

Legisprudence Limitations on Constitutional Amendments? Reflections on The Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act

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Abstract: Can a constitutional norm be unconstitutional? This idea seems, at first sight as a self-contradiction. Unconstitutionality is commonly referred to those ordinary laws, inferior to the constitution, which violate it. Constitutional norms, in contrast, carry an equal normative status as the constitution itself and other constitutional provisions. The question of unconstitutional constitutional norms recently arose in the Czech Republic. On 10 September 2009, the Czech Constitutional Court declared Constitutional Act no 195/2009 Coll, on Shortening the Fifth Term of Office of the Chamber of Deputies to be unconstitutional. The Czech Constitutional Court held that the constitutional act was an individual, specific decision and retroactive, thus violating the unamendability provision (Art 9(2)) in the Constitution, which prohibits amendments to the essential requirement for a democratic state governed by the rule of law. This article analyses the Czech Constitutional Court's decision in a broader comparative and theoretical perspective and focuses, mainly, on four issues: first, the Czech Constitutional Court's authority to substantively review constitutional norms; second, the appropriate standard of review when exercising judicial review of constitutional norms; third, the 'individual, specific' character of the constitutional act; and fourth, its alleged retroactive application. The article claims that while the Czech Constitutional Court was generally correct in claiming an authority to substantively review even constitutional norms, this was not the appropriate case in which to annul a constitutional act.

Keywords: unconstitutional constitutional amendments, judicial review, limitations on constitutional amendment power, rule of law, individual legislation, retroactive legislation

I. Introduction

On 10 September 2009, the Czech Constitutional Court (hereinafter: the court) delivered its decision on the constitutionality of Constitutional Act no 195/2009 Coll, on Shortening the Fifth Term of Office of the Chamber of Deputies (hereinafter: the constitutional act)¹ Grounding its reasoning mainly on Article 9(1) of the Czech Constitution of

* The author would like to express his gratitude to Martin Loughlin, Thomas Poole, Gábor Halmay, Jan Kudrna, Jan Komárek, Maxim Tomoszek, Kieran D Williams, Radim Dragomaca, Hillary Nye and the reviewer for their incredibly valuable remarks on an earlier draft and to Bianca Jackson for assisting with editing. The author would also like to thank Yoram Rabin, Richard Albert, David Landau, Claudia Haupt, Will Partlett and Adam Shinar for a beneficial discussion. Lastly, the author is grateful to the *Modern Law Review* for its generous financial support and to LAPA, Princeton, for its hospitality that enabled the completion of this article.

1 The Chamber of Deputies is the lower house of the national legislature. See Vojtech Cepl, 'Constitutional Reform in the Czech Republic' (1993–1994) 28 *USF L Rev* 29, 34. For a more general account

1992, according to which 'this Constitution may be supplemented or amended only by constitutional acts,' and Article 9(2), which reads 'any changes in the essential requirements for a democratic state governed by the rule of law are impermissible,' the court ruled that the constitutional act was unconstitutional and null.²

At first sight, the idea that a constitutional act could be deemed 'unconstitutional' is puzzling.³ The common meaning of 'unconstitutionality' is that an ordinary law, inferior to the constitution, violates it.⁴ How then can a constitutional act carrying an equal normative status as the constitution itself (and other constitutional provisions) be unconstitutional?⁵

The paragraphs below take issue directly with four major implications of the Court's decision: first, the authority of the court to review constitutional acts; second, the standard of review when reviewing constitutional amendments; third, the 'particular' character of the constitutional act; and fourth, its temporal application, ie, its alleged retroactivity. It is argued in this article that the court was generally correct in claiming an authority to adjudicate constitutional acts; nevertheless, it is maintained that this was not the right case in which to annul a constitutional act.

II. Background

After the June 2006 Czech parliamentary elections,⁶ the established coalition lasted until March 2009 when 101 of the 200 Parliament members voted against the government in a no-confidence vote. Thereafter, a caretaker government of experts governed with the support of the two pillars of the party system: the Civic Democrats (ODS) and the Social Democrats (CSSD). The two parties agreed that instead of waiting until the end of the regular four-year term (June 2010) or using the existing procedures for calling early elections, which they considered too cumbersome, an early parliamentary election would be held through the adoption of a specific constitutional act, dissolving the existing

on the Czech Parliament see Jana Reschová and Jindřiška Syllová, 'The legislature of the Czech republic' (1996) 2(1) *The Journal of Legislative Studies* 82; Lukáš Jelínek and Zdeňka Mansfeldová, 'The Parliament of the Czech Republic, 1993–2004' (2007) 13(1) *The Journal of Legislative Studies* 12.

2 Czech Constitutional Court 2009/09/10, Case Pl ÚS 27/09, *Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*. An English translation of the judgment is available at: <www.concourt.cz/clanek/pl-27-09>. An English summary of the case is available at: <www.usoud.cz/clanek/GetFile?id=4166>. For useful reviews of the case see Kieran Williams, 'When a Constitutional Amendment Violates the Substantive Core: The Czech Constitutional Court's September 2009 Early Elections Decision' (2011) 36 *Rev Cen & East Eur L* 33; Jan Kudrna, 'Cancellation of Early Elections By The Constitutional Court of The Czech Republic: Beginning of A New Concept of "Protection of Constitutionality"' (2010) 4 *Jurisprudencija/Jurisprudence* 43; Maxim Tomoszek, 'The Czech Republic' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change – A Comparative Study* (Hart Publishing 2011) 64–66; Radim Dragomaca, 'Constitutional Crisis in the Czech Republic' (2010) *Tijdschrift voor Constitutioneel Recht/Dutch Journal of Constitutional Law* 183; Zdeněk Koudelka, 'Abolition of Constitutional Statute by the Constitutional Court of the Czech Republic' (2010) 2 *Journal on Legal and Economic Issues of Central Europe*, <http://is.muni.cz/repo/930534/Abolition_of_constitutional_statue.doc> accessed 20 January 2014.

3 cf Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 34.

4 A V Dicey, *The Law of the Constitution* (8th edn, Liberty Classics 1982) 372.

5 Gottfried Dietze, 'Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany' (1956) 42 *Virginia L Rev* 21.

6 For elaboration on these elections, see Klára Plecítá-Vlachová and Mary Stegmaier, 'The parliamentary election in the Czech Republic, June 2006' (2008) 27 *Electoral Studies* 179.

Chamber of Deputies. This was not the first time that such a constitutional solution is exercised. A similar ad-hoc constitutional act for a one-time shortening the electoral term has already taken place in the Czech Republic in 1998.⁷

After both the Chamber of Deputies (172 in favour and 9 against, out of 189 present) and the Senate (56 in favour and 8 against, out of 71 present), passed a constitutional act allowing elections, the President announced 9 October 2010 as the date for elections. The parties began their campaign preparations during the summer of 2009. However, the court agreed to hear a single MP's challenge to the early election and ruled, just a month before the elections were due to take place, that the one-time constitutional act was unconstitutional. Following the court's ruling, the two chambers swiftly passed a constitutional amendment that established a permanent mechanism for early elections, according to which the Chamber is allowed to dissolve itself with the support of three-fifths of the MPs. The amendment went into effect on 14 September 2009, however, soon before the Chamber voted on its dissolution, the CSSD announced that it no longer supported early elections. Thus, the elections were postponed until the end of the four-year term.⁸ The next section summarises the main reasoning of the Court's decision.

III. The Czech Constitutional Court's Decision

One of the first questions the court faced is whether, as the 'guardian of the constitution,' it had the authority to review constitutional acts. The court began its analysis by focusing on the unamendability provision (Article 9(2) of the Constitution). According to that provision, the essential requirements for a democratic state governed by the rule of law are 'enshrined' and protected from constitutional amendments. The court mentioned the roots of such provisions, especially the tragic experience of Germany during the Weimar Republic that eventually led to the Nazi regime, and the Czech communist regime. The court noted that due to these historical events, the Czech Republic's constitution-makers decided to limit future derived constituent authorities, and prohibited changes to the Constitution's material core that comprise the essential requirements for a democratic state governed by the rule of law. From this protection, the court inferred its authority to review constitutional acts. The court stated that the protection of the Constitution's material core 'is not a mere slogan or proclamation, but an actually enforceable constitutional provision.' In other words, the court is authorised to review constitutional acts in terms of their conformity with the essential requirements of a democratic state governed by the rule of law; otherwise, the protection of constitutionality would be illusory, since any act could be dressed as a constitutional act, and would then be immune to judicial review.

7 Constitutional Act No 69/1998 Coll, on shortening of the term of office of the Chamber of Deputies. See eg Jan Kudrna, 'Dissolution of The Chamber of Deputies in The Czech Republic – The Origin and Essence of Applicable Constitutional Legislation' (2009) 3.117. *Jurisprudencija* 69-110. More generally on the problem of dissolution in the Czech Republic see Milos Brunclik, 'Problem of early elections and dissolution power in the Czech Republic' (2013) *Communist and Post-Communist Studies*, <<http://dx.doi.org/10.1016/j.postcomstud.2013.03.003>> accessed 20 January 2014.

8 For background on the postponement see Mary Stegmaier and Klára Vlachová, 'The parliamentary election in the Czech Republic, May 2010' (2011) 30 *Electoral Studies* 238.

After establishing its authority to review constitutional acts vis-à-vis the unamendability provisions, the court examined whether the contested constitutional act under Article 9(1) of the Constitution supplemented or amended the Constitution. The court stated that the constitutional act applied to a specifically designated subject – the Chamber of Deputies of the Parliament of the Czech Republic, elected in 2006, and a specific situation – termination of its term of office on the day of elections, which were to be held by 15 October 2009, and only in this instance. Therefore, by its content, it is not a statute; rather, an individual, specific decision, dressed in the form of a constitutional act. With reference to historical experience, for example – when the Weimar Constitution was repeatedly suspended by one-time constitutional acts that were inconsistent with the Constitution's text – the court concluded that 'an ad hoc constitutional act (for an individual case) is not a supplement or an amendment to the Constitution,' but is in fact a breach of the Constitution. The reasoning emphatically states:

'If the Constitutional Court is forced to answer the question of whether Art. 9 par. 1 of the Constitution also authorizes Parliament to issue individual legal acts in the form of constitutional acts (e.g. to issue criminal verdicts against specific persons for specific actions, to issue administrative decisions on expropriation, to shorten the term of office of a particular official of a state body, etc.), the answer is – no!'

