2005/07/14 - PL. ÚS 34/04: JUDGES´SALARIES

HEADNOTES

Regarding the question of constitutionality of subsequent statutory withdrawal of part of judges' salaries, which was given a statutory entitlement before that measure was passed, lets us derive these fundamental general theses:
- evaluation of the constitutionality of salary limitations regarding judges for a specific period of the year falls within the scope defined by the principle of judicial independence,
- the constitutional position of judges on one side and representatives of the legislative and executive branch, especially the state administration, on the other side, is differentiated in view of the principle of separation of powers and the principle of judicial independence, which also gives rise to a different scope of discretion for the legislature for salary limitations regarding judges in comparison with the scope of discretion for such limitations in other areas of the public sphere,
- interference in the material security of judges guaranteed by law may not be an expression of arbitrariness by the legislature, but must be, based on the principle of proportionality, justified by extraordinary circumstances, e.g. by the state's difficult financial situation, and even if this condition is met account must be taken of the different function of judges and that of representatives of the legislative and executive branches, especially the state administration; such interference may not create grounds for concerns that it may limit the dignity of judges), or that it may be an expression of constitutionally unacceptable pressure by the legislative and executive branches on the judicial branch.

The principle of an independent judiciary is one of the essential features of a democratic law-based state (Art. 9 par. 2 of the Constitution). The requirement for an independent justice system stems from two sources: the neutrality of judges, as a guarantee of a just, impartial and objective trial and the ensuring of individuals' rights and freedoms by a judge separated from political power. Judicial independence is guaranteed by guarantees of a special legal position (which must include that they can not be demoted, can not be recalled, and enjoy immunity), also by guarantees of organizational and functional independence from bodies representing the legislative and in particular the executive branch, as well as separation of the judiciary from the legislative and executive branches (in particular by applying the principle of incompatibility). In terms of content, judicial independence is then ensured by the judges being bound only by the law, i.e. ruling out any elements of subordination in judicial decision making. The Constitutional Court has already comprehensively considered the basic components of the principle of judicial independence in judgment file no. Pl. US 7/02.

Arbitrary interference by the legislature in the area of material security of judges, and within that framework also salary limitations/restrictions, must be subordinated in the framework protected by the principle of judicial independence for two reasons.

The independence of judges is, first of all, conditioned on their moral integrity and professional level, but it is also tied with their appropriate material security.

The second reason for subordinating the band on arbitrary interference in the material security of judges (salary restrictions) in the framework of the principle of judicial independence is to rule out the possibility, of pressure by the legislative or executive branch on judicial decision-making. In other words, to rule out arbitrary interference in the material security of judges as a possible form of "penalization" of judges by the legislative and the executive, and thus also rule out forms of pressure on their decision-making.

CZECH REPUBLIC
CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of the Chairman Pavel Rychetský, judge Stanislav Balík, František Duchoň, Vojen Güttler, Pavel Holländer, Ivana Janů, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická decided on 14 July 2005 on a petition from the Municipal Court in Brno seeking the annulment of § 2 in relation to § 1 let. h) of Act no. 425/2002 Coll., which, for 2003, provides an extraordinary measure for determining the level of salaries and certain reimbursements of expenses related to the exercise of the office of representatives of state authority and certain state bodies, judges, and state prosecutors, and which provides for these persons the level of additional salaries for the first and second halves of the year 2003, "in relation to judges of district, regional and high courts, the Supreme Court, and the Supreme Administrative Court," with the participation of 1) the Municipal Court in Brno, 2) the Chamber of Deputies of the Parliament of the Czech Republic, 3) the Senate of the Parliament of the Czech Republic, as parties to the proceedings, as follows:

As of the day this judgment is promulgated in the Collection of Laws, § 2 of Act no. 425/2002 Coll. is annulled insofar as it concerns a judge of a district, regional and high court, the Supreme Court, or the Supreme Administrative Court [§ 1 let. h) of Act no. 425/2002 Coll.].

REASONING

I.

On 9 July 2004 the Constitutional Court received a petition from the Municipal Court in Brno (the "petitioner"), represented by Panel Chairwoman Mgr. D. D., seeking the annulment of the part of Act no. 425/2002 Coll., which, for the year 2003, provides an extraordinary measure for determining the level of salaries and certain reimbursements of expenses related to the exercise of the office of representatives of state authority and certain state bodies, judges, and state prosecutors, and which provides for these persons the level of additional salaries for the first and second halves of the year 2003 ("Act no. 425/2002 Coll."). The petitioner requests "that the Constitutional Court of the CR, by judgment, decide to annul the part of Act no. 425/2002 Coll. concerning one half of additional salaries for the first and second halves of the year 2003 in relation to judges of district, regional and high courts, the Supreme Court, and the Supreme Administrative Court [§ 2 in relation to § 1 let. h) of Act no. 425/2002 Coll.]".

The petition was filed under Art. 95 par. 2 of the Constitution and under provisions of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") in connection with the decision-making activity of the Municipal Court in Brno. The Municipal Court is conducting civil proceedings, file no. 30 C 67/2004 on a complaint by JUDr. D. S., judge of the Municipal Court in Brno, in which the plaintiff seeks from the defendant, the Czech Republic and the Municipal Court in Brno, payment of CZK 43,200, because, as a result of the passage of Act no. 425/2002 Coll., he was not paid two halves of additional salaries for the first and second halves of the year 2003. The petitioner, without issuing a decision to suspend the civil proceedings [which it should have done under § 109 par. 1 let. c) of the CPC], filed with the Constitutional Court a petition to annul the abovementioned provisions of Act no. 425/2002 Coll., because under Art. 95 par. 2 of the Constitution it concluded that these provisions, which are to be used in resolving the matter, are "inconsistent with the right of a judge to have his judicial independence materially secured," which arises from Art. 1 par. 1 in connection with Art. 82 par. 1 of the Constitution and Art. 1 of the Charter of Fundamental Rights and Freedoms (the "Charter").

In the reasoning of its petition, the petitioner extensively reproduces the arguments used by the Constitutional Court in judgment file no. Pl. US 11/02 of 11 June 2003, which annulled part of Act no. 416/2001 Coll., on the withdrawal of additional salary for the second half of the year 2001 and setting the amount of additional salary for the first and second halves of the year 2002 to representatives of state authority, judges, state prosecutors, members of the presidium of the Securities Commission, representatives of the Ombudsman, and members of the Banking Council of the Czech National Bank. The petitioner is of the opinion that the same arguments expression in Constitutional Court judgment file no. Pl. US 11/02, apply to support the present petition, concerning Act no. 425/2002 Coll.

The petitioner also states that the legislature has impermissibly interfered in judicial interference repeatedly in recent years, which it documents with the following
- Act no. 427/2003 Coll. withdrew half of the additional salary for judges for the first and second halves of the years 2004, 2005 and 2006, and the same Act led to "freezing"

salaries, because in these years the salary basis reached as of 31 December 2003 was used;
- Act no. 420/2002 Coll., with effect as of 1 January 2003, shortened the period during which judges are paid while temporarily unable to work, from the original six months to 20 working days;
- Act no. 425/2002 Coll. provided in § 1 that for determining the salary and other reimbursement of expenses related to performance of the office of a judge in the year 2003 the salary basis reached as of 31 December 2002 would be used, which, however, as a result of amendment of the legal framework for pay grades and a personal supplemental payment, made for employees of ministries, did not increase, although in the normal course of events such an increase should have been made.

