2006/09/27 - PL. ÚS 51/06: NON-PROFIT HOSPITALS

HEADNOTES

According to Art. 1 of the Constitution, the Czech Republic is a democratic law-based state. The Constitutional Court has already previously stated that the Czech Republic adheres to the principles not only of the formal, but also and above all of the material law-based state. The Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose. As stated above, one of the basic prerequisites for the functioning of a law-based state is the existence of internal harmony within its legal order. It is therefore also necessary that particular legal enactments be comprehensible and that foreseeable results follow from them.

The Constitutional Court emphasizes its consciousness of the fact that the rights to life and to health, such as they are laid down in Art. 6 para. 1 and Art. 31 of the Charter of Fundamental Rights and Basic Freedoms, are absolute fundamental rights and values and that it is necessary to weigh the right to self-government and the right to property precisely in relation to these absolute values.

In no case does the Constitutional Court call into doubt the right of the State, in view of its constitutional responsibility to secure the rights flowing from Art. 31 of the Charter, to select the instruments for securing these rights, as well as the instruments for the supervision and regulation of medical facilities providing health care, since it thereby pursues a legitimate aim. This right cannot be conceived of in absolute terms, however, that is, in the sense that, in the interest of securing it, all other rights and constitutionally protected values, thus, even the right to self-government and the right to the protection of property, would be eliminated entirely.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court Plenum, composed of its Chairman Pavel Rychetský and judges Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný and Eliška Wagnerová, decided on the petition of a group of Senators of Deputies of the Senate of the Parliament of the Czech Republic, legally represented by Prof. JUDr. A. G., CSc., proposing the annulment of § 34 para. 2, second sentence, § 34 para. 3, lit. a), § 34 para. 6, § 40 and the Annex to Act No. 245/2006 Coll., on Public Non-Profit Institutional Medical Facilities and on Amendments to Certain Acts, with the Assembly of Deputies and

the Senate of the Parliament of the Czech Republic participating as parties to the proceeding, as follows:

The provisions of § 34 para. 2, second sentence, § 34 para. 3, lit. a), § 34 para. 6, § 40 and the Annex to Act No. 245/2006 Coll., on Public Non-Profit Institutional Medical Facilities and on Amendments to Certain Acts, shall be annulled on the day this Judgment is announced.

REASONING

I. Summary of the Petition

1. On 4 July 2006 the Constitutional Court received a petition of a group of Senators of the Senate of the Parliament of the Czech Republic, legally represented by Prof. JUDr. A. G., CSc. (hereinafter „the petitioner“) in accordance with Art. 87 para. 1, lit. a) of the Constitution of the Czech Republic (hereinafter „Constitution“) and § 64 and foll. of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended (hereinafter „Act on the Constitutional Court“), proposing the annulment of § 34 para. 2, second sentence, § 34 para. 3, lit. a), § 34 para. 6, § 40 and the Annex to Act No. 245/2006 Coll., on Public Non-Profit Institutional Medical Facilities and on Amendments to Certain Acts (hereinafter „Act No. 245/2006 Coll.“).

2. In its petition, the petitioner stated that it does not contest Act No. 245/2006 Coll. in its entirety. It contests only the above-designated provisions which conflict with the constitutional order of the Czech Republic. In the petitioner’s view, the contested provisions are in conflict with Art. 11 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „the Charter“) and Art. 8 and Art. 101 of the Constitution, as it interferes, in a constitutionally impermissible manner, with the right to own property and with the constitutionally guaranteed right to self-government, that is, with the right of autonomous territorial units autonomously to administer their own affairs.