The court emphasised that it considers the principle of generality of constitutional acts to be one of the essential requirements of a state governed by the rule of law and the separation of powers. Generality of laws is required:

'to ensure separation of the legislative, executive and judicial branches, an equal constitutional framework for analogous situations, and thereby to rule out arbitrariness in the application of state authority, and enable a guarantee of the protection of individual rights in the form of a right to judicial protection. Therefore, the essence and significance of the generality of a constitutional act, as a conceptual element of the category of a state governed by the rule of law, is protection of freedom.'

According to the court, if the aim of passing the constitutional act was to call early elections in order to quickly resolve the governmental crisis, this could have been achieved through a constitutional conforming process under Article 35(1), as follows; based on agreement between political representatives, the government would attach a motion of confidence to a particular government proposal. Then, the Chamber of Deputies would knowingly, with the aim of dissolving itself, not pass a resolution on that proposal within three months. The court concluded from this that the reason for passing the contested constitutional act was not to resolve the government crisis quickly, but to shift the date that the Chamber of Deputies would remain in office until the date of the elections. Thus, this breach of the constitutional framework contained in Article 35 also circumvented the constitutional purpose of the institution to dissolve the Chamber of Deputies, which is constitutional pressure to concoct a vote of no confidence in the government with awareness of the constitutional consequences, in the event that there is no new parliamentary majority capable of forming a government. In the court's opinion, the contested constitutional act, temporarily and ad hoc suspended Article 35, outside the framework of the constitutionally prescribed procedure, and established a different pro-

cedure for this individual case. Moreover, the court stated that the contested constitutional act was also retroactive, thus violating one of the essential requirements of a democratic state governed by the rule of law.

The court determined that 'even the constitutional framers cannot declare constitutional an act that lacks the character of a statute, let alone of a constitutional act.' Such a procedure is unconstitutional arbitrariness. Furthermore, if the court could not review such acts, the role of the court as the protector of constitutionality would be completely erased. The court concluded, with regards to subject matter, that the contested constitutional act was individual (ie not general) and retroactive, thus violated Articles 9(1) and 9(2) and therefore declared it to be 'unconstitutional'.⁹

IV. Reflections Following the Constitutional Court's decision

The court's decision naturally attracted criticism both within the political and legal scenes.¹⁰ Annulling a constitutional act, that was enacted by a qualified majority using the correct procedure without being expressly entitled to do so by the Constitution, seemed to many to be in conflict with the constitutional understanding according to which the court is bound by constitutional acts. Ruling, even of the highest judicial authority, that a constitutional act was not a constitutional act, was seen by some as a serious infringement of legal certainty.¹¹ Whereas I do not share this harsh criticism, I do believe that this decision raises important questions regarding: first, the authority of the court to review constitutional acts; second, the standard of such review; third, the particular (or 'individual') character of the constitutional act; and fourth, its temporal application. I deal with each of these issues separately.

A. Authority to Review Constitutional Norms

At the outset, it has to be admitted that the court is correct in its observation that the global trend, albeit some exceptions, is moving towards acceptance of the idea of judicial review of constitutional amendments.¹² There is also little doubt regarding the limited power of the constitutional legislature under the Czech Constitution. Article 9 expressly limits it.¹³ However, arguing that the amendment power is limited is not as arguing that

9 The judge rapporteur in the matter was the Deputy Chairman of the Constitutional Court, Pavel Holänder. Judges Vladimír Kůrka and Jan Musil filed dissenting opinions to the judgment.

10 See Marian Kokeš, 'Krátká reflexe současných debat a názorů na nález ÚS ČR Pl ÚS 27/09 z hlediska jejich obsahu i způsobu prezentace' in *Dny práva – 2009 – Days of Law: the Conference Proceedings* (Masaryk University 2009) <http://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/mezin_smlouvy/Kokes_Marian__1347_.pdf> accessed 20 January 2014.

11 See Koudelka (n 2).

12 See Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61.3 *American Journal of Comparative Law* 657; Yaniv Roznai, 'The Migration of the Indian Basic Structure Doctrine' in Malik Lokendra (ed), *Judicial Activism in India – A Festschrift in Honour of Justice V. R. Krishna Iyer* (Universal Law Publishing Co 2012) 240; For a review of different judicial approaches see also Kemal Gözler, *Judicial Review of Constitutional Amendments – A Comparative Study* (Ekin Press 2008); Gary Jeffrey Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4.3 *Int'l J Const L* 460.

13 On substantive limits on constitutional amendments see eg Marie-Francoise Rigaux, *La théorie des limites matérielles à l'exercice de la fonction constituante* (Maison Ferdinand Larquier 1985); Richard

this limitation is judicially enforceable.¹⁴ One can cogently argue that even if the amendment power is limited, whether a particular amendment oversteps those limits is not a decision for courts to make.¹⁵ That may certainly be true in countries without constitutional courts or with other bodies than constitutional courts which use instruments of ex-ante review or scrutiny,¹⁶ and in the Westminsterian parliamentary model in which judicial review is absent or limited, but it may also apply in the 'constrained parliamentarianism' model in which there is an effective judicial review mechanism.¹⁷ Indeed, in some jurisdictions, such as Norway and France, limitations on the amendment power are considered declarative or a directive for the legislature, denying courts any authority of judicial review.¹⁸

One must distinguish between two separate questions: does the court have the authority to review amendments and, if so, what are the criteria or standards for that review?¹⁹ With regard to the first question, some constitutions expressly vest courts with the competence to substantively review constitutional amendments.²⁰ However, a constitution may be silent on this point. Such silence, comparative studies demonstrate, is not

Albert, 'Constitutional Handcuffs' (2010) 42(3) *Arizona State L J* 663; Christoph Bezemek, 'Constitutional Core(s): Amendments, Entrenchments, Eternities and Beyond. Prolegomena to a Theory of Normative Volatility' (2011) *J Juris* 517, 538-543.

- 14 Susan Wright, 'The Constitutional implications in France of the Maastricht Treaty' (1994) 9 *Tul Eur & Civ L F* 72; Yaniv Roznai, 'Book Review: Dawn Oliver and Carlo Fusaro (eds.), *How Constitutions Change: A Comparative Study*, Oxford: Hart Publishing, 2011' (2012) 75 *MLR* 645, 649; European Commission for Democracy Through Law (Venice Commission), *Report on Constitutional Amendment, adopted by the Venice Commission at its 81st Plenary Session* (Venice, 11-12 December 2009) para 225 <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282010%29001-e>> accessed 20 January 2014.
- 15 Laurence H Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' (1983) 97 *Harv L Rev* 440, 433; Joseph F Ingham, 'Unconstitutional Amendments' (1928-1929) 33 *Dick L Rev* 161, 198; Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 519-21. For Schmitt, for example, the 'guardian of the constitution' would not be a constitutional court, but rather, the President. See Claire-Lise Buis, 'France' in Markus Thiel (ed), *The 'militant democracy' principle in modern democracies* (Ashgate Publishing Ltd 2009) 83. Nevertheless, it has to be remembered that with the absence of judicial review of ordinary legislation during the Weimar period, judicial review over constitutional amendments was naturally not recognised.
- 16 On ex-ante scrutiny of constitutionality see eg David Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected?' in Philip Alston (ed), *Promoting human Rights Through Bills of Rights: Comparative Perspectives* (OUP 1999) 158, 163-174; Yaniv Roznai, 'The Basic Laws on Human Rights and the Legislative Process in the Knesset – You've got to Practice what you Preach?' (2012) 14 *IDC L Rev – Law & The Man: Festschrift For Amnon Rubinstein* 199, 225-237 (Hebrew).
- 17 For the use of this term see Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harv L Rev* 633, 664-687.
- 18 Dietrich Conrad, 'Limitation of Amendment Procedures and the Constituent Power' (1970) 15-16 *Indian Y B Int'l Aff* 347, 380; Claude Klein, *Théorie et pratique du pouvoir constituant* (constituant coll Les voies du droit Paris Presses Universitaires de France 1996) 181; Denis Baranger, 'The Language of Eternity: Constitutional Review of the Amending Power in France (Or the Absence Thereof)' (2011) 44 *Israel L Rev* 389; Yaniv Roznai and Serkan Yolcu, 'An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10.1 *International Journal of Constitutional Law* 175, 199-200.
- 19 Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel L Rev* 321, 333-338.
- 20 For example, the Romanian Constitution empowers the Constitutional Court to adjudicate *ex officio* on initiatives for revising the Constitution. Such judicial adjudication is *a priori* to the amendment's adoption. See Romania Const (1991), Art 146(a); Ion Deleanu and Emil Boc, 'The Control of the Constitutionality of Laws in Romania' (1995) 2.1 *J Const L Eastern & Central Europe* 119, 120, 124; Ioan Deleanu, 'Separation of powers – Constitutional Regulation and Practice of the Constitutional Court' (1996) 3.1 *J Const L Eastern & Central Europe* 57, 63.

necessarily interpreted as negating such authority, and courts – such as in Germany and Turkey – have declared themselves competent to substantively review amendments even without any such expressed empowerment in the constitution.²¹

Clearly, the lack of any explicit grant of authority to the court to substantively review constitutional acts is not the 'end of the story' but merely the beginning of the investigation. Let us then return to the Czech Republic.