The petitioner criticizes the legislature on the grounds that with these pay changes it does not observe the goal declared by the government of “preserving a comparable position of individual groups” of persons, i.e. state employees, representatives of state authority, and judges, expressed in the background report to the draft of Act no. 425/2002 Coll. The comparable position is allegedly violated by the following measures, in particular:
- amendment of government directive no. 253/1992 Coll., implemented by government directive no. 582/2002 Coll., which, with effect as of 1 January 2003, increased the pay scale for certain employees of state administration bodies;
- amendment of government directive no. 251/1992 Coll., implemented by government directive no. 583/2002 Coll., which, with effect as of 1 January 2003 increased the pay scale for certain employees of budgetary and other organizations;
- amendment of government directive no. 79/1994 Coll., implemented by government directive no.. 584/2002 Coll., which, with effect as of 1 January 2003 increased the pay scale for employees of the armed forces, security corps and services, customs administration bodies, members of fire brigades, and employees of certain other organizations;
- passing Act no. 361/2003 Coll., which is supposed to increase the pay of members of security forces in the future.

The petitioner disputes the hypothetical objection that the additional salary of judges is, by its nature, only a kind of bonus, paid twice a year in addition to the judge’s ordinary monthly salary, the withdrawal of which can not be considered a restriction on compensation for work. In the petitioner’s opinion, when evaluating the question of materially securing judicial independence, it is necessary to take into account the entire amount of a judge’s statutorily guaranteed annual income, which must include additional salary for the first and second halves of the calendar year, regulated in § 4 of Act no. 236/1995 Coll., on the Pay and Other Compensation Connected with the Performance of the Office of Representatives of State Authority and Some State Bodies and Judges, as amended by later regulations (“Act no. 236/1995 Coll.”).

The petitioner concludes that materially securing judicial independence is one of the guarantees of impartial and just decision making on the rights and legally protected interests of persons. Therefore, it believes that withdrawing half of the additional salary to judges for the first and second halves of the year 2003 is inconsistent with the concept

of a democratic law-based stated, expressed in Art. 1 par. 1 of the Constitution, endangers judicial independence guaranteed in Art. 82 par. 1 of the Constitution, and violates the equality of rights enshrined in Art. 1 of the Charter.

II.

The Constitutional Court requested a position statement on the petition from the Chamber of Deputies of the Parliament of the Czech Republic (the “Chamber of Deputies”), from the Senate of the Parliament of the Czech Republic (the “Senate”) and from the Minister of Justice.

The Chairman of the Chamber of Deputies, PhDr. Lubomír Zaorálek, in the statement of 27 August 2004 ref. no. 8439/04 stated that the Chamber of Deputies, when passing Act no. 425/2002 Coll., believed that not paying additional salary to judges is not inconsistent with the constitutional order and can not endanger the independence of judges, because this is not surprising or deep interference in their material security. He leaves it to the Constitutional Court to evaluate the constitutionality of the Act.

The Chairman of the Senate, doc. JUDr. P. P., in the statement of 8 September 2004, ref. no. 9654/04, states that the Senate has already several times given its opinion on the merits of the matter, i.e. the nature of additional salary in relation to the material security of judges as one of the aspects of the constitutional principle of judicial independence, e.g. in the matter conducted at the Constitutional Court as file no. Pl. US 18/99, and he now refers to those statements.

(Constitutional Court note: The matter under file no. Pl. US 18/99, to which the Chairman of the Senate refers contains the opinion of the then chairwoman of the Senate, PhDr. L. B., ref. no. 14781/99, sent to the Constitutional Court in connection with the petition to annul Act no. 287/1997 Coll. The statement says that the Senate does not doubt that the principle of judicial independence includes a number of aspects, which can also include material security of judges. However, it is appropriate to point out that this material security is realized primarily in the form of a regular monthly salary, its amount and the conditions for providing it, and no restriction affected that monetary performance. Under the legal framework, additional salary is a one-time financial payment provided under the specified conditions twice a year, and the conditions themselves for the entitlement, one of them being the that the judge continues to be employed as of the last day of the calendar half-year, indicate that this financial payment can hardly be considered material security for judges, the reduction or withdrawal of which could violate the principle of judicial independence.)

In the present statement of 8 September 2004, ref. no. 9654/04, the Chairman of the Senate focuses primarily on the formal aspect of the matter. He expresses doubts concerning the construction of the proposed judgment in the petition submitted by the

petitioner to the Constitutional Court, because it is not clear from the proposed judgment which provision of the Act is actually proposed to be annulled. In the opinion of the Chairman of the Senate the petitioner's request that the Constitutional Court annul the part of the Act "in relation to judges of district, regional and high courts, the Supreme Court, and the Supreme Administrative Court [§ 2 in relation to § 1 let. h) of Act no. 425/2002 Coll.]," is not feasible. If it granted the petition, the Constitutional Court, as a so-called "negative legislature" could not derogate the contested § 2 of the Act only in relation to the group of judges, and leave it in effect in relation to other groups of persons. If the entire § 2 were annulled, the consequences of the annulment would apply to all persons specified in § 1, which would impermissibly deviate from the scope and content of the filed petition. Similarly, in the opinion of the Chairman of the Senate, it is also not possible to annul § 1 let. h), which applies only to judges, but the consequences of the annulment would apply, beyond the framework of the petition, also to the area of determining the level of their salary basis.

Therefore, in the opinion of the Chairman of the Senate, there are doubts about whether the petition concerns "individual provisions of a statute," and thus whether it meets the condition contained in article 87 par. 1 let. a) of the Constitution, so that the Constitutional Court could discuss it on the merits. The statement points to the Constitutional Court's settled case law (e.g. the decision in the matter file no. Pl. US 16/94), which indicates that the court is bound in its decision making by the scope and content of the proposed judgment; it can not exceed those bounds in its decision, just as it can not intervene in the adjudicated statutory text otherwise than by a verdict of annulment.

The Deputy Chairman of the government of the Czech Republic and the Minister of Justice, JUDr. P. N., in his statement of 22 September 2004, ref. no. 562/2004-PERS-SO/2, primarily states that he considers the situation where the entitlements of judges are repeatedly limited by special laws and there are subsequent proceedings on the constitutionality of these laws completely unacceptable. In his opinion this situation has a negative effect on the society-wide perception of the judicial branch and the functioning of the separation of powers, because it evokes an undesirable impression of consistent competition between the judicial, legislative and executive branches about the level of compensation for performance of offices. The Minister of Justice considers the fundamental question, which he leaves to the Constitutional Court to resolve, whether a judge's income level as originally set by statute may or may not be subsequently reduced, or under what circumstances (in particular in relation to changes in the state budget) such reduction may take place. The Minister does not agree with the petitioner's arguments that limiting the level of additional salary in 2003 resulted in impermissible leveling of the position of judges and other groups who receive compensation from the state budget. He points out that this statutory framework arose out of the objective reason that the state budget was in an unfavorable condition. While the level of additional salary was limited in 2003 to an equal extent for all groups of persons compensated from the state budget, the differentiation arising from various levels of monthly salary and other compensation related to performance of office remained unaffected.

