I would like to discuss the effort of a constitutional court to reformulate/reconstruct its own institutional role, and I will investigate the development of the Czech Constitutional Court in this respect. Many constitutional courts come to the realization after a certain time in action that there is a certain disjunction between their institutional equipment (the powers with which they are endowed), so to speak, and their mission, once they come to a clear conception of what that is. This institutional equipment often spring directly from the conception of constitutional review as a mere negative legislature in the sense of Kelsen. The constitutional court usually finds its mission either directly in the Constitution or in the conception of itself as ensuring respect for the Constitution by the state, especially respect for basic rights. This task of reconciling its mission with its powers is often accomplished by making a bold departure from its original institutional design, as was the case in Italy, France, and Germany.

The Czech Constitutional Court has been gradually working in this direction by elaborating, within its own constitutional system, certain principles that were developed by Western European constitutional courts during the first few decades of their jurisprudence. Primary among these are the constitutionally conforming interpretation, the necessity to directly apply the constitution, and, most problematic of all, the radiating effect of the Constitution. Such innovations have the effect of allowing the reconciliation of the legal system with the constitution while at the same time minimizing direct confrontation with the legislature. This is precisely because the court is shrinking from what, in traditional thought, is its main power, to consider the constitutionality of statutes in the abstract, and its only real binding decision is that to annul. At the same time, that comes at the price of increasing the prospect of coming into conflict with the ordinary court system, a problem that is difficult to manage when the constitutional court is separate from the remainder of the court system and has no direct appellate jurisdiction over them. To resist this intrusion, the ordinary courts, some of which are quite traditional and formalistic in their thinking, can criticize it for departing from the original design. In the Czech Republic, this conflict became especially sharp and broke out into the open a few years back, in a series of run-ins collectively referred to as the “War of the Courts”. While this war was resolved in favor of the Constitutional Court, there is the matter of post-war reconciliation and reconstruction, as, after all, both the Constitutional and ordinary courts need each other so some sort of acceptable accommodation needs to be worked out. I would like to discuss a case in which the Constitutional Court appears to be making moves in that direction.²

As a background, it should be noted that the Czech Constitutional Court is modeled upon the German, so that it has the full panoply of procedures, abstract and concrete review of norms and constitutional complaint. This case involved the concrete review of a norm, in other words, a reference procedure initiated by an ordinary court. The norm in question empowered private law bodies, municipal transportation authorities, to impose fines on persons riding without paying fare,¹ and the court applying this norm to a minor case involving 400 Kč (approximately $10), having come to the conviction that the norm violated the Constitution, referred it to the Constitutional Court. This is hardly an issue of great

² Act No. 111/1994 Sb., § 18a, para. 1. lit. c).
moment, and the Court found no conflict with the Constitution, so it might seem puzzling that the Court devoted much attention to this case at all (or that we are devoting attention to it). But it was not the substantive constitutional issue that was of significance, rather one of procedure, the Court’s jurisdiction to hear the case, and this issue provoked a serious dispute between the majority and the dissent, which contended, with much justification, that the Constitutional Court was not entitled to consider the case on the merits. The reason was that, before the Constitutional Court decided, the statutory provision under review had been superseded by another provision (albeit substantially identical in substance).

The Constitutional Court rejected the referral on the merits, but not before engaging in a serious exchange between the majority and dissenting Justices as to whether the petition had been admissible. The submission’s admissibility was open to question because, following the referral of the case but prior to its decision, the statutory provision in question had been superseded by an amended provision (which, in any case, was substantively nearly identical). The Czech Act on the Constitutional Court requires that statutes which are not yet or no longer valid cannot be reviewed by the Constitutional Court but should be dismissed as inadmissible. This fits with the Kelsen conception that the Constitutional Court deals in the abstract with real enactments, not with an abstract interpretation of the Constitution or with the question of particular applications of ordinary statutes.