Prima facie, it seems that the court lacks competence to review constitutional acts. According to Article 87 of the Constitution '(1) The Constitutional Court resolves: a) the nullification of laws [...] if they are in contradiction with a constitutional law'.²² Such explicit allowance of jurisdiction to review ordinary legislation can be seen as a negative arrangement, negating an authority to review constitutional legislation. Moreover, Article 88(2) stipulates that 'In decision-making, judges of the Constitutional Court are bound only by constitutional laws.' This was confirmed in a prior case of 2002:

'justices of the Constitutional Court are bound by constitutional acts, so the Constitutional Court is not authorized to review (let alone abolish) the provisions contained in constitutional acts; its task is only – in concrete cases – to interpret them'.²³

These statements point to the conclusion that the court lacks any authority to review constitutional acts. Nevertheless, considering the 'unamendable provision' that exists in the Czech Constitution, it is my belief that the court was generally correct in arguing that it has the competence to review constitutional acts.

When the Constitution is silent with regard to the authority of the court to review amendments, the existence – or absence thereof – of any explicit limitation on amendments is decisive. When expressed limitations exist, the judicial enforceability of these limitations seems if not self-evident then at least less contentious. This is because such judicial exercise would carry greater legal legitimacy since it would conform to the legal norms applicable to the issue at hand.²⁴ As we have learned from the celebrated *Marbury*

21 See Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution' (2012) 19.2 Constellations 182-191; Gözler (n 12) 100; Barak (n 19); Williams (n 2). In Austria, the Constitution of 1920 does not include any substantive limitations on the amendment power but draws a procedural distinction between partial and total revision (Bundes-Verfassungsgesetz [B-VG] [Constitution] Art 44). Due to this procedural distinction, the Austrian Constitutional Court has declared itself competent to review constitutional laws and to examine whether amendments affect the Constitution's leading principles (leitender Grundsatz), which include democracy, rule of law, and federalism. Such amendments, according to the Constitutional Court, should be considered as total rather than partial revisions and would therefore require a referendum. See Decision of 10 March 2001, G 12/00, G 48-51/00; see also Alexander Somek, 'Constitutional Theory as a Problem of Constitutional Law – On the Constitutional Court's Total Revision of Austrian Constitutional Law' (1998) 32 Isr L Rev 567; Michal Val'ó, 'Protecting Against the Constitutional Framers of the Constitution' (2010) 1.1 J Crim L & Pub Prosecution 28, 29; Otto Pfersmann, 'Unconstitutional Constitutional Amendments: a normativist approach' (2012) 67 ZÖR 81; Roznai, 'Unconstitutional Constitutional Amendments' (n 12) 687.

22 Czech Constitution (1992), art 87(1)(a) <http://www.servat.unibe.ch/icl/ez00000_.html> accessed 20 January 2014. See also George E Glos, 'The Constitution of the Czech Republic of 1992' (1993-1994) 21 Hastings Const LQ 1049, 1066.

23 Case Pl ÚS 21/01, in *Sbírka zákonů* part 42 (11 March 2002) 2328, cited in Williams (n 2) 38.

24 Richard H Fallon JR, 'Legitimacy and The Constitution' (2004-2005) 118 Harv L Rev 1787, 1819: 'The concept of legal legitimacy appears to function somewhat analogously to the concepts of discretion and jurisdiction when applied to judicial decisionmaking. More particularly, a claim of judicial legitimacy characteristically suggests that a court (1) had lawful power to decide the case or issue before

v Madison case, an 'effectiveness presumption' exists: 'It cannot be presumed that any clause in the constitution is intended to be without effect.'²⁵ If the constitution-maker declared certain provisions 'unamendable,' the interpreter – ordinarily the court – must supply the appropriate mechanism of effectiveness. Judicial review of constitutional amendments then becomes, as Aharon Barak writes, 'a natural mechanism for protecting eternity clauses in the constitution'; it 'provides (legal) "teeth" to the eternity clause.'²⁶ Such an 'effectiveness presumption' is all the more important in the constitutions of post-communist states where, as Cass Sunstein notes, 'under communism, constitutional guarantees were not worth the paper on which they were written; leaders felt free to ignore them if the situation so required.'²⁷

As the Czech Constitution serves a concrete basis for the state's democratic system,²⁸ the enforceability of the unamendable provision is vital for protecting constitutionalism.²⁹ Seeing in that perspective, the review of constitutional acts against the background explicitly provided by the original constitution-maker³⁰ preserves the constitution.³¹ The exercise of judicial review of constitutional amendments vis-à-vis unamendable provisions can thus be seen as an essential condition of a rigid constitution.³² Moreover, the court was correct in asserting that without effective judicial review of amendments, limitations that are imposed by the constitution can be by-passed by using constitutional acts that would be immune from review.³³ Therefore, in light of the unamendability provision, the authority of the court to review constitutional acts should be recognised.³⁴

it; (2) in doing so, rested its decision only on considerations that it had lawful power to take into account or that it could reasonably believe that it had lawful power to weigh; and (3) reached an outcome that fell within the bounds of reasonable legal judgment'; cf Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2009) 167.

25 *Marbury v Madison*, 5 US 137 (1803). For a similar position see Sharon Weintal, *Eternity Clauses in the Constitution* (PhD thesis, Hebrew University of Jerusalem 2005) 30 (Hebrew); Sharon Weintal, 'The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty; Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory' (2011) 44 *Isr L Rev* 449, 458.

26 Barak (n 19) 333, adding that: 'In this respect, there is no substantive difference between a regular statute that violates the constitution and an amendment to the constitution that violates the eternity clause. Just as judicial review is recognized in the first case [...] it should also be recognized in the second case'.

27 Cass R Sunstein, 'A Constitutional Anomaly in the Czech Republic?' (1995) 4 *Eur Const Rev* 50, 51. More generality on unamendability in Eastern Europe see Stephen Holmes, Cass R Sunstein, 'The Politics of Constitutional Revision' in Sanford Levinson (ed), *Responding To Imperfection – The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 275.

28 See in general Petr Kopecký, 'The Czech Republic: From the Burden of the Old Federal Constitution to the Constitutional Horse Trading Among Political Parties' in Jan Zielonka (ed), *Democratic Consolidation in Eastern Europe – Vol 1: Institutional Engineering* (OUP 2001) 319.

29 cf Dante B Gatmaytan, 'Can Constitutionalism Constrain Constitutional Change?' (2010) 3.1 *North-western Interdisciplinary L Rev* 22.

30 Markku Suksi, *Making a Constitution: The Outline of an Argument* (Rättsvetenskapliga Institutionen 1995) 6.

31 Olivier Beaud, *La puissance de l'état* (PUF 1994) 345.

32 Paulo Ferreira da Cunha, *Les Limites Du Pouvoir De Revision Constitutionnelle Entre Le Pouvoir Constituant Et La Constitution Materielle – Une Illustration Dans Le Contexte Lusophone* 11 <<http://www.enelsyn.gr/papers/w9/Paper%20by%20Prof.%20Paulo%20Ferreira%20da%20Cunha.pdf>> accessed 20 January 2014.

33 See Claude Klein, 'An Introduction to the Modernity of a Constitutional Question' (2011) 44 *Israel L Rev* 318, 319.

34 In contrast, one may claim that it is precisely due to the very notion of 'democracy' which is protected by the unamendable provision which would suggest judicial self-restraint in this regard. Admittedly,

B. Standard of Review

What should be the standard for judicial review of amendments? Clearly, in this case the examination of amendments should be in the light of the unamendability provision as stated in Article 9(2) of the Constitution. Here, judicial review of amendments seems to be a similar intellectual operation as ordinary judicial review; it is an examination of the compliance of a given legal standard to a superior standard.³⁵ Of course, any examination of amendments in light of Article 9 calls for a preliminary exercise of developing a theory of protected unamendable principles: what do democracy and the rule of law contain?³⁶ The principles of 'democracy' and the 'rule of law' have a myriad of different formal and substantive aspects, and the various interpretations of these principles carry significant implications for the scope of the amending power.³⁷

Even if we acknowledge that basic constitutional principles – such as 'democracy' or 'the rule of law' – cannot be changed, what is considered an impermissible change remains unclear and contentious. Is every deviation or violation of these sacred principles prohibited? Or is a more severe standard required? One may claim that if the aim of unamendable provisions is to provide hermetic protection for a certain set of values or institutions, then any infringement ought to give rise to grounds for judicial intervention. However, such a standard would not only grant great power to courts, but also would place wide – perhaps too wide – restrictions on the ability to amend the constitution.

According to Maxim Tomoszek, when analysing the Czech court's decision, it seems that the court in fact applies certain criteria of the 'proportionality' test when reviewing the appropriateness of the constitutional act, as the court emphasizes that there were other means to call early elections provided by Article 35 that are less interfering with the protected principle of the rule of law. Tomoszek argues that the proportionality test is suitable for judicial review of constitutional amendments. Just as ordinary law may

endowing courts with competence to declare constitutional norms unconstitutional enhances the counter-majoritarian difficulty embodied in the situation of a non-elected court invalidating legislation enacted by a legislature. How can a small, often divided, set of judges replace the democratic judgment of the people and their representatives? Allowing courts to review constitutional norms might turn the 'people's guardian of the constitution against politicians, into a guardian of the constitution against all comers'. See Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 JCL 51. Nonetheless, Michel Rosenfeld was right to state that in the case of explicit limitations on constitutional amendments 'any countermajoritarian difficulty would have to be ascribed to the constitution itself rather to judicial interpretation'. Michel Rosenfeld, 'Constitutional Adjudication in Europe and The United States: Paradoxes and Contrasts' in *European and US constitutionalism* (Council of Europe 2005) 165, 186, n 80. Moreover, certain judicial enforcement of unamendability could be viewed not as anti-democratic but rather as a tool forestalling the possibility of a democracy's self-destruction. Compare Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (CUP 1988) 195, 239.