The Minister of justice also does not agree with the petitioner's claim that this statutory provision interferes in judicial independence. In his opinion, material security is only one of the supporting conditions which create an environment for the principle of judicial independence, and there is not a direct connection between material security and the essence of that principle. The Minister considers unacceptable the opinion that the degree of a judge's independence is, regardless of any existing objective circumstances, directly dependent on the level of material security. He also states that the level of material security must reflect the general real economic situation of the state in which the judiciary functions as a public service.

In the conclusion of his statement the Minister proposes that the Constitutional Court reject the petition to annul part of Act no. 425/2002 Coll. He states the opinion that the legislature should in future resolve the question which is the subject of this petition by removing from the payment system the institution of additional salary, and compensating it by increasing the monthly salary.

III.

The legal issues and all factual circumstances of the case were sufficiently clear from the submitted documents, and because no further clarification of the matter could be expected from a hearing, the Constitutional Court waived a hearing with the consent of all the parties, pursuant to § 44 par. 2 of the Act on the Constitutional Court.

IV.

The filed petition concerns these provisions of Act no. 425/2002 Coll.:
"§ 1
For determining the salary and certain reimbursements of expenses related to the performance of the office of
a) a deputy and senator of the Parliament,
b) a member of the government,
c) the president of the republic,
d) a judge of the Constitutional Court,
e) a member, vice president and president of the Supreme Audit Office,
f) a member, Deputy Chairman and Chairman of the Council for Radio and Television Broadcasting,
g) the director of the Security Information Service,
h) a judge of a district, regional and high court, the Supreme Court, or the Supreme Administrative Court,
i) the Ombudsman and the Ombudsman's representative,
j) the Chairman of the Securities Commission and a member of the presidium of the Securities Commission,
k) the Chairman of the Office for Protection of Personal Data and an inspector of the Office for Protection of Personal Data,

l) a state prosecutor, and
m) the director of the Office for Representing the State in Property Matters and employees of the Office for Representing the State in Property Matters
the salary basis in the year 2003 shall be that reached as of 31 December 2002. As a result of amendment of the legal framework for pay scales and the personal supplemental payment implemented for employees of ministries, taking effect after 31 December 2002, the salary basis in the specified year is not increased.

§ 2
If, under a special legal regulation, the persons specified in § 1 are entitled to an additional salary, it shall be provided to them for the first and second halves of the year 2003 only in the amount of half of the amount to which they would otherwise be entitled."

The government presented the draft of this Act to the Chamber of Deputies on 10 September 2002 as part of the drafts of eight statutes whose purpose was to address the budget situation which arose after the catastrophic floods in August 2002. The government requested that all these drafts be discussed under conditions of legislative emergency, and they were so discussed by the Chamber of Deputies.

In the background report to the draft of this Act the government states that the changes in pay were aimed at saving expenses in the state budget, "...in connection with the economic situation resulting from the floods in August of this year." The background report estimates the total savings which the new regulations are supposed to bring at CZK 480-500 million; out of that, the savings from cutting back additional salaries is estimated at CZK 250 million (in addition, savings are expected by "freezing" the pay scale at the 2002 level and the further unspecified savings of other expenses, e.g. for covering expenditures derived from the salary basis level).

The Chamber of Deputies discussed the draft Act as Chamber of Deputies publication no. 46. On 11 September 2002 the draft was discussed by the guarantee Committee for Social Policy and Health Care, which recommended that it be approved. The plenary session of the Chamber of Deputies discussed the draft at its 5th session on 13 September 2002; out of 187 deputies present, 154 deputies voted to approve it, and no one voted against.

The draft Act was delivered to the Senate on 16 September 2002, where it was evaluated, as Senate publication no. 356 in two committees:
- the committee for economics, agriculture and transportation, whose resolution recommended that the Senate not consider the draft Act,
- the constitutional law committee, which, as the guarantee committee did not pass any resolution concerning the draft Act.

The Senate then discussed the draft Act at its 21st session on 19 September 2002 and passed a resolution in which it expressed its will not to consider the draft Act. Out of 49

senators present, 32 voted in favor of the resolution, and six were against.

After being signed by the president on 25 September 2002, the Act was published on 1 October 2002 in part 151 of the Collection of Laws as number 425/2002 Coll., and went into effect on the same day.

The Constitutional Court states that of Act no. 425/2002 Coll. was passed and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner. It determined that the contested Act was duly discussed and approved by the legislative assembly, signed by the appropriate constitutional officers, and promulgated in the Collection of Laws. Therefore, nothing prevented evaluating the contested provision of the Act in terms of its consistency with the constitutional order of the Czech Republic.

V.

The Constitutional Court has considered the issue of valid restrictions regarding judges in the form of withdrawal of "additional" salaries in a number of its decisions. A detailed summary of this case law is contained in Constitutional Court judgment file no. Pl. US 11/02. Despite this, as the Constitutional Court is repeatedly confronted with this problem, it has no choice but to repeat an outline of that summary.

In the derogative judgment file no. Pl. US 13/99 of 15 September 1999 the Constitutional Court annulled part of § 1 of Act no. 268/1998 Coll., on the withdrawal of additional salary for the second half of the year 1998 from representatives of state authority and some state bodies, judges, state prosecutors and members of the presidium of the Securities Commission, specifically the provision governing the withdrawal of additional salaries from judges for the second half of 1998. The key reason in the judgment was the argument based on the principle of judicial independence, into which the court also extended "aspects of a material nature." Another argument was the reference to the different position of judges on one side, and representatives of the legislative and executive branches, especially the state administration, on the other.

In its judgment of 3 July 2000, file no. Pl. US 18/99, the Constitutional Court denied the petition to annul parts of § 4a of Act no. 236/1995 Coll., as amended by Act no. 287/1997 Coll., regulating the withdrawal of additional salaries from judges for the second half of 1997. In that judgment too it emphasized that judicial independence is one of the fundamental democratic values, and that the material security of judges undoubtedly assists in ensuring it. it considered it important that other bodies of state power not interfere in the pay of judges, in any form, arbitrarily and repeatedly. However, in the adjudicated case the legislature's intervention did not show signs of arbitrariness. According to the Constitutional Court, in evaluating the constitutionality of the contested statutory provision it was not possible to disregard the difficult social and economic reality

in which the Czech Republic found itself in 1997.

On the same day, i.e. 3 July 2000, the Constitutional Court, in judgment file no. Pl. US 16/2000, also denied the petition to annul part of § 1 of Act no. 308/1999 Coll., on withdrawal of additional salaries for the second half of 1999 and for the second half of 2000 from representatives of state authority and some state bodies, judges, state prosecutors, and members of the presidium of the securities Commission, specifically the provision governing the withdrawal of additional salaries from judges for the second half of the year 1999 and of the year 2000. In doing so, it did not change the basic starting point for evaluating that problem. It emphasized that the judges' compensation should not be a moveable factor depending on the momentary ideas of one or another government. Therefore, it considered the withdrawal of "additional salaries" as an extraordinary act, which can be justified only for serious reasons, and it consider the effect of the state's financial problems to be such reasons, and only in connection with the complex of implemented savings measures concerning salaries in the entire sphere of state representatives and employees.

