 2010. The Constitutional Court confirmed the constitutional conformity of the act on property settlement with churches and religious societies in Judgment no. Pl. ÚS 10/13 of 29 May 2013. In recent times, the Constitutional Court discussed the case of taxation of financial compensation for churches and religious societies (Judgment no. Pl. ÚS 5/19 of 1 October 2019).

In its decision-making activities, the Constitutional Court refers in particular to the relevant provisions of the Charter, but it also often invokes the case-law of the ECHR and sometimes finds even violations of the Convention (e.g. Judgment no. III. ÚS 3591/16 of 30 August 2017).

- Does the case-law of your court differ from that of international courts as regards the protection of this right?

Generally speaking, the Constitutional Court has a relatively accommodating approach to churches and religious societies (with the relative exception of Judgment no. Pl. ÚS 2/06, which, depending on the dissenting judges, deviated from the conclusions of Judgment Pl. ÚS 6/02 of 27 November 2002, when it excluded legal persons derived from churches and religious societies - with regard to the subject of their activities - from the regime of the Act on Churches and Religious Societies).

II.V Prohibition of discrimination

- What is the original text of the protection of this right in your national catalogue?

In the constitutional order of the Czech Republic, equality and prohibition of discrimination are governed primarily by the general provisions of the Charter, where the first sentence of Article 1 of the Charter states that “All people are free and equal in their dignity and rights”. Article 3(1) of the Charter then states that “everyone is guaranteed the enjoyment of his or her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.” It follows from Article 4(3) of the Charter that “any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions.”

In addition to these general provisions, there are individual special provisions guaranteeing equality and prohibition of discrimination in certain areas or situations, e.g. procedural equality of the parties in accordance with Article 37(3) of the Charter, equal protection of property in accordance with Article 11(1) of the Charter, which states that "each owner’s property right shall have the same content and enjoy the same protection" or equal rights of children born in and out of wedlock under Article 32(3) of the Charter.

- Can this right be limited? If so, how and under what conditions?

To answer this question, it should first be noted that, although the Constitutional Court has described equality as a fundamental human right constituting the system of values of modern democratic societies (e.g. Judgment Pl. ÚS 42/04 of 6 June 2006), equality in the concept of the constitutional order of the Czech Republic cannot be understood as absolute equality, because not every distinction can be considered unconstitutional discrimination. The fundamental distinction on which the Constitutional Court's case-law is based relates to accessory and non-accessory equality.

Accessory equality (i.e. equality in fundamental rights) requires intensity that calls into question the very essence of equality. This occurs when the violation of equality is accompanied by a violation of another fundamental or constitutionally guaranteed right, e.g. the right to own property under Article 11(1) of the Charter, political rights under

Article 17 of the Charter, etc. In other words, the principle of accessory equality prohibits discrimination against persons in the exercise of their fundamental rights. The Constitutional Court interprets this in the way that while freedom is a value in itself, equality is a relational category (requiring intermediaries, a relation to another social value) that is not worthy of protection in itself, but always in relation to another constitutional value. To put it simply, this is essentially an interpretation of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the difference between this Article and equality under Protocol No 12 to the Convention.

In the case of non-accessory equality, which is constitutionally enshrined in the first sentence of Article 1 of the Charter, the main purpose is to exclude the arbitrary will of the legislature in making distinction in the rights of certain groups of entities (i.e. the principle of equality before the law). In essence, it concerns a difference in treatment between different entities in cases where the constitutionally protected accessory right cannot be identified. However, the differentiation of equality into these two categories has recently been relativized, for example, by Judgment no. Pl. ÚS 18/15 of 28 June 2016.

It follows from the above mentioned that the definition of equality as a relational category leads to the fact that not any discrimination, but only discrimination which is unjustified, may be regarded as unconstitutional discrimination. Thus, according to the Constitutional Court, it is not in conflict with the constitutional order if the state or the legislator decides to grant fewer benefits to one group than to another; whereby differential treatment must always pursue a legitimate objective. According to the Constitutional Court, less favourable treatment can be justified by public interest or public welfare, where the key criterion is an objective and reasonable justification of the legal regulation adopted by the legislature (see e.g. Judgment no. Pl. ÚS 37/04 of 26 April 2006), this criterion being a kind of elaboration or extension of the category of public interest mentioned above, not an entirely different concept. Thus, both categories can be considered as a subset of the broader concept of legitimate objective. It is under these conditions that this right can be limited.