35 Compare Barak (n 19) 336: 'it is claimed that there is no real difference between judicial review of the constitutionality of a regular statute and judicial review of an amendment to the constitution. In both cases, the judicial review is intended to safeguard the constitution and its (express or implied) content. The court thus fulfills its classic role.'

36 Walter F Murphy, 'Staggering Toward The New Jerusalem of Constitutional Theory: A Response To Ralph F. Gaebler' (1992) 37 Am J Juris 337, 349. A separate but related problem is of course if there is (and can be) any consensus on the meaning of these two principles. On how complex and contested these ideas can be see Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21.2 Law & Phil 137.

37 cf Carl J Friedrich, 'The New French Constitution in Political and Historical Perspective' (1959) 72.5 Harv L Rev 801, 812.

limit the scope of fundamental rights, so may constitutional amendments limit protected principles. There is no 'technical' obstacle to using proportionality in review of constitutional amendments: it is the balancing of competing principles and values. In the case of constitutional amendments, the balance would be between the protected 'unamendable principle,' and the pursued interest and the means taken by the amendment.³⁸

While there is great force in this claim, I submit that this test should be rejected when it comes to constitutional amendments. Proportionality generally means that rights' violation has a 'proper purpose;' that there is a rational connection between the violation and the purpose; that the law is narrowly tailored to achieve that purpose; and that the requirements of the proportionality *stricto* (balancing) test are met.³⁹ Even if one can apply this test to principles such as democracy or republicanism, this would allow excessive discretion to courts in determining what is proportionate or not. More importantly, the aim of the limitation set upon the amendment power is different from ordinary limitation clauses which protect rights. The latter are aimed at parliament and direct it to take fundamental rights considerations in everyday politics. In contrast, unamendability is intended to preserve the core nucleus principles of the constitution.⁴⁰ Therefore, I believe that the correct standard is that which was adopted by the German jurisprudence.

Article 79(3) of the German Basic Law (1949) prohibits amendments to the Basic Law that *affect* the division of the Federation into Länder, human dignity, the constitutional order, or basic institutional principles describing Germany as a democratic and social federal state.⁴¹ In the *Klass* case of 1970, which concerned a constitutional amendment which limited the right of privacy telecommunications,⁴² the German Constitutional Court (hereinafter GCC) gave Article 79(3) a relatively narrow meaning:

'The purpose of Art. 79, par. 3, as a check on the legislator's amending the Constitution is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment [...] and abuse of the Constitution to legalize a totalitarian regime. This provision thus prohibits a fundamental abandonment of the principles mentioned therein. Principles are from the very beginning not "affected" as "principles" if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character [...]. Restriction on the legislator's amending the Constitution [...] must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner'.⁴³

38 Maxim Tomoszek, *Proportionality in Judicial Review of Constitutional Amendments* (VIIIth World Congress of the International Association of Constitutional Law 2010) <<http://www.juridicas.unam.mx/wccl/ponencias/9/175.pdf>> accessed 20 January 2014.

39 See Aharon Barak, *Proportionality – Constitutional Rights and their Limitations* (CUP 2012) 245-445.

40 On the relation between unamendability and constitutional identity see Jacobsohn (n 3) 34-83.

41 On the German unamendability see Ernst Benda, 'The Protection of Human Dignity (Article 1 of the Basic Law)' (2000) 53 SMU L Rev 443, 445; Ulrich K Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44 Isr L Rev 429, 439-440.

42 30 BVerfGE 1, 24 (1970). An English translation of the case is available in Walter F Murphy and Joseph Tanenhaus (eds), *Comparative Constitutional Law – Cases and Commentaries* (St Martin's Press 1977) 659. For a discussion see Russell A Miller, 'Balancing Security and Liberty in Germany' (2010) 4 J Nat Sec L & Poly 369, 377-378.

43 See Murphy and Tanenhaus *ibid* 661-662.

The GCC continued to determine that the amendment does not violate human dignity. Importantly, three dissenting judges argued that the purpose of Article 79(3) was not only to prevent the abuse of the amendment process for establishing a totalitarian regime, but to make certain fundamental values inviolable: 'the wording and meaning of Art. 79, par. 3 do not merely forbid complete abolition of all or one of the principles. The word "affect" means less [...]. The constituent elements are also [...] to be protected against a gradual process of disintegration'.⁴⁴ Nevertheless, The GCC followed its narrow interpretation of Article 79(3) in the *Electronic Eavesdropping* case, where it held that an amendment permitting eavesdropping in homes accords with Article 79(3).⁴⁵ The GCC's 'principle abandonment' approach was criticised on the grounds that Article 79(3) prohibits the constitutional legislator from even *affecting* the principles laid down in Articles 1 and 20 of the Basic Law and not as merely prohibiting their abandonment.⁴⁶

Admittedly, the 'fundamental abandonment' approach taken by the GCC raises two main problems: first, it grants a relatively weak protection to the unamendable principle; and second, it allows, at least in theory, for gradual encroachments of the constitutional system piece by piece.⁴⁷ Along with its disadvantages, I believe that the majority's approach in the *Klass* case is generally correct. Normatively, it allows for changes and concurrently for the preservation of the constitution's core principles. It allows for their 'development and suitable modification in consonance with the constitutional system'.⁴⁸ Institutionally, it mandates courts to use their extraordinary power of declaring amendments unconstitutional cautiously, only in aggravated cases; hence it is compatible with the principle of separation of powers. How can one tell if an infringement is severe enough to judicially intervene? That would be an exercise of judicial reason and restraint. As Serkan Yolcu and I write:

'Limitations on the amendment process are not aimed at preventing minor changes that contradict unamendable principles or deviate from them. The main function of limits on the amendment power is to maintain the constitutional order and to protect against revolutionary changes in the basic self-determination characteristics of a nation. Such limits thus apply only to those extraordinary and exceptional circumstances in which the constitutional change strikes at the heart of the constitutional principle, depriving it of its minimal conditions of existence. The nature of the conflict between the amendment and the basic principle must cause a change of such intensity and to such extent that it modifies the principle's essence, rather than merely deviating from it or limiting it. The amendment's content must have a broad impact on the essence of the principle. After such an amendment, if allowed to stand, the

44 *ibid* 662-664.

45 109 BVerfGE 279 (2004). See Nicolas Nohlen, 'Germany: the Electronic Eavesdropping Case' (2005) 3 *Int'l J Const L* 680; Jutta Stender-Vorwachs, 'The Decision of the Bundesverfassungsgericht of March 3, 2004 Concerning Acoustic Surveillance of Housing Space' (2004) 5.11 *German L J* 1337.

46 See Nohlen *ibid* 684.

47 This recalls the works of Eduard Bernstein, who believed that socialism would be achieved not through capitalism's revolutionary destruction ('catastrophic crash'), but through steady advances. See his *Evolutionary Socialism: A Criticism and Affirmation* (Independent Labour Party 1909).

48 Dieter Conrad, 'Basic Structure of the Constitution and Constitutional Principles' in Soli J Sorabjee (ed), *Law & Justice - An Anthology* (Universal Law Publishing 2003) 186, 197 (also noting that in that respect these protected principles 'are not considered hard and fast rules, but are principles in the jurisprudential sense, *i.e.* imperatives of optimization and standards of some flexibility').

constitutional principle would no longer be the same – it will have been essentially modified. [...] changes to unamendable principles which preserve the state's constitutional identity, do not justify the annulment of constitutional amendments.⁴⁹

The basic question is, in Dennis Baranger's words, 'if this amendment is upheld, are we still going to live under the same constitution?'⁵⁰ In other words, does the amendment collapse the basic principles of the existing order and replaces them with new ones. If so, I argue, this would be a revolutionary change.⁵¹

After establishing the proper standard of review, it is appropriate to continue and deductively examine whether the violation of the constitutional act justified judicial intervention. Did the constitutional act change the essence of the rule of law principle?

C. 'Particular' Constitutional Amendment

The prohibition on particular legislation is an essential condition of the rule of law. Laws ought to be drafted in a general way and not to apply to any specific or particular person or party.⁵² Legislation can be particular with regard to the *subject* of the norm or the *situation* or *occasion* in which the norm is meant to be followed.⁵³ In that regard, it

49 Roznai and Yolcu (n 18) 205-206 and the references cited therein.

50 Baranger (n 18) 425. Compare also with the Colombian 'substitution theory', according to which: 'there is a difference, then, between the amendment of the Constitution and its replacement. [A reform may] contradict the content of constitutional norms, even drastically, since any reform implies transformation. However, the change should not be so radical as to replace the constitutional model currently in force or lead to the replacement of a "defining axis of the identity of the Constitution," with another which is "opposite or completely different"'. See Opinion C-1040/05, cited in Daniel Bonilla and Natalia Ramirez, 'National Report: Colombia' (2011) 19 Am U J Gender Soc Pol'y & L 97, 99, n 10. See also Joel I Colón-Ríos, 'The Three Waves of the Constitutionalism-Democracy Debate in the United States: (And an Invitation to Return to the First)' (2010) 18 Willamette J Int'l L & Dispute Res 1. According to Bernal, an amendment would count as a 'replacement of the constitution if, and only if, the infringement is of such magnitude that the political system can no longer be consider as an institutionalization of deliberative democracy'. Bernal proposes that 'As is common in constitutional review, it is also possible to use the principle of proportionality in order to determine whether an infringement of a central element of deliberative democracy is unconstitutional. The rule of the extreme nature of the infringement would be a part of the principle of proportionality in narrower sense. Within this context, this principle would state that an infringement of a central element of deliberative democracy is unconstitutional if and only if the degree of the infringement upon this element is extreme, while the degree in which the amendment contributes to achieve its pursued end is of a lower degree.' See Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11.2 Int'l J Const L 339, 357. So, while it seems that Bernal proposes to use the proportionality standard, he in fact uses an 'extreme infringement' test, which is closer to my proposed 'fundamental abandonment' standard.