3. Regarding the petition proposing the annulment of § 34 para. 3, lit. a), § 40 and the Annex to Act No. 245/2006 Coll., the petitioner states that Act No. 245/2006 Coll. creates a „network of public non-profit institutional medical facilities“ (hereinafter „public medical facilities“) and it presupposes that this network will be formed in part by currently existing medical facilities (these are enumerated in the Annex to the Act) and in part by medical facilities that are newly emerging, which from their inception will already have the appropriate legal form in accordance with § 1 para. 1 of this Act. Thus, those medical facilities which are listed in the Annex to the Act will ex lege be directly placed into the network of public medical facilities. These are, specifically, medical facilities, whose founder is the State, alternatively the competent Ministry, further medical facilities which take the form of contributory organizations and whose founders are municipalities or regions, further are included here those medical facilities which are in the legal form of a commercial company (joint-stock companies and limited liability companies). Also the municipalities and regions will be the incorporators and

partners or shareholders of these medical facilities. The petitioner is of the view that, to the extent that title to individual medical facilities, including material property items, rights, and obligations which are connected with their existence, was transferred to the municipalities and regions by Act No. 157/2000 Coll., on the Passage of Title to certain Material Property Items, Rights, and Obligations from the Czech Republic to Regions, as subsequently amended (hereinafter „Act No. 157/2000 Coll.“), and Act No. 290/2002 Coll., on the Passage of Title to certain other Material Property Items, Rights, and Obligations of the Czech Republic to Regions and Municipalities, Civic Associations Operating in the Area of Physical Education and Sport and on Related Changes, and on the Amendment of Act No. 157/2000 Coll., as subsequently amended (hereinafter „Act No. 290/2002 Coll.“), and on the strength thereof, the municipalities and regions became the founders of the medical facilities, then these facilities were legally transformed from contributory organizations of the State, alternatively organizational components, into contributory organizations of the regions, alternatively organizational components of the regions and municipalities, the legal regime of which is, after the transfer was accomplished, governed by Act No. 250/2000 Coll., on the Budget Rules of the Territorial Budgets, as subsequently amended. In consequence of the contested provisions of Act No. 245/2006 Coll., however, territorial self-governing units were deprived of the possibility to decide on the existence and operation of those contributory organizations and organizational components. In contrast, the Ministry of Health became empowered to decide on the extent and types of health care which should be provided in these medical facilities (§ 33 of Act No. 245/2006 Coll.), moreover with the minimal opportunity for the founders, which in the future will continue to be the territorial self-governing units, to intervene into these affairs.

4. In the petitioner’s view Act No. 245/2006 Coll. in no way ensures that the medical facilities, alternatively their founders, will be reimbursed by the State the expenses of arranging for the activities which the Ministry will mandatorily ordain for them. This will result in an intrusion into the financial autonomy of the territorial self-governing units, which is guaranteed in Art. 101 para. 3 of the Constitution. It also results in an interference with their right to own property in the sense of Art. 11 of the Charter, as they will be prevented from deciding on the disposition of their property due to the fact that medical facilities must have to perform the tasks imposed upon them by statute and by decision of the Ministry. If they violate these duties, then it will be possible to impose fines of a significant amount, either upon the territorial self-governing units, as founders of the public medical facilities, or also directly upon the medical facilities, (cf. § 38 of Act No. 245/2006 Coll.). Although the intrusions referred to will occur on the basis of a statute, and it can be judged that they will also be in the public interest, however, the appropriate compensation will not be assured. In this connection the petitioner stated that Act No. 245/2006 Coll. will have impact not only on the functioning of contributory organizations and organizational units of the territorial self-governing units, but will also lead to an intrusion into the functioning of purely private-law subjects, that is, commercial companies which provide health care. In this connection the petitioner refers to the judgments of the Constitutional Court published in the Collection of Laws as No. 404/2002 Coll. and No. 211/2003 Coll.

5. The petitioner also stated that the State has assigned to the territorial self-governing units the obligation to manage the property of medical facilities and to fulfill the function of their founder even against the will of the territorial self-governing units mentioned in Act No. 157/2000 Coll. and Act No. 290/2002 Coll. It thereby renounced its own duty to provide citizens with free medical care on the basis of public insurance and transferred the burden of providing it to the territorial self-governing units. In adopting Act No. 245/2006 Coll. the State left this burden to the territorial self-governing units, however, it deprived them of the possibility independently to decide to what extent and under what conditions it would be provided [naturally while adhering to the conditions terms of Act No. 48/1997 Coll., on Public Health Insurance and on Amendments and Additions to certain Related Enactments, as subsequently amended (hereinafter „Act No. 48/1997 Coll.“)].