Finally on 11 June 2003 the Constitutional Court, in judgment file no. Pl. US 11/02, annulled part of § 1 of Act no. 416/2001 Coll., on the withdrawal of additional salaries for the second half of the year 2001 and setting the amount of additional salaries for the first and second halves of the year 2002 to representatives of state authority and certain state bodies, judges, state prosecutors, members of the presidium of the Securities Commission, representatives of the Ombudsman, and members of the Banking Council of the Czech National Bank, those regulating the withdrawal of additional salaries for judges for the second half of 2001 and reducing additional salaries for the first and second halves of 2002 to one half of the amount to which they would otherwise be entitled.

In the Constitutional Court's opinion, the adjudicated change in the statutory framework applying to judges' pay exceeded the constitutional limit for acceptance of the "extraordinariness" of the act which withdrew additional salaries from judges, as the court had defined that limit in previous decisions. It further stated that if, under quite extraordinary circumstances, one can give precedence to the principle of equality in the area of limitations in compensating state employees, constitutional officials and judges over the principle of comprehensively understood judicial independence, that relationship between the two principles does not apply generally as having been set once and for all in all circumstances. On the contrary, the compensation of judges, in the wider sense, should be a stable, non-reducible value, not an adjustable factor which one or another government calculates, e.g. because judges' salaries seem too high to it in comparison with the salaries of state employees, or in comparison with another professional group. In other words, if we can accept application of the principle of equality in the abovementioned sense as regards an exceptional, economically justified, reduction of everyone's salaries, we can not accept the equality of all the abovementioned groups (even as a target group) as regards the final salary level. Striving for such equality deviates from the category of constitutionality that concerns a political aim which has no support in the constitutionally understood principle of equality. The limits of this principle in a

substantive sense are found in the expression that “equal things may not arbitrarily be regulated unequally, although at the same time unequal things may not arbitrarily be regulated equally.” The principle of equality can not be understood as a leveling in results, but it must be interpreted as a guarantee of opportunities at the starting point. However, in the Constitutional Court’s opinion, the legislature evidently did not observe the principle of equality, thus interpreted, § 1 of Act no. 416/2001 Coll. In judgment file no. Pl. US 11/02 the Constitutional Court formulated a generalizing maxim under which the principle of equality in the area of limiting compensation to state employees, constitutional officials and judges can be given precedence over the principle of a comprehensively understood judicial independence under quite extraordinary circumstances, and it thus delineated space for constitutionally consistent limitations on compensation as regards judges.

From a comparative viewpoint, in the developed democracies of western Europe one can not find a case of salary limitation affecting judges; thus doctrine has also not been faced with this issue. Comparable situations appear only in the post-communist European countries.

This is illustrated by the extensive case law of the Constitutional Court of the Polish Republic on issues of the constitutionality of the legal framework of judges’ salaries (see, in particular, decision file no. P 1/94 of 8 November 1994, K 13/94 of 14 March 1995, P 1/95 of 11 September 1995, P 8/00 of 4 October 2000). In all these decisions the court considered the constitutionality of viewpoints for setting the level of judges’ salaries in terms of Art. 178 par. 2 of the Constitution of the Polish Republic, under which judges’ salaries must correspond to the dignity of their office and ensure fulfillment of their obligations.

In decision file no. K 12/03 of 18 February 2004, the Constitutional Court of the Polish Republic in evaluating the constitutionality of rates of increase in judges’ salaries (which were reduced, not retroactively) expressed two key theses in the context of pay limitations regarding judges: Under the first, if the state has budget difficulties judges’ salaries are to be protected from “excessive unfavorable fluctuation.” The second is the principle that it is impermissible to lower the pay of judges, which, according to the court, is “exceptionally strongly protected by the Constitution” (Art. 178 par. 2 of the Constitution of the Polish Republic). The only constitutionally acceptable exception to this principle is considered to be, under Art. 216 par. 5 of the Constitution of the Polish Republic, the case where public debt exceeds 3/5 of the annual national product.

The outline of the Constitutional Court’s case law, as well as the comparative illustration using the case law of the Constitutional Court of the Polish Republic regarding the question of constitutionality of subsequent statutory withdrawal of part of judges’ salaries, which was given a statutory entitlement before that measure was passed, lets us derive these fundamental general theses:
- evaluation of the constitutionality of salary limitations regarding judges for a specific period of the year falls within the scope defined by the principle of judicial independence,

- the constitutional position of judges on one side and representatives of the legislative and executive branch, especially the state administration, on the other side, is differentiated in view of the principle of separation of powers and the principle of judicial independence, which also gives rise to a different scope of discretion for the legislature for salary limitations regarding judges in comparison with the scope of discretion for such limitations in other areas of the public sphere,
- interference in the material security of judges guaranteed by law may not be an expression of arbitrariness by the legislature, but must be, based on the principle of proportionality, justified by extraordinary circumstances, e.g. by the state's difficult financial situation, and even if this condition is met account must be taken of the different function of judges and that of representatives of the legislative and executive branches, especially the state administration; such interference may not create grounds for concerns that it may limit the dignity of judges (see recommendation of the Committee of Ministers of the Council of Europe no. R (94) 12 of 13 October 1994), or that it may be an expression of constitutionally unacceptable pressure by the legislative and executive branches on the judicial branch.

The principle of an independent judiciary is one of the essential features of a democratic law-based state (Art. 9 par. 2 of the Constitution). The requirement for an independent justice system stems from two sources: the neutrality of judges, as a guarantee of a just, impartial and objective trial and the ensuring of individuals' rights and freedoms by a judge separated from political power. Judicial independence is guaranteed by guarantees of a special legal position (which must include that they can not be demoted, can not be recalled, and enjoy immunity), also by guarantees of organizational and functional independence from bodies representing the legislative and in particular the executive branch, as well as separation of the judiciary from the legislative and executive branches (in particular by applying the principle of incompatibility). In terms of content, judicial independence is then ensured by the judges being bound only by the law, i.e. ruling out any elements of subordination in judicial decision making. The Constitutional Court has already comprehensively considered the basic components of the principle of judicial independence in judgment file no. Pl. US 7/02.

Arbitrary interference by the legislature in the area of material security of judges, and within that framework also salary limitations/restrictions, must be subordinated in the framework protected by the principle of judicial independence for two reasons.

The independence of judges is, first of all, conditioned on their moral integrity and professional level, but it is also tied with their appropriate material security. This component of the principle of judicial independence was also established in the recommendation of the Committee of Ministers of the Council of Europe no. R (94) 12 of 13 October 1994 on the independence, effectiveness, and role of judges, according to which the "proper working conditions" of judges also include "ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities" (Principle III, point 1b). A similar maxim is also found in Art. 6.1 of the European Charter on the Status of Judges, passed by the participants of a multilateral

conference organized by the Council of Europe on 8 to 10 July 1998, under which judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

The second reason for subordinating the band on arbitrary interference in the material security of judges (salary restrictions) in the framework of the principle of judicial independence is to rule out the possibility, of pressure by the legislative or executive branch on judicial decision-making. In other words, to rule out arbitrary interference in the material security of judges as a possible form of "penalization" of judges by the legislative and the executive, and thus also rule out forms of pressure on their decision-making.