51 cf Yaniv Roznai, 'Revolutionary Lawyering? On Lawyers' Social Responsibilities and Roles During a Democratic Revolution' (2013) 22 South Cal Interdisc L J 353, 355. The definition of revolutionary change is built upon Ulrich K Pruess, *Constitutional Revolution: The Link between Constitutionalism and Progress* (Deborah L Schneider tr, Prometheus Books 1995) 81. Importantly, according to my thesis, revolutionary change does not have to be incompatible with the constitutional amendment procedure, as understood by legal philosopher Hans Kelsen in his *Pure Theory of Law* (Max Knight trans 1967) 209, rather can also take place via legal means.

52 Captain Dan E Stigall, 'The Rule of Law: A Primer and a Proposal' (2006) 189 Mil L Rev 92, 105. On the jurisprudential history of the rule against specificity see Note, 'The Bounds of Legislative Specification: A Suggested Approach to The Bill of Attainder Clause' (1962–1963) 72 Yale L J 330.

53 See debate in George Henrik von Wright, *Norms and Action: a Logical Inquiry* (Humanities 1963) 77–81; Alf Ross, *Directives and Norms* (Routledge 1968) 106–112; Haim Ganz, 'On the Generality of Legal Norms' (1991) 17.3 Iunev Mishpat 581 (Hebrew).

is worth mentioning Richard Hare's important distinction between 'specific' and 'singular'; 'generality and specificity are, unlike universality and singularity, matters of degree'; 'Universality and singularity are not a matter of degree. They are either characteristics of a given word or not.'⁵⁴ We, in any case, are interested in particularity of legislation with regard to the *situation* or *occasion* in which the norm is meant to be followed, which is according to George Henrik von Wright, 'a prescription which is for one specified occasion only', or 'a prescription which is for a finite number of specified occasions'.⁵⁵ In other words, a norm would be general if it would command, prohibit, or allow for an orderly or interminable exercise of an action. It would be particular if it would command, prohibit, or allow for a single or multiple – but not orderly or interminable – exercise of that action.⁵⁶ This brings us to an *ad rem* discussion.

Article 35 of the Czech Constitution regulates the means for dissolving the Chamber of Deputies in four situations.⁵⁷ It is a general norm, since it regulates an orderly means for such an action. In contrast, the constitutional act was designed to apply to a single exercise of action and only to this instance. Therefore, it was indeed a particular, and not a general, norm. The Court was so far correct in its analysis.

The court was also correct in arguing that generality is 'one of the essential requirements of a state governed by the rule of law.' However, I disagree that a norm is void solely due to its non-general nature.⁵⁸ Even in Lon Fuller's 'inner morality of law', generality is not a necessary element of law. An explanation is required; 'generality' of laws is indeed one of Fuller's conditions for a legal system, but this is not the same 'generality' that we refer to here.⁵⁹ Attributing the requirement of general (as opposite to particular or personal) laws to Fuller is a common mistake. But for Fuller, the requirement of generality is simply that 'there must be rules':

'the desideratum of generality is sometimes interpreted to mean that the law must act impersonally, that its rules must apply to general classes and should contain no proper names. Constitutional provisions invalidating "private laws" and "special legislation" express this principle. But the principle protected by these provisions is a principle of fairness, which, in terms of the analysis presented here, belongs to the external morality of the law. This principle is different from the demand of the law's

54 Richard M Hare, *Freedom and Reason* (Penguin Books Limited 1963) 39-40.

55 von Wright (n 53) 79-80.

56 Ganz (n 53) 579.

57 Art. 35(1) Chamber of Deputies may be dissolved by the President of the Republic, if

- a) the Chamber of Deputies fails to vote confidence in a newly appointed Government the Prime Minister whereof was appointed by the President on the proposal of the Chairman of the Chamber of Deputies;
- b) the Chamber of Deputies has not decided on a Government Bill the consideration whereof the Government tied to the question of confidence;
- c) the session of the Chamber of Deputies has been recessed for a longer than admissible term; and
- d) the Chamber of Deputies has not had a quorum for a period longer than three months although its session was not recessed and although during the said period it had been repeatedly convened to meet.

(2) The Chamber of Deputies may not be dissolved three months prior to the end of its electoral term'. See generally Kudrna (n 7) 69-110.

58 See similarly Koudelka (n 2): 'the one-shot changes of the Constitution are not convenient, but they are not unconstitutional.'

59 Lon Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 46.

internal morality that, at the very minimum, there must be rules of some kind, however fair or unfair they may be'.⁶⁰

The issue then is one of fairness. The same logic applies *vice versa*: a legal system in which the vast majority of legal norms are general (in our sense, not in Fuller's) does not necessarily mean a just and morally superior system. Imagine a racist regime that applies its rules generally. Such a legal system would be unjust, and the rule of law – in its substantive aspect⁶¹ – would not exist.⁶² Of course, particular legislation itself raises various objections. Through the use of particular legislation we know more precisely which group of people would be offended. This widens the possibility that the legislature would target specific individuals or groups. Such a deviation from generality might offend the principle of equality before the law and exposes the legislature to greater temptation of corruption and bias.⁶³ Generality thus becomes an essential requirement in guaranteeing the protection of individual's and minorities' basic rights.⁶⁴ This is why Friedrich Hayek believed that generality of laws is connected to liberty and freedom.⁶⁵ Hence, particular constitutional amendments raise suspicion regarding abuse of the amendment power.

Indeed, abuse of power is not only to be feared from the executive or legislative branch, but also from the constitutional legislature.⁶⁶ As David Landau recently demonstrated, there is a growing misuse of constitutional mechanisms designed for constitutional change in order to erode the democratic order.⁶⁷ Judicial review in this context is a constitutional mechanism protecting the democratic order from usurpation by transient majorities.⁶⁸ Destruction of the constitution, as Dietrich Conrad remarks, can also be 'by using the form of amendment to directly exercise other constitutional functions in given cases, disregarding constitutional limitations and upsetting the constitutional disposition

60 *ibid* 47.

61 cf Tom Bingham, *The Rule of Law* (Penguin Books Limited 2011); Aharon Barak, *The Judge in a Democracy: The Role of a Supreme Court in a Democracy* (Princeton University Press 2006) 55-56; Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PL 467.

62 Ganz (n 53) 590.

63 Compare J W Bridge, 'Retrospective Legislation and the Rule of Law in Britain' (1967) 35 UMKC L Rev 132, 147; Harold J Krent, 'The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking' (1995-1996) 84 Geo LJ 2143, 2159; Yaniv Roznai, 'Retroactivity – Not Only a Matter of Time! Thoughts on Analyzing Retroactive Legislation Following Genis' (2008) 9 IDC L Rev 395, 406 (Hebrew). Of course, a particular ('specific') norm does not necessarily offend the principle of equality, if, for instance, the differentiation is reasonably justified such as the case of affirmative action.

64 Bernard W Bell, 'In Defense of Retroactive Laws' (1999) 78 Tex L Rev 235, 264.

65 Friedrich A Hayek, *The Constitution of Liberty: The Definitive Edition* (University of Chicago Press 2011) 221-222; and at 318, where Hayek quotes Leon Duguit's statement that 'a law may be bad and unjust; but its general and abstract formulation reduces this danger to minimum. The protective character of the law, its very *raison d'être*, are to be found in its generality.'

66 Marie-Claire Ponthoreau and Jacques Ziller, 'The Experience of the French Conseil Constitutionnel: Political and Social Context and Current Legal-Theoretical Debates' in Sadurski Wojciech (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer 2002) 139.

67 David Landau, 'Abusive Constitutionalism' (2013) 47.1 UC Davis L Rev 89.

68 Pratap Bhanu Mehta, 'The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure' in Zoya Hasan, Eswaran Sridharan and Ratna Sudarshan (eds), *India's Living Constitution: Ideas, Practices, Controversies* (Anthem Press 2002) 179, 193-195.

of powers.⁶⁹ Conrad mentions that even the German jurist Richard Thoma, who otherwise opposed the notion of implicit limitations on the amendment power,⁷⁰ maintained that parliament could not, for example, dissolve itself in violation of normal prescribed procedures, or pass a bill of attainder.⁷¹ This is a strong support for the court's decision, and is especially the case when the body that is authorised to amend the constitution is the same body that enacts ordinary legislation.⁷² The identity of persons causes the mingling of functions and interests.⁷³ But longer-range issues of constitutional planning should not be confused with short-term interest of political power. According to Conrad, the interfusion of government and constituent functions has always been feared to lead, and has led in history, to tyrannical results.⁷⁴ The dangers of coupling governmental interest with fundamental constitutional decisions may justify judicial intervention when the constitutional legislative body abuses its authority. 'It is,' Conrad continues, 'the possibility of a *Putsch* by the legislature, depriving the people of either their constitutional rights or their exercise of constituent power, which has brought into sharp relief the exigencies for a functional limitation of the amending power.'⁷⁵ This is not a mere theoretical presupposition. It is built upon historical evidence.⁷⁶

The idea of jurisprudence limitations on the amending power – such as the argument that a constitutional act cannot be 'particular' – recalls the Indian constitutional debates regarding the scope of the amending power. In the *Kesavananda* case, it was famously held by the Indian Supreme Court that the amendment power is not unlimited; rather, it 'does not include the power to alter the basic structure, or framework of the constitution

69 Dietrich Conrad, 'Constituent power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration' (1977–78) 6–7 *Delhi L Rev* 1, 17.

70 Richard Thoma believed that the parliamentary system with proportional representation could create a genuine democratic decision-making process. He therefore argued that, theoretically, the parliament had unlimited amending power. See Peter C Caldwell, 'Richard Thoma – Introduction' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar – A Jurisprudence of Crisis* (University of California Press 2002) 151, 153. Thoma argued that 'the opinion that [...] Article 76 cannot be without limits [...] fails to appreciate the idea [...] of free, democratic self-determination'. See Richard Thoma, 'The Reich As a Democracy' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar – A Jurisprudence of Crisis* (University of California Press 2002) 157, 163.