The Court majority made a frankly questionable interpretation of its jurisdictional empowerment in order to be able to decide the referral. Article 87 of the Constitution contains an enumeration of the Court’s powers, the first of which is the power to annul statutes. Article 88.1 provides that the Court’s procedures shall be laid down in an ordinary statute, the Act on the Constitutional Court. That act, in turn, provides for a common procedure for all petitions proposing the annulment of a statutory provision (whether it be abstract, concrete, or in the context of a constitutional complaint), and this procedure is subject to the admissibility requirement mentioned above. Since this case could, accordingly, not be decided pursuant to Article 87 and the ACC, the Court had to find another basis for its jurisdiction. Even though the provision had been repealed, it was still “live” in the sense that it was applicable to resolve cases arising before the repeal. Hence, the ordinary courts, such as the one in this case would have to apply it to resolve a dispute. With this consideration in mind, the Constitutional Court based its jurisdiction on Article 95.2 of the Constitution, the provision which authorizes ordinary courts to make referrals to the Constitutional Court. Article 95.2 provides that should a court find that a provision which it must “use” or apply in its decision-making is in violation of the Constitution, it shall submit the matter to the Constitutional Court. Whether by chance or design the language concerns court “application” of a provision and instructs the court to submit the matter to the Constitutional Court, no mention made of annulment. The Court determined that Article 95.2 could be directly applied and that it gives a separate basis for jurisdiction.

Apart from the problem of the Constitutional Court seeming to grant itself jurisdiction, there is the difficulty pointed out in the dissent that the Court has no procedural basis on which to decide; it does not know whether the Plenum or a panel should decide such a matter, by what procedure, and what vote. One might ask why the Court would go to such trouble and take such a problematic decision for what appears to be a highly insignificant legal

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3 Article 88.1 provides in relevant part: A statute shall specify who shall be entitled to submit a petition instituting a proceeding before the Constitutional Court, and under what conditions, and shall lay down other rules for proceedings before the Constitutional Court.
provision. Perhaps the process was reversed; they Court hid/camoflauged in the shade of a
matter of little significance the fact that they were doing something of great moment - making
an expansive interpretation of its own powers.

It is my contention that the majority took this risk in order to move toward a more
workable system for constitutional review and a better functioning relationship with the
ordinary courts. Its conception of the role of the Constitutional Court and its powers vis-à-vis
the ordinary courts differed considerably from that of the dissents, and both differ immensely
from that of ordinary courts. First and most simple, is the conception which, during the first
few years of the Constitutional Court’s existence, was put forward by ordinary courts in
various bits and pieces in an effort to resist what they viewed as Constitutional Court’s
intrusion upon their jurisdiction. Claims were made that, the existence of the constitutional
complaint procedure notwithstanding, the Constitutional Court has no jurisdiction to review
ordinary court decisions. The constitutional complaint procedure was explained away as
merely a medium for the initiation of an abstract review proceeding. In one specific case the
Court’s intervention was rejected as a usurpation, with the explanation that its role is to
protect constitutionality and the protection of constitutionality consists in abstract review of
norms. In other words, the ordinary courts conceived of the two court systems as entirely
separate, with differing functions that do not come into conflict with each other.

The majority’s conception can be deduced from it main argument made in this case. It
asserted that only the Constitutional Court and not ordinary courts may judge the
constitutionality of a statute, which seems to follow from Article 95.2. In addition, Article
95.1 provides that ordinary courts are bound by statutes, hence they cannot refuse to apply
them in a given case. While it has a monopoly on annulment, this is not strictly true, as
ordinary courts must assess constitutionality in many situations. What seems to be behind its
concern is the problem that, under Their only option is to submit the problem to the
Constitutional Court for its action, in the typical case to annul the statutory provision, thus
allowing the ordinary court to resume the suspended proceeding and decide the case without
having to apply the defective provision. If in the situation found in this case, the ordinary
court could not submit the matter to the Constitutional Court (and the blockage would arise in
the context of a proposal to annul the provision made in the context of a constitutional
complaint, as the same admissibility requirement applies to such a proposal as well), then it
would be forced to apply a statute it believes to be unconstitutional. Why is this so
problematic? It is a long-held custom and normal habit for ordinary courts unquestioningly to
apply statutes and not concern themselves with their constitutionality. Why should this then
present a special problem? One dissenting opinion argues that the problem could, in any case,
be resolved through a constitutional complaint procedure. The ordinary court can go ahead
and apply the questionable statute, acknowledging its doubts concerning the statute but citing
its duty to apply it, and the party adversely affected by it could bring a constitutional
complaint. This approach presents problems of its own, for reasons to do with relations
between the Constitutional and ordinary courts, as will be discussed below. But first should
be considered one major problem which points to the incoherence of the dissent’s position.
The dissent refers to the fact that the Constitutional Court has the final word concerning the
constitutionality of the application or interpretation of any statutory provision, so that if it
cannot consider a particular statutory provision because inadmissible, it can do essentially the
same thing by condemning its application in a particular case. This would seem correct, but it
would seem to follow, as well, that a finding to the effect that an ordinary court interpreted or
applied a statutory provision unconstitutionally, then it violated the Constitution, a serious
charge to make. In a law-based state, any public official should be permitted the possibility to
comply with the Constitution and properly carry out its specific duties at the same time. Accordingly, the Constitutional Court’s “final word” necessarily means that ordinary courts should, at least in some cases (i.e., where they foresee the problem), be able to avert its unconstitutional step by acting in conformity with the Constitution. The principle of constitutionally conforming interpretation requires precisely that, and it is always within the ordinary courts’ power to interpret differently. But the issue of application presents other problems, and precisely Article 95.1 does not seem to permit ordinary courts to avert its unconstitutional behavior by refusing to apply a statute to a case to which, by its terms, it clearly applies.