The Constitutional Court consistently applied the thus-analyzed viewpoints for evaluating the constitutionality of salary limitations regarding judges in judgment file no. Pl. US 11/02, in which it annulled part of § 1 of Act no. 416/2001 Coll., specifically the provision regulating the withdrawal of additional salaries from judges for the second half of 2001 and reducing the additional salaries for the first and second halves of 2002 to one half of the amount to which they would otherwise be entitled.

Similarly to all democratic constitutional courts the Constitutional Court of the Czech Republic also, for resolving a conflict of fundamental rights, or public values protected by the constitutional order, in proceedings to review a norm and in proceedings on constitutional complaints, applies the principle of proportionality (it first comprehensively analyzed it in a case of evaluating the constitutionality of maintaining the confidentiality of the personal data of witnesses in a criminal trial – Pl. US 4/94). The present matter involves conflict between, on the one side, the principle of judicial independence and the fundamental rights arising from the constitutional principle of equality, and on the other side of the public good, solidarity during an extraordinary event, and securing the funds to mitigate or remove its consequences.

Methodologically the principle of proportionality is based on three steps:

The first is evaluation of simple law from the point of view of suitability, which involves evaluating the selected normative measure in terms of the possible fulfillment of the aim pursued. If a given normative measure is not capable of achieving the aim pursued, or is not consistent with the declared aim, there is an expression of arbitrariness on the part of the legislature, which is considered inconsistent with the principle of a law-based state.

The second step in applying the principle of proportionality is evaluating simple law from the point of view of necessity, which entails analysis of the variety of possible normative measures in relation to the intended aim and their subsidiarity in terms of limiting

constitutionally protected values – a fundamental right or a public value. If the aim pursued by the legislature can be achieved by alternative normative means, then the constitutionally consistent one is the one which limits the constitutionally protected value to the smallest extent.

If, on the one hand, the evaluated simple law pursues the protection of a particular constitutionally protected value, on the other hand it limits another one; the third aspect of the principle of proportionality, balancing, is a methodology for weighing these conflicting constitutional values.

For deriving a conclusion in a case of conflict of fundamental rights, or the public good, as principles, in contrast to a case of conflict of norms of simple law, the Constitutional Court is guided by the optimization imperative, i.e. the postulate of minimizing the limitation of a fundamental right or freedom, or public good. It contains the maxim that if it is concluded that giving priority to one of two conflicting fundamental rights, or public values is justified, a necessary condition for the final decision is to apply all the possibilities to minimize interference in one of them. The optimization imperative can be normatively derived from Art. 4 par. 4 of the Charter, the fundamental rights and freedoms must be preserved in employing provisions concerning limitations on the fundamental rights and freedoms, and so, analogously, this must also be done if they are limited as a result of being in conflict.

Based on these aspects of constitutional evaluation of the given issue, we must state that the legislature did not meet the safeguards arising from the postulate of suitability, i.e. the relationship between the legal means applied and the legislature's aims.

The Minister of Labor and Social Affairs, Z. Š., summarized the intentions which led the legislature to pass Act no. 425/2002 Coll., in his speech at a meeting of the Chamber of Deputies of the Parliament of the Czech Republic on 13 September 2002 [during discussion of the government draft of the Act which provides for 2003 an extraordinary measure for determining the level of salaries and certain reimbursements of expenses related to the exercise of the office of representatives of state authority and certain state bodies, judges, and state prosecutors, and which provides for these persons the level of additional salaries for the first and second halves of the year 2003 (Chamber of Deputies publication 46)] as follows: "the submitted government draft contains one of the measures which are meant to bring necessary savings in the expenses in the state budget for 2003. In connection with the economic situation that arose as a consequence of floods in August of this year it was necessary to propose a second postponement of the implementation of a new, 16-grade pay system for public services and public administration employees, and reduce the amount of funds allocated for their pay increases by more than half. At present it will not be possible to give public services and public administration employees an additional salary in each half of 2003 in an amount corresponding to the components of their monthly salary, but, as in past years, only half of that amount. These necessary measures led to preparation of the submitted draft Act, which will freeze the pay of all representatives, senators, government ministers, judges, state prosecutors, and other

persons, at their 2002 levels. This will limit the further distancing of the pay level of these persons from the pay level of public services and public administration employees until the new method for setting the salary basis goes into effect, which will slow the rate of pay increases for state authority representatives and certain other persons starting in 2004 and will bring it in line with pay increases financed from public funds. At the same time, it is proposed that state authority representatives, just like public services and administration employees, be provided only half of the amount of additional salary, if they are entitled to it, in each half of 2003. In addition to being an expression of solidarity with the citizens stricken by the floods, passing the proposed regulation would represent a savings in budget expenses totaling ca. 480-500 million crowns."

Thus, according to the statement from its proponent, the purpose of Act no. 425/2002 Coll., was to ensure proportionality in the pay level of public administration and services employees and government authority representatives, certain state bodies, judges, and state prosecutors, and further, to demonstrate solidarity with citizens stricken by the floods, as well as to obtain funds for removing the consequences of the floods.

However, the government, as the proponent of the Act, cast doubt on the declared intentions of Act no. 425/2002 Coll., by increasing the pay scale for public sector employees with effect as of 1 January 2003 (government directives no. 582/2002 Coll., no. 583/2002 Coll., no. 584/2002 Coll., no. 330/2003 Coll.), as well as by the state budget passed for 2003. According to the appendix to the draft state budget for 2004, submitted by the government to the Chamber of Deputies, for employees in the central state administration bodies the actual amount of funds for salaries in 2002 was CZK 4,840,899,000, the 2003 budget was CZK 5,669,263,000, and the 2004 proposal was CZK 5,916,963,000 (table no. 9); in state organization the actual amount of funds for salaries in 2002 was CZK 8.,55,060,000, the 2003 budget was CZK 10,319,286,000, and the 2004 proposal was CZK 10,524,110,000 (table no. 10), in defense, security, customs and legal protection the actual amount of funds for salaries in 2002 was CZK 26,999,082,000, the 2003 budget was CZK 29,161,674,000, an the proposal for 2004 was CZK 30,156,796,000 (table no. 11), in the "other" state organization components the actual amount of funds for salaries in 2002 was CZK 11,406,195,000, the 2003 budget was CZK 12,545,862,000, and the proposal for 2004 was CZK 13,205,240,000 (table no. 12).

In these circumstances, it is difficult to accept the thesis of "necessary savings in funds expended for the salaries of public services and administration employees"; on the contrary, it must be said that the content of Act no. 425/2002 Coll. does not match its declared purpose. The violation of the principle of proportionality thus created must then be classified as an expression of arbitrariness on the part of the legislature, which is inconsistent with the principle of a law-based state (Art. 1 par. 1 of the Constitution).