71 Conrad (n 69) 17.

72 Dieter Grimm, 'The Basic Law at 60 – Identity and Change' (2010) 11.1 *German L Rev* 33, 40. This, as Grimm pointed out, is not a healthy situation: 'If politicians can decide on the framework in the same way they are allowed to act within the framework, the difference between constitution making and law making, and the difference between the constitutions for political decisions and these decisions themselves, disappears. The constitution loses its function'. Therefore, Grimm argues, 'constitution making should differ from law making not only in terms of the quorum, but also in terms of actors and procedures.'

73 The process of adopting an ordinary act in the Czech Republic is only slightly different from that of adopting a constitutional act. See Tomoszek (n 2) 54–55.

74 Conrad (n 69) 14–15.

75 *ibid* 16.

76 The Indian Basic Structure Doctrine was developed in response to far-reaching constitutional amendments during an emergency period, undermining personal liberties. See T S Rama Rao, 'Constitutional Amendments, Judicial Review and Constitutionalism in India' in Rajeev Dhavan and Alice Jacob (eds), *Indian Constitution – Trends and Issues* (N M Tripathi 1978) 108, 110–111. See, more recently, in Taiwan, while amending the constitution on September 1999, the Third National Assembly extended, by a constitutional amendment, its term for two additional years. The Council of Grand Justices declared the amendment unconstitutional on the ground that it violated certain basic constitutional principles. See J Y Interpretation No 499 (2000/03/24) <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499> accessed 20 January 2014.

so as to change its identity.⁷⁷ This has become known as the 'basic structure doctrine.'⁷⁸ Eminent Indian law professor Upendra Baxi argued that even those judges who did not pledge to the 'basic structure doctrine' in *Kesavananda* did imply a certain 'good faith' limitation on the amending power:

'the same pen which apparently grants extraordinary powers, even for repealing the Constitution, also writes panegyrics of the collective wisdom, "innate good sense" of the amending body. Thereby, the amending body is in effect being told to be wise and trustworthy and conveyed an implicit message that its actions will always be thus construed, *even if wanted to act otherwise*'.⁷⁹

A 'good faith' limitation opposes abuse of the amendment power, and, as noted above, a constitutional act that is 'particular' may raise suspicion of abuse. It is interesting in this context to mention Justice K K Mathew of the Indian Supreme Court. In the very politically charged case of *Indira Nehru Gandhi v Shri Raj Narain*,⁸⁰ Justice Mathew argued that the amending body may express itself only by making general laws:

'A Constitution cannot consist of a string of isolated dooms. A judgment or sentence which is the result of the exercise of judicial power or of despotic discretion is not a law as it has not got the generality which is an essential characteristic of law. A despotic decision without ascertaining the facts of a case and applying the law to them, though dressed in the garb of law, is like a bill of attainder. It is a legislative judgment'.⁸¹

According to Justice Mathew, when a statute operates in relation to one specified person and 'has no relation to the community in general; it is rather a sentence than a law.'⁸² The constituent power, Justice Mathew continued, similar to ordinary legislative power, cannot be exercised in order to produce a 'bill of attainder' or a 'legislative judgment,' noting that he 'cannot regard the resolution of an election dispute by the amending body as law; it is either a judicial sentence or a legislative judgment like a Bill of Attainder.'⁸³

So *prima facie* a 'particular' constitutional amendment raise risks regarding abuse of the amending power. But not all 'particular' constitutional acts are manifestations of such an abuse. Moreover, one may argue that 'the possibility of abuse of power is no ground

77 See for example: *Kesavanda Bharati v State of Kerala*, AIR 1973 SC 1461, 1510, 1603, 1624-1625.

78 Much has been written on this doctrine. See eg A Lakshminath, *Basic Structure and Constitutional Amendments – Limitations and Justiciability* (Deep & Deep Publications 2011); Krishnaswamy (n 24); Pran Chopra (ed) *The Supreme Court versus the constitution: a challenge to federalism* (SAGE 2006). See also the NUJS Law Review, 'Symposium: Basic Structure of the Constitution' (2008) 1 NUJS L Rev 397–593.

79 Upendra Baxi, 'Some Reflections on the Nature of Constituent power' in Rajeew Dhavan and Alice Jacob (eds), *Indian Constitution – Trends and Issues* (N M Tripathi 1978) 123, 127. See also Upendra Baxi, 'The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment' (1974) 1 SCC (Jour) 45.

80 (1975) AIR 1590 SC

81 *ibid* para 284.

82 *ibid* para 285.

83 *ibid* 299; See also in paras 324-329.

for the denial of power if it found to have been legally vested.⁸⁴ An ad hoc particular constitutional act, regulating a specific state of affairs but also improving or strengthening a certain constitutional right, perhaps undermines legal certainty but could be welcome. It is vital to evaluate the circumstances that lead to constitute a particular constitutional act.⁸⁵ Considering the overall surroundings can guide us whether the amending power is being abused or not. Otto Pfersmann's quandary is instructive:

'one might wonder why the modification of the date of elections by a constitutional act, hence adopted by a qualified majority, should be contrary to the principles of democracy under the rule of law. Shortening the terms of a legislature gives the citizens the right to express their choice more often, thus it seems perfectly in line with the requirements of democracy. It is also questionable whether this can be qualified as an individual act as all citizens generally are concerned. It may also be considered problematic, that the "Rule of law" requires that constitutional acts may not state on particular issues. Art 106 para 1 of the Constitution states, for instance, that the term of the first Czech House of Deputies ends on 6th of June 1996. This is obviously as particular an issue as the one the annulled act was concerned with'.⁸⁶

Indeed, legal rules are normally formulated in a general manner as they are meant to apply to a multiplicity of situations and people.⁸⁷ This applies also to constitutional rules, perhaps even all the more so.⁸⁸ However does this mean that in a society that enshrines the rule of law as an unamendable principle, a single constitutional act that regulates a particular state of affairs would be *ipso facto* unconstitutional? I am not convinced, and I join Jan Kudrna's hesitations: 'it is doubtful however whether the lack of generality of a norm is in and of itself a justification for its characterization as a norm that is unconstitutional.'⁸⁹ As Hare wrote, 'it is, indeed, always possible for a situation to arise which calls for a qualification of the principle.'⁹⁰ While in an ideal society, legislation will be flawlessly neutral and impartial, one must confess that such ideal societies do not exist in reality.⁹¹ Also, a certain ad hoc constitutional act can have a legitimate aim and

84 See Justice Khanna in *Kesavananda Bharati v State of Kerala* (n 77) paras 1417-1418 (adding that 'the best safeguard against the abuse or extravagant use of power is public opinion and not a fetter on the right of people's representatives to change the Constitution by following the procedure laid down in the constitution itself'). See also H R Khanna, *Making of India's Constitution* (2nd edn, Eastern Book Company 2008) 193; Lester B Orfield, *Amending the Federal Constitution* (The University of Michigan Press 1942) 123: 'the fact that a power may be abused does not necessarily militate against the existence of the power.'

85 Compare Israeli Supreme Court decision in HCJ 4908/10 *Knesset Member Bar-On v The Knesset* (7 April 2010), according to which a temporary constitutional basic law deviated from the established rule of annual budget requirement by permitting a bi-yearly budget for 2011 and 2012. The Supreme Court held that temporary requiring a bi-yearly instead of yearly review did not amount to harm of the regime's basic principles that would justify nullification of the basic law.

86 Pfersmann (n 21) 83-84.

87 Noam Gur, 'Legal Directives in the Realm of Practical Reason: A Challenge to the Pre-emption Thesis' (2007) 52 *Am J Juris* 159, 170.

88 Adrian Vermule, 'Veil of Ignorance Rules in Constitutional Law' (2001) 111.2 *Yale LJ* 399, 411-415.

89 Kudrna (n 2) 62.

90 Hare (n 54) 40.

91 Stephen Holmes, 'Lineages of the Rule of Law' in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (CUP 2003 reprint 2006) 19, 49.

necessity due to provisional and particular needs. Of course, it does not follow that the repeated use of ad hoc constitutional amendments is desirable.⁹²

It seems that behind the court's fear of particular constitutional acts rests the 'slippery slope' rationale. In the court's opinion, as stated in the discussion of a similar constitutional act of 1998:

'the danger of the proposed act lies primarily in the fact that it creates a precedent of the highest legal force, a precedent that says that it is possible, for momentary, utilitarian, political reasons, to change the fundamental law of the land. If that is possible once, it is possible always. Parliament could, for the same reasons, suspend the powers of the Constitutional Court if its decisions were not in line with the political will of the moment; it could [...] suspend the powers of the president if they were inconsistent with the political will of the moment, it could [...] suspend the Charter of Fundamental Rights and Freedoms if it were an obstacle to achieving political aims. Putting fundamental legal certainties in doubt for political reasons puts democracy in doubt, and it creates the potential danger that authoritarianism and totalitarianism will arise. And it is to no avail that the authors of this precedent did not and do not [...] have anything of the sort in mind, and [...] only want to arrange for early elections to be held'.

The court is trying to convince us that the constitutional act must be annulled based on an argument that goes something like this: it does not matter what the content of the current constitutional act is. The fact that it is a particular act creates a dangerous precedent which might lead to particular constitutional acts that would suspend rights, and even destroy democracy to create a totalitarian regime. If we allow this particular act to stand, we might find ourselves in another Nazi era. This is a 'slippery slope' argument. The court is attempting to persuade us that if one particular constitutional act is wrong – such as one that suspends rights – so is the other (in our case, the ad hoc dissolvent of the Chamber of Deputies). This 'slippery slope' argument is far from convincing. The approval of a certain 'particular' act as 'constitutional' does not mean that another one which seriously infringes upon the rule of law would not be declared as unconstitutional. *Ex hypothesi*, there could be a relevant distinction between different 'particular' constitutional acts. Dissolving parliament in order to conduct democratic elections where there is freedom of expression, assembly and association, freedom from arbitrary arrest and other reprisals, and free, equal and fair voting procedures (in a deliberative and open manner) – does not raise the fear of abuse of the amendment power.⁹³ One may even view it as a use of the rule of law against democracy.⁹⁴ On the contrary, 'once you start using slippery slope arguments,' David Enoch states, 'you're on a very slippery slope.'⁹⁵

92 See the Venice Commission, *Opinion on recent amendment to the law on major constitutional provisions of the Republic of Albania, Adopted by the Sub-Commission on Constitutional Reform on 15 April 1998*, (CDL-INF(1998)009e, Strasburg, 17 April 1998) para 62 <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF%281998%29009-e>> accessed 20 January 2014.