- Has your court dealt with this right / its interpretation / enshrining in more detail? If so, please provide practical details and information about which human rights catalogue have been applied.

In the light of the above, we must mention Judgment No. Pl. ÚS 36/01 of 25 June 2002, in which the concept of non-accessory equality was used for the first time, because the Constitutional Court could not identify the right to which the different treatment would be applied. The case concerned the remuneration of the bankruptcy trustee in the event of insolvency bankruptcy and failure to pay an advance, where the Constitutional Court stated that “the performance of the office of bankruptcy trustee is not a part of an employment relationship and hence its content, objective and purpose do not fall under Article 26 of the Charter. Furthermore, it is not a business or any other economic activity and, therefore, from the constitutional point of view, it cannot be subordinated to the scope defined by Art. 26 of the Charter.” The difference between accessory and non-accessory equality was later systematically explained in Judgment no. Pl. ÚS 29/08 of 21 April 2009, which concerned the determination of the tax and its rate on the transfer of real estate. In this decision, the Constitutional Court took into account the objective justification for inequality and concluded that the imposition of a tax on the transfer of immovable property is not contrary to the principle of equality, as it reflects the substantial differences between the legal regime of immovable and movable property.

However, the criterion of objective and reasonable justification appeared much earlier in the case-law of the Constitutional Court - for example, in Judgment no. Pl. ÚS 36/93 of 17 May 1994, concerning the alleged discrimination against university teachers in concluding fixed-term employment contracts. The Constitutional Court accepted special treatment in comparison with other employees and justified specific features of higher education, such as the necessity of obtaining highly professional knowledge, the objectivity of teaching and the then need to remove the proponents of the former communist regime from the higher education. Worth mentioning is also Judgment no. Pl. ÚS 9/95 of 28 February 1996, concerning the retirement allowances for members of the former counterintelligence, where the Constitutional Court accepted legal regulation excluding the inclusion of certain periods of service into the period decisive for granting the allowance. Here again, the need to come to terms with the totalitarian past and to enforce the rule of law served as an objective justification for discrimination.

From more recent case-law in the field of discrimination, it is necessary to mention Judgment no. Pl. ÚS 53/04 of 16 October 2007, in which the Constitutional Court dealt with the regulation stipulating different pensionable age of men and women dependent on the number of children raised. According to the contested provision, after 31 December 2012 - to put it simply - the retirement age for men was 63 years, for women 59 to 63 years, depending on the number of children raised. The Constitutional Court, favouring women who raised children, did not find this to be a demonstration of the arbitrary will of the legislature, as it was based on objective and reasonable reasons. It should be said that this conclusion was confirmed by a later judgment of the European Court of Human Rights in the case of Augustin Andrle v. the Czech Republic, Judgment of 17 February 2011, which applied the margin of appreciation doctrine instead of seeking objective justification. Another fundamental decision in the field of discrimination is Decision Pl. ÚS 7/15 of 14 June 2016, in which the Constitutional Court reviewed Section 13(2) of the Act on Registered Partnership, which stipulated that “a registered partnership prevents a partner from becoming a child's adoptive parent”. The Constitutional Court concluded that the legislation unjustifiably excluding registered partners from the possibility of individual adoption of children ultimately affects the human dignity of these persons (Article 1 of the Charter), is contrary to their right to equal treatment (Article 1 and Article 3(1) of the Charter and Article 14 of the Convention) and violates their right to the protection of private life (Article 10(1) and (2) of the Charter and Article 8(1) of the Convention).

In addition to the abovementioned examples of case-law, which concerned the control of standards, it is also necessary to mention the anti-discrimination case-law of the Constitutional Court in dealing with individual constitutional complaints. In Judgment no. I. ÚS 297/99 of 20 October 1999, the Constitutional Court dealt with discrimination against the Roma ethnic group, which consisted in the fact that pupils of this ethnic group were “by default” transferred from primary schools to special schools. For the first time, the Constitutional Court used the term indirect discrimination, but did not further elaborate on this concept. This case later lead to a famous ECHR Grand Chamber judgment D. H. and Others v. the Czech Republic of 13 November 2007).