The principle of necessity then gives rises to a maxim for the legislature, under which, if the aim pursued can be achieved by multiple normative means, the constitutional means is the one which limits the particular constitutionally protected value (fundamental right or

freedom, public good) to the smallest extent.

Solidarity in the case of extraordinary events (such as the floods in 2002) can be achieved through constitutional procedures, i.e. those which respect the fundamental rights and freedoms, especially the constitutional principle of equality. The same safeguards also apply for obtaining funds to mitigate or remove the consequences of such events.

The government attempted to implement a solution which would demonstrate solidarity and ensure the necessary funds, but simultaneously not violate the constitutional framework of protection of fundamental rights, and submitted to Parliament a draft Act which was to amend Act no. 587/1992 Coll., on Consumption Taxes, Act no. 588/1992 Coll., on Value Added Tax, and Act no. 586/1992 Coll., on Income Tax. According to the government's calculations, this draft, called the "floods tax package," would have increased state budget revenue in 2003 by CZK 10.7 billion, and that revenue was to be allocated for compensating flood damage. The government draft was discussed as Chamber of Deputies publication no. 38 at a session of the Chamber of Deputies on 13 September 2002, i.e. before discussion of the contested Act no. 425/2002 Coll., and the Chamber of Deputies rejected it.

Thus, the legislature's process also did not meet another of the components of the principle of proportionality, the principle of necessity, because, given the existence of more than one possible normative means for the intended aim, it did not respect their subsidiarity from the point of view of limiting a constitutionally protected value – the fundamental right arising from the constitutional principle of equality and constitutional protection of judicial independence.

Based on these reasons, as analyzed, the payment restriction on judges contained in § 1 let. h) and § 2 of Act no. 425/2002 Coll. must be considered inconsistent with Art. 1 par. 1 in connection with Art. 82 par. 1 of the Constitution, Art. 1 of the Charter and Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

VI.

Under § 2 of the cited Act: "If, under a special legal regulation, the persons specified in § 1 are entitled to an additional salary, it shall be provided to them for the first and second halves of the year 2003 only in the amount of half of the amount to which they would otherwise be entitled." Under § 1 let. h) of Act no. 425/2002 Coll. for determining the pay and certain reimbursement of expenses connected with exercise of the position of "a judge of a district, regional and high court, the Supreme Court, or the Supreme Administrative Court" in 2003 the salary basis reached as of 31 December 2002 shall be used; the cited § 1 contains letters a) to m).

Thus, the ratio decidendi of this judgment affects a defined circle of persons (judges), affected by § 2 of the Act in question, and that circle of persons is governed by a reference to another provision of the same Act, which also provides other rights, or obligations, for those persons. That reference is formulated generally, i.e. not only in relation to judges, but also others precisely defined subjects.

Thus, annulling the referring norm in full, i.e. the provision expressed in § 2 of Act 425/2002 Coll. by the words "§ 1" would also affect persons to whom the grounds for derogation do not apply. However, annulling the provision expressed in § 1 of Act 425/2002 Coll. by the words "h) a judge of a district, regional and high court, the Supreme Court, or the Supreme Administrative Court" would deviate from the scope of the subject matter of the proceedings, because it would be annulment of the regulation of the salary basis for judges.

In judgment file no. Pl. US 24/94, which was then followed by case law in proceedings on review of norms, the Constitutional Court defined the term "statutory provision" to mean any part of the text of a legal regulation with normative content, i.e. an expression containing linguistic means of any kind whose purpose is to express a legal norm or one of the components of its factual elements (e.g. the circle of subjects or situations), or its legal consequence (i.e. a legal obligations or penalty).

As already stated, § 1 of the Act in question contains letters a) to m), so these letters are also implicitly contained in the referring norm, contained in § 2 of the Act, insofar as it provides: "If, under a special legal regulation, the persons specified in § 1 are entitled to an additional salary, it shall be provided to them for the first and second halves of the year 2003 only in the amount of half of the amount to which they would otherwise be entitled."

Based on the foregoing, the Plenum of the Constitutional Court decided on derogation of the statutory provision in question, in the wording stated in the verdict of this judgment. That means, that the Constitutional Court judgment annuls in § 2 of Act 425/2002 Coll. the implicitly contained reference to § 1 let. h) of that Act.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 14 July 2005

Dissenting Opinion
of Constitutional Court judges Vojen Güttler, Jan Musil and Pavel Rychetský to judgment file no. Pl. US 34/04 of 14 July 2005

We do not agree with the verdict and part of the reasoning in the judgment of the Plenum of the Constitutional Court of 14 July 2005 file no. Pl. US 34/04, and we file a dissenting opinion to it pursuant to § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations. We believe that the petition from the Municipal Court in Brno to annul § 2 in relation to § 1 let. h) of Act no. 425/2002 Coll., should have been denied.

1. The mere fact that the legislature repeatedly (in recent years annually) intervened in the statutory framework of salaries for judges and executive branch representatives testifies to the instability and incompleteness of the then-existing legal framework. This situation evoked undesirable conflicts, led to unnecessary court disputes, and to the filing of repeated petitions to the Constitutional Court to annul laws. It is undesirable for the legislature to function in such a way, and it is appropriate to criticize this.

2. Generally we agree with the opinion that the constitutional principle of judicial independence, stated in article 82 par. 1 of the Constitution, is a very important attribute of a law-based state, and that this principle also includes the essential aspect of appropriate material remuneration of the judicial profession. It is certainly desirable for an adequate level and stability of a judge's pay to create defenses against potential influencing of judicial decision making both by private persons and, especially, by the executive and legislative branches. Judges' salaries may not become subject to any sort of manipulation which would threaten the independence of the judicial branch. Salary adjustments may not be the subject of pressure on a judge, and may not be arbitrary or unjustified.

3. However, one can not derive from the constitutional principle of judicial independence an absolute imperative for judges' nominal or real salaries to not be reduced under any circumstances whatsoever. However desirable it is for judges' salaries to be stable, it must be admitted that under quite extraordinary circumstances it is possible, by statutory means, to temporary withdraw or reduce part of the salary compensation of state representatives, including judges, if it can be justified on the basis of serious, reasonable, and socially acceptable grounds. Long historical experience shows that the growth of a state's economy, and the development of state budgets which are dependent on it, and from which judges' salaries are derived, is not completely stable, but is subject to exceptional fluctuations, which force exceptional savings measures. These fluctuations are influenced both by social and economic factors and by natural factors, which can not be influenced by human activity (natural catastrophes, and so on).

As the Constitutional Court has also repeatedly said (judgment file no. Pl. US 18/99, published as no. 320/2000 Coll.; judgment file no. Pl. US 16/2000, published as no.

321/2000 Coll.), judges also do not live in a social vacuum, and they share the fates of their social environment. The requirement for complete “inviolability” of judges’ salaries is illusory, and contrary to the elementary conditions of social reality.

We believe that in the case of the passage of Act no. 425/2002 Coll., which provided judges of district, regional and high courts, the Supreme Court and the Supreme Administrative Court additional salary for the first and second halves of 2003 of only half the amount to which they would otherwise be entitled, the conditions for taking away part of the additional salaries of judges had been met, because there were extraordinary circumstances which urgently required making savings in the state budget and thus obtaining funds to repair the damage caused by a natural disaster (the floods) which had no equal in the modern history of the Czech lands.