It is in this respect that the majority opinion seems to offer a more adequate solution. If we can tell a court after the fact that it applied a statute in conflict with the Constitution, then we should permit them the opportunity to request such guidance in advance.

This situation nicely demonstrates the artificiality of the divide between abstract and concrete norm control. If a constitutional court is restricted to abstract, then it might be argued that it should only deal with statutes in the abstract and not particular applications of it (though that is not the case in fact either – as the constitutional courts in Italy and France demonstrate). But if it is permitted to judge the constitutionality of essentially all state action, the divide is seen as highly artificial and cannot really be maintained in practice. A constitutional court cannot keep its hands off matters that in theory belong strictly within the jurisdiction of ordinary courts, and ordinary courts are obliged (if only due to the interrorem effect of a cassational finding by the constitutional court) to consider criteria that it would not otherwise concern itself with, and traditionally feels it is not permitted to concern itself with.

Reason for so doing. Avoiding trouble of labels (abstract and concrete) constitutional review plays out into two basic types - review of norms as such (abstract review in the wider sense) and review of individual acts (whether application of norm or not). This creates a great divide which is rather artificial (as evidenced by constitutionally conforming and prozarovani function of constitutional complaint, which tend to act as a bridge between these two) making it seem as if they are entirely different and separable functions when, in fact, they are not. There is a continuum, and each has influence on the other (Luth’s mutual effect). Here for first time, the Constitutional Court has breached this artificial divide by allowing an ordinary court to ask for its view, not on the constitutionality of a norm as such, but only of its application.

This decision can be seen as a symbolic rejection of the strict dividing line between A and C. This sharp dividing line (view) is well represented by ordinary courts, which have been stout adherents of this perspective. The Constitutional Court does two things, either it makes statutory provisions disappear (in which case they were constitutionally defective, so that Parliament was to blame) or it buts out and lets the ordinary courts do their job, to intervene only in cases (such as the above) where they decide the statutory provision was defective or else in cases (which should be exceptional) where state institutions or court departed from their constitutional duties (failed to provide judicial protection, arrested somebody without legal justification, etc.). Here we see a certain differing perspective on the respective roles of the two different court systems: one emphasizes an integrated legal system where courts must cooperate, each with its own expertise, to produce a comprehensive system of justice upholding both constitutionalism and legality which exercise a certain influence on each other. The other sees a sharp division - constitutionalism concerns an initial test of
kosherhood, once passed, it falls to ordinary courts’ exclusive business (emphasized separable and mutually distinguishable components resulting in exclusivity - never the twain shall meet). The Constitutional Court rejects partly because it is simply against current of contemporary constitutionalism and partly because they see it as necessary to accomplish their mission.

Possible consequences - ordinary courts have the right/duty to refer cases to the Constitutional Court, the standard for which is set out in Art. 95(2) - if the ordinary court comes to the conclusion that the statutory provision in question is unconstitutional; in other words, it has reached this conclusion in its own discretion. This standard follows the German and can be distinguished from much more open standards in Italy and the EC - a constitutional issue is presented and the court does not consider it manifestly unfounded or an issue of the interpretation of C law arises (which is much the same thing). Understandably, references are much more frequent in systems with an open standard, and one of the striking phenomena in the USR initial phase was the dearth of such references. The Constitutional Court decision in the „Black Rider“ Case may be an effort to (or it may just have the unintended effect of) increase such references by encouraging ordinary courts to make the according to a more open standard. After all there is no logical divide between the two standards, if not manifestly unfounded, a court acknowledges some judge could reasonably conclude it is unconstitutional. Of the 200 judges in the Czech Republic, one could hardly object if one takes the position for any given statutory provision that is somehow constitutionally problematic. In any case, if it is a matter of discretion, who can really question their exercise of it [although the Constitutional Court has questioned their exercise of it in refusing to refer a question - Child Custody case]. So the Constitutional Court could be seen as encouraging the ordinary courts to refer issues whenever there is a viable constitutional issue, giving the Constitutional Court the opportunity to give them guidance on the interpretation of the Constitution - how it affects the interpretation and application of the ordinary statute at issue. While this is loosening, hence revising, constitutional standard, if both responsible institutions conspire in this, no others are really in a position to object.