In the case-law of the Constitutional Court, there are several other cases of discrimination against the Roma ethnic group, for example when assigning flats or providing accommodation in hotels. However, the aforementioned cases (see Judgment no. I. ÚS 1891/13 of 11 August 2015 or Judgment no. III. ÚS 1213/13 of 22 September 2015) are reviewed before the Constitutional Court in accordance with the concept of the fair trial within the meaning of Article 36(1) of the Charter or Article 6(1) of the

Convention. Section 133a of the Code of Civil Procedure governs the reversal (transfer) of the burden of proof in discriminatory disputes where, under paragraph (b) of that section, if before the court the applicant presents facts from which it can be inferred that the defendant took part in indirect discrimination based on racial or ethnic origin, inter alia, in the sale of goods in a shop or in the provision of services or access to housing, the defendant is obliged to prove that there was no infringement of the principle of equal treatment. In these cases, the Constitutional Court annulled the decisions of ordinary courts on the grounds that they ignored the proposed evidence of the complainants who pointed out their indirect discrimination or on the grounds that the defendant did not rebut the established presumption under Section 133a of the Code of Civil Procedure that the complainants were discriminated against.

Most other cases of discrimination were reviewed in accordance with the fair trial principle according to Article 36 (1) of the Charter and Article 6(1) of the Convention, for example discrimination on the grounds of sex (Judgment no. III. ÚS 880/15 of 8 October 2015), pregnancy (Judgment no. Decision IV. ÚS 4091/17 of 13 March 2018) or age (Judgment no. II. ÚS 1609/08 of 30 April 2009) and it can therefore be concluded that the majority of discriminatory cases are decided by the Constitutional Court in an essentially concealed manner.

- Does the case-law of your court differ from that of international courts as regards the protection of this right?

In general, the case-law of the Czech Constitutional Court is rather influenced by the case-law of the ECHR than it is fundamentally different from it. In any case, its case-law in the area of prohibition of discrimination in comparison with the EU judicial authorities or the European Court of Human Rights is basically very modest and not always easy to grasp.

II.VI Right to personal liberty

- What is the original text of the protection of this right in your national catalogue?

At the constitutional level, personal liberty is enshrined in Article 8 of the Charter:

(1) Personal liberty is guaranteed.
(2) No one may be prosecuted or deprived of her liberty except on the grounds and in the manner specified by law. No one may be deprived of her liberty merely on the grounds of inability to fulfil a contractual obligation.
(3) A person accused of or suspected of having committed a criminal act may be detained only in cases specified by law. A person who is detained shall be immediately informed of the grounds for the detention, questioned, and within forty-eight hours at the latest, either released or turned over to a court. A judge must question the detained person and decide, within twenty-four hours of receiving her, whether the person shall be placed in custody or released.
(4) A person accused of a criminal act may be arrested only on the basis of a warrant issued by a judge in writing and stating the grounds for the arrest. The arrested person shall be turned over to a court within twenty-four hours. A judge shall question the arrested person and decide, within twenty-four hours, whether the person shall be placed or released.

(5) Nobody may be placed in custody, except on the grounds and for the period of time laid down in a law, and only on the basis of a judicial decision.

In addition to Article 8 of the Charter, the constitutional guarantee of personal liberty is also based on the solemn formulas in the preamble of the Constitution and the Charter (liberty is declared inviolable) and their introductory articles (Article 1(1) of the Constitution, Article 1 of the Charter). They speak of human liberty in the broadest sense.

- Can this right be limited? If so, how and under what conditions?

Article 8 of the Charter stipulates, for various types of deprivation of liberty, that this can only take place on grounds specified by the law or on the basis of a reasoned order by a judge (in the event of an arrest).

In its case-law, the Constitutional Court emphasizes that any interference with personal liberty, if it is to stand up in terms of constitutional guarantees, must be carried out on the grounds specified by the law and in order to achieve a legitimate or constitutionally recognized objective. At the same time, the interference must be proportionate to this objective – it must comply with the proportionality requirement, which will be met if the interference is appropriate (necessary to achieve the objective) and necessary, i.e. if it is not possible to achieve the objective by another means which would be considered less burdensome to the infringement of fundamental rights under consideration. If these conditions are met, it is necessary to consider which of the two conflicting interests or values should be given priority in the specific case (proportionality in the narrower sense), namely the public interest in the intervention in question or the fundamental right of the individual.