4. We do not agree that the contested statutory provision is unconstitutional interference in judicial independence. In our opinion judicial independence, as a principle of a democratic law-based state, is, first of all, conditioned on the moral integrity and professional level of judges, their special legal position (they can not be demoted, recalled, and enjoy immunity), as well as the guarantee of organization and functional independence from bodies of the legislative and executive branches.

In our opinion, the present Constitutional Court judgment overly exaggerates the material aspect (i.e. the inviolability of judges’ salaries) and assigns it excessive weight in the structure of components of judicial independence, which, as a result, devalues other, in our opinion far more essential, attributes of an independent judiciary.

5. In the situation in which the contested statutory provision was passed, absolutely no connection can be found between the enacted norm and an alleged threat to judicial independence.

The very judgment to which we are taking a dissenting opinion points out in the reasoning that judicial independence could be threatened by interference in the material security of judges if the interference were arbitrary and represented pressure by the legislative or executive branch on judges, and could influence their decision making and conduct when making legal findings. However, in this case nothing of that sort was actually determined. In our opinion the Constitutional Court can not classify the enacted statutory norm as “an expression of arbitrariness by the legislature” if in this case that is not based on indisputably determined facts.

6. When enacting the contested Act the legislature pursued a legitimate aim – to acquire funds for removing the extensive damage caused by a natural disaster, the floods of 2002, by making savings in state budget expenses. There are no facts from which one could conclude that this aim was only a pretense.

It is a completely indisputable fact that the floods in August 2002 affected a considerable part of the Czech Republic and that their scope was catastrophic, unequaled in the last centuries. For example, in the capital city of Prague the flow of water in the Vltava was measured as a "five hundred year" water level (see Hospodářské noviny of 20 July 2005). the total amount of flood damage in the Czech Republic exceeded 70 billion crowns. In this extraordinary situation it is completely understandable that the government and the parliament looked for savings measures, including in the socially sensitive area of salaries paid from public budgets. In these circumstances there can be no doubt about the need to pass savings measures.

One can justifiably say that the natural catastrophe brought the entire society and state authority into a situation of extreme emergency, where it was necessary to take quick and effective measures. It must be acknowledged that the executive and legislative branches had to find a suitable legislative solution very quickly, and that there was not enough time to look for a consensus on starting points. The state is also bound by legal regulations to take effective measure to deal with natural catastrophes. For example, under Act no. 12/2002 Coll., on State Assistance in Renewing a Territory Affected by a natural or Other Disaster, the state is required to ensure the removal of damage to state property and non-state property that serves to ensure the basic services in the territory. It was also necessary to find domestic funds and make savings in the state budget because that was required by conditions for the provision of foreign aid and foreign loans that were offered to the Czech Republic at the time (see, e.g., the background report to the government draft Act on the Czech Republic's acceptance of a framework loan from the European Investment bank in order to finance and remove flood damage from 2002, Chamber of Deputies publication no. 101). It would certainly be strange if the Czech Republic accepted foreign aid given as an expression of solidarity and did not try to find domestic funds by making savings in the state budget.

7. The government estimated the expect savings achieved by reducing the additional salaries of representatives of state power as a result of Act no. 425/2002 Coll., at CZK 250 million (of which, of course, only part came from judges' salaries). We consider the judges' share of salary savings measures in the entire sector of public budgets to be proportional in relation to other social groups of citizens and to the total amount of flood damage.

Act no. 425/2002 Coll. itself applied not only to judges, but also to other representatives of the state power, and certain state bodies and state prosecutors. It is appropriate to point out that together with the passage of the Act, the government, in its competence, issued several directives which decided that only half of the additional salaries for the first and second halves of 2003 would be provided for other groups of persons as well. These measures applied to all employees of state administration bodies, certain other bodies and municipalities, the employees of budget and certain other organizations, e.g. teachers and health care workers, employees of the armed forces, security forces and services, customs administration bodies, members of Fire Brigades, employees in public services and administration, and employees of certain other organizations. This was done by

government directives no. 582/2002 Coll., no. 583/2002 Coll., no. 584/2002 Coll. and no. 330/2003 Coll. Thus, these savings measures affected practically the entire sector of workers paid out of public budgets.

This is not changed at all by the objection raised by the petitioner and accepted in the Constitutional Court's judgment, that the abovementioned government directives as regards the cited categories of employees and members, along with taking away the additional salaries, also raised the pay scale, and this automatically compensated for the non-payment of additional salaries. The government justified the raising of the scale of pay grades with the need to improve the great under-compensation of workers in the public sectors, which, even after the changes made as of 1 January 2003, was not particularly high. As an By illustration, even after the increases under the cited government directives no. 582/2002 Coll., no. 583/2002 Coll. and no. 584/2002 Coll. the highest possible pay grade (in the highest class, 12, and the 12th grade, i.e. after more than 32 years of eligible work) was CZK 20,070 per month. Government directive no. 330/2003 Coll., which increased the pay scales of certain employees in public services and administration (especially as a result of increasing the number of pay classes from twelve to sixteen), did not go into effect until 1 January 2004, i.e. outside the relevant period to which the contested Act no. 425/2002 Coll. applies.

According to data from the Ministry of Justice, the average monthly salary of a judge (for all judges in the general courts) in 2002 was CZK 64,300 (see information made public in discussion in the Chamber of Deputies of the Parliament of the Czech Republic on 13 September 2002 during discussion of chamber of Deputies publication no. 43). The average monthly wage of a person in the Czech Republic in 2002 was CZK 15,866 (see data from the Czech Statistical Office on the webpage http://www.czso.cz). It is obvious from the cited statistical data that in the context of the Czech Republic at that time judges salaries were considerably above average, and it is absolutely indisputable that this marked difference between judges' salaries and the salaries of other professional groups was preserved even after Act no. 425/2002 Coll. was passed. Present statistical data on wage growth also testify that this differentiation has continued since the passage of the contested Act: in the first quarter of 2005 the average wage in the Czech Republic was CZK 17,678 (see data from the Czech Statistical Office on the webpage http://www.czso.cz), while the expected average monthly salary of a judge in 2005, according to data from the Ministry of Justice, was CZK 72,330 (see data published in the daily newspaper Právo on 15 June 2005).

Thus, the restrictions consisting of reducing by half the two additional salaries in 2003, i.e. by one fourteenth of total annual pay, could not be significant interference in the total annual income of judges, or an undesirable leveling of judges' pay in comparison with the pay of other groups of persons, such as could be interpreted as a threat to judicial independence. The interference in judges' salaries can not be considered disproportionate or arbitrary, let alone an interference which threatens the constitutional principle of judicial independence.