93 cf Conrad (n 69) 12.

94 José María Maravall, 'The Rule of Law as a Political Weapon' in Maravall and Przeworski (n 91) 261, 274.

95 David Enoch, 'Once you start using slippery slope arguments, you're on a very slippery slope' (2001) 21(4) Oxford J Legal Studies 629.

Using a 'slippery slope' argument – even a good one – will lead to the use of bad slippery slope arguments which in turn might lead to bad consequences, such as avoiding good things.⁹⁶ A particular constitutional act might be aimed to achieve a desirable and legitimate aim for the benefit of the society, but due to the 'slippery slope' argument, that desirable result would be avoided. Moreover, I predict that since we are already on a 'slippery slope,' the court will begin to use the extraordinary power of annulling constitutional acts routinely. The court should have kept this 'judgment day weapon' for the right case, one that would 'fundamentally abandon' the principle of the rule of law and would aim to convert the state from a state based on the rule-of-law to an arbitrary state. This was not the case.

D. Retroactive Constitutional Amendment

Finally, a remark is warranted on the temporal application of the constitutional act. The constitutional court held that the constitutional act was 'retroactive' since it changed the rules during the course of a term of office, thereby violating the right of citizens to vote and be elected with knowledge of the conditions for creating the democratic public authorities resulting from the elections, including knowledge of their term of office.

The description of the constitutional act as 'retroactive' is flawed. One has to distinguish between 'retroactivity' and 'retrospectivity' – which the literature often fails to do.⁹⁷ While both forms attach new legal consequences to past transactions,⁹⁸ retrospective legislation operates forwards only. In contrast, retroactive legislation applies to a time prior to its enactment, changing the law from what it was.⁹⁹ Similar to particular acts, both types of legislation are inconsistent with the rule of law and raise suspicion regarding abuse of power and the targeting of individuals.¹⁰⁰ While indeed a certain retrospective legislation could be worse than a retroactive one,¹⁰¹ there is a difference – certainly in degree if not in kind – between legislation that changes future legal consequences of past actions and between legislation that rewrites history.¹⁰² As Paul Salembier puts it, 'it is one thing for the future not to turn as you thought it was going to be; it is quite an-

96 *ibid* 635-636.

97 See C S Bobett, 'Retroactive or Retrospective? A Note on Terminology' (2006) 1 BTR 15; Geoffrey T Loomer, 'Taxing Out of Time: Parliamentary Supremacy and Retroactive Tax Legislation' (2006) 1 BTR 64, 65; Charles Sampford, *Retrospectivity and the Rule of Law* (OUP 2006) 17, 37. On the distinction between different categories of retroactivity see Jan G Laitos, 'Legislation Retroactivity' (1997) 52 Wash U J Urb & Contem L 81, 86-91; Ann Woolhandler, 'Public Rights, Private Rights, and Statutory Retroactivity' (2006) 94 Geo L J 1015, 1023; Matthew P Harrington, 'Retroactivity of Law: Forward – The Dual Dichotomy of Retroactive Lawmaking' (1997) 3 Roger Williams U L Rev 19, 19-20; W David Slawson, 'Constitutional and Legislative Considerations in Retroactive Lawmaking' (1960) 48 Cal L Rev 216, 217-218; Stephen R Munzer, 'Retroactive Law' (1977) 6 J Legal Stud 373, 382-384; Daniel E Troy, *Retroactive Legislation* (The AEI Press 1998) 6-8.

98 Gregory J DeMars, 'Retrospectivity and Retroactivity of Civil Legislation Reconsidered' (1983) 10 Ohio N U L Rev 253, 257.

99 Elmer A Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 Can Bar Rev 264, 268-269.

100 See generally A D Wozzley, 'What is Wrong With Retrospective Law?' (1968) 18 Phil Q 40, 42.

101 See Jeremy Waldron, 'Retroactive Law: How Dodgy was Duynhoven?' (2004) 10 Otago L Rev 631, 641-642.

102 On the distinction between the different temporal applications with regard to various parameters see Roznai (n 63) 439-445; Matthew A Schwartz, 'A Critical Analysis of Retroactive Economic Legislation: A Proposal for Due Process Revitalization in the Economic Arena' (1999) 9 Seton Hall Const L J 935, 974-977; Bridge (n 63) 147

other for the past to turn out to be not what you thought it was.¹⁰³ The constitutional act in question did not change the law as it was in the past. It applied on the totality of existing legal relations and brought an immediate and future change in the constitutional structure. Thus, it was not retroactive, but rather, retrospective or 'active'.¹⁰⁴

But then, didn't this retrospective application violate the deputies' 'vested right' to serve their full term of office? One must distinguish between the problems of retrospectivity and the vested rights doctrine. True, retrospective legislation is commonly associated with vested rights,¹⁰⁵ and in the past, the vested rights doctrine controlled the intertemporal rules.¹⁰⁶ However, retrospectivity should not be defined by the vested rights term. Vested rights could be infringed not only by retrospective legislation, but also by prospective legislation. Moreover, a retrospective law could affect a prior state of affairs or legal status without necessarily depriving vested rights.¹⁰⁷

The alleged infringement of the deputies' vested right to serve for a fixed term is itself disputable. Do the members of the Czech parliament really have a subjective right to remain in power? Are there really any vested rights, given the case that the Constitution provides for an ordinary procedure to dissolve parliament before the expiry of its term? One may argue, at the very least, that parliament members have a legitimate expectation that their term would be fixed as stated in the Constitution, unless dissolved earlier according to the means stipulated in Article 35 of the Constitution. Ideally, any amendment to these means ought to be prospectively, ie to apply solely to future parliaments. Do parliament members also have a legitimate expectation that their term would not be shortened by an ad hoc constitutional act? Imagine that the constitutional act settled a general new means for dissolving parliament – for example, by a simple vote of a special majority. This would not be a particular act for a certain circumstance, but rather, a general one. Such an act would not be purely prospective but also active, as it would apply to the existing parliament term. It would have been interesting to see whether the constitutional court would have accepted such a general constitutional act,

103 Paul J Salembier, 'Understanding Retroactivity: When the Past Just Ain't What is Used to Be' (2003) 33 HK L J 99, 138.

104 See Kudrna (n 2) 65: 'The criticized constitutional law corresponds rather with non-genuine retroactivity, which is not even considered by some lawyers as retroactivity at all. Rather than establishing or breaking a legal relationship or reality with an effect back to the past, one is concerned here with modification of an existing relationship or reality for the present moment or for the future.' See also Koudelka (n 2). On active legislation see Aharon Barak, *Interpretation in Law – Constitutional Interpretation* (Nevo 1994) 432, 568 (Hebrew). Surely, one can claim that any active change is retrospective since it changes the legal consequences of past actions. See Michael J Graetz, 'Legal Transitions: The Case of Retroactivity in Income Tax Revision' (1977) 126 U Pa L Rev 47, 49.

105 Theodore Sedwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* (2nd edn, Fred B Rothman & Co 1980) 160-175, 638-643; Bryant Smith, 'Retroactive Laws and Vested Rights' (1926-1927) 5 Tex L Rev 231; Bryant Smith, 'Retroactive Laws and Vested Rights II' (1927-1928) 6 Tex L Rev 409.

106 Sedwick *ibid* 160; Jackie M McCreary, 'Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues through the Revised Civil Code Article on Disinheritance' (2002) 62 La L Rev 1321; H Campbell Black, 'The Constitutional Objections to Retrospective and Ex Post Laws' (1886) 34 Am L Reg 681, 685-686; James L Kainen, 'Historical Framework for Reviving Constitutional Protection for Property and Contract Rights' (1993) 79 Cornell L Rev 87, 102-114; Simeon Nash, 'The Constitutionality of Retrospective statutes' (1844-1845) 2 W L J 170, 177.

107 See Paul Roubier, *Le Droit Transitoire: Conflicts Des Lois Dans Le Temps* (2nd edn, Dalloz et Sirey 1960) 181-205; Salembier (n 103) 117-119; Daniel E Troy, 'Towards a Definition and Critique of Retroactivity' (1999-2000) 51 Ala L Rev 1329, 1334; Aharon Barak, *Interpretation in Law – Legislative Interpretation* (Nevo 1994) 633-635.

which would also undermine parliament members' expectation to serve full terms according to the conditions that existed when they were elected. In any event, the 'vested right' argument is relatively weak in light of the aforementioned fact that the shortening of the election term in 2009 was not the first case in Czech's modern constitutional history, and was therefore anticipatable to some degree. Even if the 'vested right' question was considered a crucial one, the court does not, at least not sufficiently, deal with the vested right of members of the Chamber of Deputies.¹⁰⁸

If we continue on the basis that the constitutional act was retrospective, that in itself is not a good enough reason for its invalidation. Indeed, the general rule against retrospectivity is a basic jurisprudential principle, and thus among the essential requirements of a democratic state governed by the rule of law.¹⁰⁹ There is also no doubt that the presumption of prospectivity¹¹⁰ applies to constitutional laws as to ordinary legislation,¹¹¹ perhaps even with excessive strength.¹¹² In that respect, it is interesting to recall the writings of Karl Loewenstein, with regard to German Basic Law's prohibition against ex post facto penal law:

'a fortiori this prohibition should apply to constitutional provisions, for the non-retroactivity of fundamental legal norms is a basic principle of the state under the rule of law. Comparative constitutional jurisprudence fails to record a single instance in which a constitutional norm has been made retroactive'.¹¹³

Regardless of the last sentence which surely deserves an empirical research, the investigation into the possible retrospective application of constitutional norms is thorny. On the one hand, the greater harm the retrospective legislation would cause to legal certainty and security, and the higher the normative standard of the changed right or principle, the stronger is the consideration against retrospectivity.¹¹⁴ One can thus claim that specifically due to the normative value of a constitutional legislation – the highest

108 See Kudrna (n 2) 66-67: 'It is however necessary to agree with the dissenting opinion of Judge Musil, who points out that the subject matter of the individual constitutional complaint is the objected to violation of the individual basic rights of a specific person, here Deputy Melčák. Judge Musil further draws attention to the fact that nobody paid any attention to this individual aspect, no proof was given, nor did other participants express their opinion on this.'