Requirements for the legality of deprivation of liberty within the meaning of Article 8 of the Charter or the Article 5 of the Convention overlap to a large extent with the right to judicial protection or the fair trial according to Article 36 et seq. of the Charter and Article 6 of the Convention. The decision of the court on the basis of which the person was deprived of his or her liberty shall be duly reasoned. The interpretation of sub-constitutional rules must not be arbitrary or unreasonable, or deviate from generally accepted rules of interpretation of legal regulations.

- Has your court dealt with this right / its interpretation / enshrining in more detail? If so, please provide practical details and information about which human rights catalogue have been applied.

Over time, the Constitutional Court applied the protection of personal liberty to various types of deprivation of liberty - from custody proceedings, to security detention issues, to hospitalization at a psychiatric clinic. First, the case-law in the review of rules will be described, followed by the decision-making activity pertaining to individual constitutional complaints.

In Judgment no. Pl. ÚS 29/98 of 2 June 1999 the Constitutional Court stated that Article 5(4) of the Convention and Article 36(2) of the Charter, in conjunction with Article 8(2) of the Charter, impose an obligation on legislators to place all cases of deprivation of liberty by public authority under effective control of independent judicial decision. Therefore, such judicial review is an essential part of any statutory deprivation of liberty,

without which it cannot stand up alone because it would be contrary to the provisions of the Convention and the Charter.

In Judgment no. Pl. ÚS 45/04 of 22 March 2005 the Constitutional Court held that, according to the settled case-law of the ECHR, the same requirements as those imposed on the initial decision on deprivation of liberty must also be applied to proceedings which examine the merits of the continuation of the restriction of liberty. In accordance with Article 5(4) of the Convention, the hearing of the accused by the court must happen before a decision is made on his or her complaint against the prosecutor's decision on the continued duration of custody (i.e. de facto a hearing of the accused every three months was supposed to be sufficient). However, such a procedure was prevented by Section 242(2) of the Code of Criminal Procedure, which precluded the accused (and anyone else) from participating in a closed session. Therefore, the Plenum of the Constitutional Court, with a direct reference to the contradiction with Article 5(4) of the Convention, removed the provision from the Criminal Procedure Code.

In Judgment no. I. ÚS 1104/10 of 21 October 2010 the Constitutional Court considered that the type of custody proceedings the court decides upon is not decisive for the obligation to personally hear the accused by the court, but the timeframe is, so that within the meaning of the judgment in the case *Husák against the Czech Republic*, the accused is questioned by the court at intervals of several weeks, rather than months, and if he or she did not have the opportunity to do so earlier, then always at the latest when deciding on the complaint of the accused against the prosecutor's decision on the continued duration of custody. Conversely, the accused does not have to be questioned, if the accused himself or herself refuses, if objectively insurmountable obstacle prevents the questioning, or if the accused was questioned in custody a short time ago in another custody decision for unchanged custody reasons.

In Judgment no. I. ÚS 3326/13 of 15 January 2014 the Constitutional Court criticized the procedure of the ordinary court, which prolonged the custody of the accused outside of custody session with reference to the flood situation. Although it was difficult to hold a custody session, it was not objectively impossible by an extraordinary event and, according to the Constitutional Court, the court was obliged to execute it without delay after the obstacle had ceased to exist.

Media attention was attracted by Judgment no. I. ÚS 2208/13 of 11 December 2013 and I. ÚS 2665/13 of 12 December 2013, which responded to the constitutional complaints of former Deputy David Rath, concerning the assessment of the merits of continuation of the escape preventing custody. The Constitutional Court pointed out that the threat of a high sentence in itself is not sufficient to stand up as grounds for escape preventing custody and that in assessing and reviewing the existence of grounds for custody, it is the responsibility of the ordinary courts to take into account the duration of custody.