8. We are of the opinion that in such a situation the legislative regulation passed was one of the possible and legitimate methods for addressing a state of emergency. One can consider hypothetically whether the legislature could have achieved its aim by other means as well, e.g. by introducing a "flood tax" which would have distributed the burden of flood damage more evenly across wider levels of citizens. However, we can assume with high probability (as experience with passing any kind of tax laws shows), that this would have taken a very long time, whereas in the particular situation it was necessary to act immediately. In this specific situation it is unrealistic to require the legislature and executive to take only such legislative measures as would ensure absolutely equal distribution of the economic consequences of a natural disaster on every citizen of the state and which would find general agreement about all groups of the population. That would necessarily require long-term, minutely detailed calculation of all the economic consequences of the legislative changes, and thus also lengthen the legislative process. That kind of maximalistic requirement of a "just tax burden" can perhaps be addressed as part of long-term tax reform, but not in a legislative emergency. Moreover, such blanket taxing of the population (natural persons) would undoubtedly also affect the sizeable group of citizens who were stricken by the floods in 2002, as it would not be possible to successfully remove that group of people from the exceptional blanket taxation.

In our opinion the Constitutional Court is not authorized to speak on the suitability of a fiscal or tax solution, or on other economic or political alternatives which could have hypothetically provided an optimal solution to the given situation. The Constitutional Court is supposed to evaluate a contested statute only from the perspective of constitutionality, i.e., in a particular case, whether the implemented salary adjustments violated or endangered the principle of judicial independence; we believe that such unconstitutional interference did not take place.

9. We think that the Constitutional Court should, in its case law, also reflect "meta-legal," i.e. social and ethical principles for the functioning of the bodies of power in a democratic society. It is one of the generally recognized norms of social behavior in civilized countries all levels of the population participate, in solidarity, and proportionately in removing the consequences of natural catastrophes, and citizens are generally willing to take on no small sacrifices in such situations. That was also what happened in the case of the catastrophic floods in 2002, when the degree of civic solidarity, the extend of public financial contributions to help flood victims, etc., reached unusual proportions, as is well know from all publicly available sources of information; in the context of the catastrophic floods the savings measures met with public understanding and were accepted as unavoidable. As far as we know, no other professional group of public sector workers (with the exception of judges) did not raise any objections to wage saving measures at that time.

We believe that the authority and seriousness of the judiciary, and ultimately even the prestige of the democratic state, suffers if, in such an exceptional situation, judges are taken out of this social context. If the judiciary in a democratic society is to fulfill its role, it must enjoy a natural authority with the citizens, it must be organically anchored in

social structures, and must be positively accepted by the public. The judiciary is a public service; a judge has voluntarily decided to perform it, and by accepting the status he has also accepted the particular ethical norms of the judicial profession. Judges are rightly expected to have certain “above standard” civic values, which include the expectation that in a time of emergency caused by force majeure they will contribute their proportional personal share to overcoming social difficulties.

We consider it regrettable that the Constitutional Court did not take this opportunity to point out in its judgment that when the conflict of various social interests is weighed, account should also be taken of the principle of social solidarity, a justified requirement that a citizen will play a proportionate part in removing the tragic consequences of a heavy natural catastrophe, a requirement of loyalty by public officials (including judges) to the democratic state and to their fellow-citizens, and ultimately also a requirement of decency and elementary human sympathy with the victims afflicted by the natural disaster.

Brno, 14 July 2005

Dissenting Supplementary Opinion
of Judge Miloslav Výborný to the reasoning of judgment file no. Pl. US 34/04

The judgment’s reasoning closely analyzes the legal conclusions which the Constitutional Court reached in judgment Pl. US 11/02; I did not vote for that judgment, and published by dissenting opinion, together with other Constitutional Court judges (see Collection of Decisions vol. 30, no. 87).

Although I have no serious reason to retreat from my dissenting opinion at that time, I now voted in favor of the judgment granting the petition, primarily for the following reasons.

Judgment Pl. US 11/02 was passed despite the opinion of four dissenting judges and was duly published in the Collection of Laws on 2 July 2003, as no. 198/2003 Coll. It is quite clear from my dissenting opinion at that time that I had (and have) absolutely no doubts about that part of its substantial grounds, according to which “If the Constitutional Court itself, as a constitutional body, i.e. a body of public power, is not to commit the arbitrariness, the ban on which it is also subject to, because the Constitutional Court too, or especially it, is required to respect the framework of a constitutional state in which exercise of arbitrariness by bodies of public power is strictly forbidden, it must feel bound by its own decisions, which it can overcome through its case law only under certain conditions. This postulate can be characterized as an essential requirement of a democratic law-based state.” In the dissenting opinion written jointly with Judge Pavel Varvařovský I indicated as the fundamental reason for disagreement with the verdict of judgment Pl. US 11/02 the lack of grounds for abandoning the opinion stated by the

Constitutional Court in the same matter in the judgment published as no. 321/2000 Coll. In other words, the reason for my disagreement was the belief that conditions for changing the previous case law of the Constitutional Court had not been met; however, that was an opinion held by only a small minority of the Plenum of the Constitutional Court.

Given my full agreement with the abovementioned parts of the reasoning of that judgment, I could not now take a different position than that agreeing with the verdict of the judgment, precisely because in the adjudicated matter none of the alternatives under which the Constitutional Court could and would be permitted to depart, without being arbitrary, from its previous case law , i.e. from judgment Pl. US 11/02, as well as form judgment Pl. US 43/04. As in the dissenting supplemental opinion to the reasoning of judgment Pl. US 43/04, I state my conviction that although I did not agree with judgment Pl. US 11/02, I consider observing it to be a value which can not be denied. That opportunity did not arise, for reasons analyzed in the judgment, even from the existence of the catastrophic floods which afflicted the Czech Republic in 2002.

It is also not insignificant for me that, as a result of two judges not being appointed, the Constitutional Court decided on the submitted petition in an incomplete, i.e. only 13-member plenum. With the four dissenting opinions presented to the verdict of the judgment, my disagreement would lead to denying the petition, and thus to further splitting of the Constitutional Court's case law concerning the issue of judges' salaries despite the fact that the majority of judges of the Constitutional Court would hold the contrary opinion.

Dissenting Opinion
of judge Stanislav Balík

I voted to deny the petition, for these reasons:
1) In the dissenting opinions to the reasoning of judgments file no. Pl. US 43/04 and Pl. US 9/05, of 12 August 2005, I expressed by reservations to the repeated efforts of the legislature to take additional salaries from judges, and explained why I am convinced that the withdrawal of additional salaries, in and of itself, in the conditions at the time could not be an impulse which in any way affected the independence of judicial decision making. At the same time, I stated the opinion that I do not rule out the possibility that additional salaries could be removed for especially serious reasons under certain circumstances, and really on a one-time basis, in a constitutional manner.

2) The contested § 2 of Act no. 425/2002 Coll. was passed by the legislature precisely in circumstances which, in my opinion, do not rule out that its passage could be constitutional. I can not leave aside the ethical aspects, the requirement for high moral integrity of judges and the judicial profession, which can be summarized in the motto

“noblesse oblige.” A statement by the late philosopher, judge emeritus of the Constitutional Court, Vladimír Čermák has been handed down: “You will recognize a member of the elite only by his social performance, that is, by whether he is capable of sacrificing himself or sacrificing something, even if he already has property or education. The world is founded on sacrifices.” (Most recently quoted in: MF DNES, 4 August 2005, p. B16).

Weighing the aspects of the principle of proportionality, I considered this sentence to be the weightiest.