109 See Elmer E Smead, 'The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence' (1935-1936) 20 *Minn L Rev* 775, 776-777. See also John Rawls, *A Theory of Justice* (Harvard University Press 1972) 235; John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* (The Lawbook Exchange Ltd 2005) 469; Joseph Raz, *The Authority of Law – Essays on Law and Morality* (Clarendon Press 1979) 214; Jeremy Bentham in P Schofield and J J Harris (eds), *Legislator of the World: Writing on Codification, Law and Education* (Clarendon Press 1998) 20; Geoffrey Walker, *The Rule of Law – Foundation of Constitutional Democracy* (Melbourne University Press 1988) 315.

110 See Ben Juratowitch, *Retroactivity and the Common Law* (Hart Publishing 2008) 80.

111 See eg Amnon Rubinstein, *The Constitutional Law of the State of Israel* (5th edn, Schocken 1996) 252 (Hebrew).

112 Barak (n 104) 569: 'the idea that the constitution – which is aimed to protect human rights and to prevent their retrospective deprivation – would itself deprive rights retrospectively is vexing.' However, Barak leaves the question whether the constituent authority is entitled to act retrospectively unanswered.

113 Karl Loewenstein, 'The Bonn Constitution and the European Defense Community Treaties' (1954-1955) 64 *Yale LJ* 805, 832.

114 Charles B Hochman, 'The Supreme Court and the Constitutionality of Retroactive Legislation' (1960) 73.4 *Harv L Rev* 692, 697-726.

stratum in the formal pyramid of norms – it should not apply retrospectively.¹¹⁵ It appears that the court adopted this approach when stating that ‘even the constitutional framers cannot declare constitutional an act that lacks the character of a statute, let alone of a constitutional act.’

On the other hand, this approach leads to illogicality. *Prima facie* one would assume that the constituent authority possesses *more powers than the ordinary legislature, not less*. Here, a distinction between authority and responsibility must be drawn. The constituent authority is higher than the ordinary legislative authority. Accordingly, if ordinary legislative powers can – with a clear statement – enact a law retrospectively (as long as it does not conflict with constitutional prohibitions to that effect), then all the more so the constituent authority can do so. A retrospective constitutional amendment is not invalid simply because of that fact alone.¹¹⁶ However, due to the high normative status and importance of the constitutional norm, the constituent authority has to be very cautious with the temporal application of constitutional norms. A separate question is what the adequate temporal application of a constitutional amendment which was enacted in response to – and in order to overturn – judicial decisions is. This complicated issue, which deserves a careful attention, is beyond the scope of this note.¹¹⁷

To conclude this section, similar to ‘particular’ laws, retrospective laws are not void merely because of their temporal application. Retrospectivity may often be necessary.¹¹⁸ Even Fuller, who regarded retroactive law as ‘truly a monstrosity’ since ‘to speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose,’ argues that:

‘It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.’¹¹⁹

Moreover, for Fuller, ‘a total failure’ of one of his requirements ‘results in something that is not properly called a legal system at all.’¹²⁰ But importantly – and this point is often neglected – this is in the case of a ‘total failure’ and not a one-time failure. Indeed, Charles Sampford rejects the claim that a retroactive law is not ‘a law.’ For him, Fuller’s theory refers to a general framework of a prospective legal system and not to a single retroactive law.¹²¹ Even if the presumption against retrospectivity applies with a greater degree to constitutional legislation, there is no – and ought not to be – absolute prohibition against retrospective application of constitutional norms. The temporal application

115 Eyal Gabai, ‘A Retrospective Change in the Basic Law: The Government – its Constitutionality’ (1998) 44 *Hapraklit L Rev* 151, 167 (Hebrew).

116 Bernard C Gavit, ‘The Jurisdiction of Courts’ (1935-1936) 11 *Ind LJ* 439, 443.

117 See Mark Strasser, ‘Baehr Mysteries, Retroactivity, and the Concept of Law’ (2000) 41 *Santa Clara L Rev* 161, 171-74; R Stephen Painter Jr, ‘Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?’ (2006) 36.1 *Seton Hall L Rev* 125, 148-151; The Venice Commission (n 92) para 40.

118 See eg Frank Maher, ‘The Ghost in the Machine: Myths and Facts about Retrospectivity’ (1983) 57 *L Inst J* 183, 191; Andrew Palmer and Charles Sampford, ‘Retrospective Legislation in Australia: Looking Back at the 1980’s’ (1994) 22 *Fed L Rev* 217, 281.

119 Fuller (n 59) 53.

120 *ibid* 39.

121 Sampford (n 97) 68.

of the constitutional act was clear. The remaining question is whether this retrospective – not retroactive – temporal application conflicted with the unamendable principle of ‘the rule of law’ to such an extent that justified its annulment. As aforementioned, I believe the answer should be negative.

V. Conclusion

In its decision of 10 September 2009, the Czech constitutional court made a huge leap forward, as it annulled, for the first time, a constitutional act. In this Note I opined that the court was correct in holding that it has the competence to review constitutional acts.¹²² This in itself carries great significance. However, the judgment is not entirely convincing on its merits. The court’s main argument was that the constitutional act was an ‘individual, specific decision.’ It thus violated Art 9(2) of the Constitution, which prohibits amendments to ‘the essential requirements for a democratic state governed by the rule of law.’ Tomoszek claimed that ‘it is hard to imagine that the Constitutional Court would have decided in any other way [...] [risking] legitimizing a negative precedent allowing Parliament to adopt a Constitutional Act violating some of the most fundamental principles of Czech constitutional system.’¹²³ Allow me to differ. Does a constitutional act that dissolves a chamber of parliament in order to engender early democratic elections, constitute an abandonment of the rule of law which deserved an annulment? Or maybe this extraordinary ‘weapon day judgment’ deserves a clearer case to be exercised. The above analysis suggests the latter.¹²⁴ Even if the court simply wanted to set a precedent to equip itself with the power of judicial review of constitutional acts for possible future cases involving more serious challenges, the court could have easily declared that it has an authority to review and even to annul the act, but to conclude its examination by holding that this case did not warrant judicial annulment, thereby leaving an open room for future judicial intervention.

Importantly, the particular legislation in question was definitely problematic. According to basic rule of law principles, the legislature should not adopt rules and subsequently declare them inapplicable when it does not like them in a particular situation. The said constitutional act did precisely that. It circumvented important constitutional rules regarding dissolution of parliament. Such an ambivalent approach to constitutional rules poses a threat to the rule of law. Any ignorance of the existing constitutional rules poses a risk of violating legal certainty and security. Nonetheless annulling a constitutional act can also infringe legal certainty. Paradoxically, the decision that attempts to protect the rule of law can also be seen as damaging it. We care not only about rule of law principles,

122 One may claim that this was not a substantive judicial review at all but merely a formal one. According to such an argument, the challenged act – for its particularity – was not an actual amendment (or not even a piece of legislation) and therefore the constitutional court only declared its nullity.

123 See Tomoszek (n 2) 65. See contra Koudelka (n 2).

124 See also Radim Dragomaca, ‘Constitutional Amendments and the Limits of Judicial Activism: The Case of the Czech Republic’ in Willem Witteveen and Maartje DeVisser (eds), *The Jurisprudence of Aharon Barak: Views from Europe* (Wolf Legal Publishers 2011) (claiming with regard to the Czech case that ‘it is difficult to say that the Court’s ruling was proportional. On the one hand, the Court prevented early elections and undermined an almost unprecedented degree of political consensus on how to lead the country out of crisis, whereas on the other, it upheld standard constitutional procedures over extraordinary ad-hoc ones. Had the case been about the parliament trying to extend its mandate instead of shorten it, the proportionality test would have been in the Court’s favor’).

such as prospectivity and generality; we also care about having a system where power is appropriately divided and judging is carried out thoughtfully. True, as Samuel Issacharoff demonstrated, the experiences of 'third wave' democracies after the collapse of the Soviet Union shows that in these new democracies, courts are assigned a central role in preserving the democratic order, and have assumed the responsibility for 'protecting the integrity and accountability of the political process'.¹²⁵ Nonetheless, judicial review of constitutional acts is a delicate task, which must be approached with great caution. The hands of a judge writing a judgment annulling a constitutional act may shake due to the seriousness of the exercise, but will be stable enough if he is certain that the circumstances are right. A Czech proverb states 'dvakrát měř, jednou řež': 'measure twice, cut once.' I am not sure that the court measured twice before 'cutting' this judgment. Article 9(2) of the Czech Constitution was aimed to secure and maintain a certain constitutional democratic identity. It is doubtful that if the constitutional act had been allowed to stand, the Czech's core constitutional identity would have been altered.

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125 Samuel Issacharoff, 'Managing Conflict Through Democracy' in Colin Harvey and Alex Schwartz, *Rights in Divided Societies* (Hart Publishing 2012) 33, 43.

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