Further point - the Constitutional Court is shifting perspectives from protecting the objective interest of a legal order without unconstitutional laws to protecting the subjective interests of individuals in not having laws applied to them, if such would be unconstitutional. It is important to recognize this could fill a certain gap - constitutional complaints cannot be submitted unless a specific fundamental right is violated, and the individual cannot otherwise object merely because his legal situation was adversely affected by a statute not in conformity with the Constitution.

Why does the Constitutional Court feel the need to take this step?

As pointed out earlier, the Constitutional Court and ordinary courts have a quite different conception of the nature of the two court systems, the role each fills and their respective relations. Far from a mere academic disagreement, their mutual relations consisting in part in possible Constitutional Court cassational review of any conceivable ordinary court decision, has resulted in serious friction culminating in outright conflict - the so-called „War of the Courts“, where the Supreme Court and Constitutional Court were in open conflict because the Constitutional Court annulled its ruling in a particular matter (rejected its interpretation) and the Supreme Court brazenly rejected its intervention, pointedly declaring it was not bound by the Constitutional Court’s conclusion and deciding anew the same way. Such a conflict could not persist and was eventually resolved in early
1999 when the Supreme Court’s newly appointed Chief Justice declared that ordinary court judges are bound on remand by Constitutional Court rulings overturning their judgment. She threatened any errant judge with disciplinary proceedings. The Supreme Court now routinely accepts the Constitutional Court’s views but some issues are still under the surface and call for some sort of resolution. It is possible that the „Black Rider“ decision is an effort to seek that solution.

The skirmished leading up to and during the „War of the Courts“ took forms reflecting the different courts’ basic outlook. The Constitutional Court criticized the ordinary courts for not submitting references in obvious cases, for omitting the direct application of human rights conventions, for neglecting to make constitutionally conforming interpretations or to apply provisions in light of the Constitution. In other words, ordinary courts failed to use reference procedure when they should have and failed to decide in conformity with the Constitution so as to avert eventual Constitutional Court intervention in the context of a constitutional complaint proceeding. Ordinary courts on the other hand objected that the Constitutional Court had no cassational jurisdiction over them period, that it usurped their role by intervening in issues of statutory interpretation. What ordinary courts proposed as a solution was as follows: they denied the duty to interpret in light of the Constitution, emphasizing they are bound by statutes and that the Constitutional Court can (and should) intervene only if the applied statute is constitutionally defective. Accordingly, as a means of rejecting the Constitutional Court complaint jurisprudence, the Supreme Court hit upon a novel solution - if the Constitutional Court sees a constitutional problem with out interpretation of a particular statutory provision, we reject the intervention and submit a reference with regard to that provision - if you see this provision as problematic, then annul it and force the Parliament to revise it. The Constitutional Court accepted this vyzvu once (in the 24 hours case), but then resoundingly rejected it February 1999, declaring in no uncertain terms that ordinary courts must conform their interpretation to constitutional requirements, moreover as they are interpreted by the Constitutional Court.

How to make this bitter pill a bit sweeter. One of the most stinging aspects of the resolution of the „War of the Courts“ is that ordinary courts (especially the Supreme Court) feel a certain humiliation and threat of subordination to the Constitutional Court. After all, in some high publicity/attention matters, ordinary courts (especially when the decision was by the Supreme Court) gave their considered views as to what the law was and requires, and the Constitutional Court rebuked them, making them look bad in a double sense, legally incompetent and subordinated (how is it that the Supreme Court is not the „supreme“ court). One way to lessen this problem was by the Eliška Wagnerová, Chief Justice f the Supreme Court, that cassational quashings be returned to a large senate [one answer to the fact that procedural laws make no special provision for the eventuality that an ordinary court ruling make be quashed by the Constitutional Court, hence there are no rules for how the ordinary court is meant to proceed on remand], which if it still adheres to its original position can then request the Constitutional court Plenum to reconsider (with the assumption if must respect the Plenum’s view, if it goes against them). This attempt is a step in the right direction, but runs up against the problem that Constitutional Court decisions are res judicata, binding on all persons under Article 89(2), so that no appeal or request for rehearing is possible. Also this ping-pong simply cannot reflect well on the prestige and public standing of either court system. Hence, one possible alternative is to press the ordinary courts to that, if they wish to avert the humiliation of being quashed, they have the option to bring the issue to the Constitutional Court’s attention prior to taking a binding and final decision on the matter (hence a position it would feel the need to defend with its institutional prestige). This way
ordinary courts can defer to the Constitutional court without it seeming that they are subordinate.
Issue of the Constitutional Court Defining Its Own Jurisdiction