In Judgment no. I. ÚS 2652/16 of 14 September 2016 the Constitutional Court emphasized the difference in decision-making when taking the offender into custody and when extending the custody from the point of view of time, because reasons for custody develop over time. The threat of high sentence may create grounds for fear of avoiding prosecution and thus it may fulfil the merits of custody under the Code of Criminal Procedure, but over time these grounds may lose importance or convincingness and may no longer be sufficient to justify the continued deprivation of liberty of the accused in custody.

In Judgment no. IV. ÚS 168/18 of 20 February 2018 the Constitutional Court emphasized the duty of the courts to deal with the complaint of the accused against the decision on custody even after his or her release from custody or his or her transfer from custody to imprisonment.

The issue of admissibility of restrictions on the personal liberty of a foreigner detained in the Czech Republic was dealt with in Judgment no. II. ÚS 1301/17 of 5 September 2017, in which the Constitutional Court reminded the ordinary courts that the validity of the fear of a person's escape and the decision to place such person in temporary custody must be based on concrete facts.

In Judgment no. III. ÚS 2453/11 of 29 February 2012, the Constitutional Court commented on the institute of security detention, emphasizing that high standards must be demanded for evidence in proceedings in which it is decided to impose security detention. In Judgment no. I. ÚS 497/18 of 18 July 2018, the Constitutional Court criticized the ordinary courts for failing to review the reasons for the duration of security detention as part of the periodic review and for not basing their decision on up-to-date independent information. The report of the institution in which detention is carried out is not in itself sufficient to conclude on the necessity of detention. The court's decision requires additional grounds or evidence independent of this report.

Medical detention was then related to in Judgment no. III. ÚS 916/13 of 17 February 2015, in which the Constitutional Court found a violation of a minor's personal liberty, when the ordinary courts ordered, without the consent of the minor’s representatives, a precautionary measure for his or her hospitalization at a psychiatric clinic for serious physical assault of a teacher. The Constitutional Court then addressed the requirements for judicial review of detention in a psychiatric hospital in Judgment no. I. ÚS 1974/14 of 23 March 2015, in which it pointed out that the legal rules concerning persons with mental disabilities should be interpreted with particular caution and in accordance with their fundamental rights, since such persons are also holders of all human rights and they guarantee them protection and respect for their natural human dignity. In Judgments no. II. ÚS 2545/17 of 27 February 2018 and I. ÚS 2647/16 of 20 November 2018, the Constitutional Court emphasized that in proceedings on the admissibility of admission to an institute of public health against the will of the admitted person, the ordinary court is obliged to appoint an expert; the expert may not be a doctor working in the given institute of public health.

In Judgment no. III. ÚS 3675/16 of 11 April 2017, the Constitutional Court dealt with the issue of imposing institutional protective treatment on persons with mental disorders. The ordinary courts must, in the light of the principle of proportionality of the intervention, verify and justify in a reviewable manner why the imposition of a more lenient means is not sufficient.

- Does the case-law of your court differ from that of international courts as regards the protection of this right?

Although the Constitutional Court's relationship with the Convention and the Strasbourg case-law is favourable, there are some conflicts between the Constitutional Court and the ECHR over the implementation of certain ECHR judgments. These partly stem from the fact that there is no equivalent in the Charter to Article 5(4) of the Convention, guaranteeing anyone deprived of their liberty the right to bring an action in which the

court would swiftly rule on the legality of the deprivation of liberty and order the release, if deprivation of liberty is illegal.

The concept held by the ECHR, according to which constitutional courts are regarded as courts of detention within the meaning of Article 5(4) of the Convention, seems problematic. These conclusions were reached by the ECHR in the case of the Czech Republic in the Smatana v. the Czech Republic judgment, which included proceedings on constitutional complaints (in cases where the constitutional complaint is directed against decisions in custody matters) under the concept of proceedings on legality of deprivation of liberty within the meaning of Article 5(4) of the Convention. However, such an interpretation is quite extensive. First of all, the Constitutional Court cannot be described as a body reviewing decisions concerning custody from the position of legality, since it constitutes a body reviewing the constitutionality. Moreover, the Constitutional Court is not even a court authorized to order the release of a detained person from custody. This rigid concept has recently been abandoned by the ECHR in the Grand Chamber judgment in the case Ilnseher v. Germany of 4 December 2018 No 10211/12.

On other issues, the Constitutional Court fully accepts the ECHR case-law, is inspired by it and refers to it.