Since the CC power to decide this case was not found in the ZUS, rather the ZUS can most likely be interpreted as not permitting it, the CC had to find some other basis for its jurisdiction, which it did by direct application of Article 95.2, the constitutional provision permitting references by ordinary courts. It declared as a general matter that, unless it provides otherwise, the Constitution is directly applicable. In addition, the jurisdiction of the Constitutional Court encompasses any power entrusted to it by the Constitution at any place in the text. It went on to say that this means not only Article 87, which contains the bulk of its powers, but also Article 95.2. By making these declarations, the Court opened up a can of worms. It is unclear whether the court meant to say that Article 95.2 was the only other place in the Constitution where an additional power is mentioned or whether there may not be others. First, its statement about direct application as regards its jurisdiction is problematic. For one thing, Article 88.1 seems to require a statute governing procedure, which could lead to an interpretation analogous to that given to Article III of the US Constitution, that the grant of jurisdiction to the courts requires in addition an implementing statute. Article 88.1 provides as follows: The question then arises whether Parliament is granted an implicit authority to refuse to create procedural means by which the Constitutional Court can exercise the jurisdictional grants enumerated in Article 87. In any case, Parliament has not done that. For the most part, those jurisdictional grants have been implemented in full, although there are certain grants where the ZUS seems to grant more limited power than provided for in the Constitution (e.g., regarding decisions of international courts). One might conceive of the decision to repeal some as a means of trimming the Court’s wings, but that seems hardly likely as it would clearly be seen as a blatant political move. In that context, Article 88.1 can also be interpreted not as granted power to restrict the Court’s jurisdiction, but only to give Parliament the authority to lay down detailed procedures. Does the Constitutional Court see its direct applicability argument as a way around that possibility? If the Parliament should at some point revoke a procedure, could the Court rely directly on the Constitution, or its direct applicability argument, for its jurisdiction? This approach clearly entails some risks of unwarranted aggrandizement. If one considers Article 83, it alone is sufficient to make the point. It would give the Court an open-ended jurisdictional grant to ensure constitutionalism. More likely candidates are Articles 4 and 10, which could be interpreted as permitting the Court to assume jurisdiction over cases involving basic rights or treaties concerning fundamental rights. It is an intriguing question, but these matters are already amply covered by the constitutional complaint procedure, so the resort to these two provisions as possible additional textual grants of jurisdiction seems unlikely.

It is significant that Article 88 provides that the Constitutional Court is bound by its procedural statute, which suggests it should not disregard admissibility requirements and that it is not permitted to act outside of it.

I do not believe the Court has some intention to head in that direction in the future. There is no reason to suspect Parliament would cut back on its procedural possibilities and in fact this decision was most surprising in that a court which is rather wedded to procedure and strict adherence to them departed precipitously from that tendency. I believe the explanation must be looked for elsewhere. The Court will not become wildly activist loosed from its mooring provided by its jurisdictional statute.

In regard to this last category, its jurisdiction concerning the interpretation of its own jurisdiction, powers and place within the judiciary and constitutional framework, the Court
made a highly significant decision in February, 2001. The case was one of incidental review in which an ordinary court referred to it a statutory provision for determination of its constitutionality. Although all Justices seemed in agreement that the provision was in conformity with the Constitution, they came into sharp conflict as to the issue of admissibility. In this case, the

It seems like a straightforward (open and shut) case that, moreover, concerns a fairly insignificant matter (minor fines for black riders). At the same time, in order to decide it, the US went to great lengths and made a questionable, perhaps even risky (inviting risks) decision concerning its competence to decide (admissibility). This leads one to ponder why it would do so, and leads one to consider that