6. In the petitioner's view, the interference with purely private property is all the more emphatic in the case of § 40 paras. 5 and 6 of Act No. 245/2006 Coll., relating to the medical facilities providing health care which are in the legal form of a commercial companies. In this case the Act provides (§ 40 para. 5) that rights in property invested without payment into the limited liability company, which are listed in the Annex to the Act, pass without payment to the founder. No distinction is made with regard to who invested this property into the medical facility, under what conditions, or for what purpose. The Act also does not take into consideration that such property could, in the interim, have been assessed, so that the person who invested property into the limited liability company may in fact lose it potential gain from its assessment. Also § 40 para. 6 Act No. 245/2006 Coll. has the character of an impermissible intrusion upon acquired rights, as it establishes for the proprietors of limited liability companies which function in the capacity of medical facilities, the right to a settlement share in connection with the mandatory termination of their participation in the company. There is, however, no public interest in them losing their ownership interest in such companies, as medical facilities in the form of commercial companies can perform the tasks connected with health care delivery just as well, as they are doing at present. It does not even make a distinction on the basis of who the proprietor of such company is, whether they are only territorial self-governing units or other natural or legal persons. Those of the statute's measures are therefore in evident contradiction with the principle of proportionality, which requires that a proportionate relation be maintained between the objective pursued and the means selected. In the petitioner's view, there is no doubt that, in the given case, the means employed were manifestly inappropriate to the objective pursued, because health care would be provided even without the adoption of the contested provisions, which in fact result in the expropriation of private property.

7. The petitioner takes it as a given that health care of the inhabitants of a region, among other things, falls within the regions‘ competence. If § 34 para. 2, second sentence of Act No. 245/2006 Coll. places an obligation upon the regions that at least one public medical facility should be located in each district within its territory and if § 34 para. 6 of the cited Act places an obligation upon regions to supplement the network of public medical facilities, to the extent that municipalities or other founders do not do so, then it is evident that the supplementation of the network of public medical facilities will hinge exclusively

on the decision of the Ministry, which prescribes the requirements for the functioning of the network of medical facilities (§ 33 of Act No. 245/2006 Coll.)

8. The petitioner does not call into doubt the right of the State to form a network of medical facilities, however, in doing so it cannot intervene into the sphere of autonomous competence of territorial self-governing units and may not offend against their possibility to exercise their property rights in accordance with their own choice and autonomy.

9. The petitioner joined, its petition seeking the annulment of the contested provisions of Act No. 245/2006 Coll., with a proposal, pursuant to § 39 of the Act on the Constitutional Court, requesting that the petition be heard as a matter of priority, with the justification that, although the Act came into effect on the day it was promulgated, nonetheless the legal effects consisting in the fact that transformation of the medical facilities listed in the Annex to the Act into public medical facilities, will occur only following the expiry of the 180 day period running from the day this Act enters into force (§ 40 para. 1). Should the contested provisions be annulled only after the 180 day period has expired, then it would lack any significance whatsoever, since the effects foreseen in the Act would have already irreversibly taken place.

II. The Formal Prerequisites for Hearing the Petition and the Constitutionality of the Legislative Procedure

10. In conformity with § 68 para. 2 of the Act on the Constitutional Court, in proceedings on the annulment of statutes or other legal enactments, the Constitutional Court is obliged to adjudge whether Act No. 245/2006 Coll., whose individual provisions have been contested, whether it was adopted and issued constitutionally, within the confines of the powers set down in the Constitution, in the constitutionally prescribed manner, and whether the formal preconditions for the substantive adjudication of the petition have been satisfied.

11. In accordance with § 64 para. 1, lit. b) of the Act on the Constitutional Court, a group of at least 17 Senators is entitled to submit a petition, under Article 87 para. 1, lit. a) of the Constitution, proposing the annulment of an Act or individual provisions thereof. As the Constitutional Court ascertained from the submitted powers-of-attorney of 21 June 2006 and 20 July 2006, a group of 28 Senators altogether submitted the petition.

12. The Constitutional Court ascertained from the electronic library of the Assembly of Deputies of the Parliament of the Czech Republic, that a group of Deputies submitted the bill to the Assembly of Deputies on 2 November 2004. The bill was distributed to the Deputies on 4 November 2004 as Print No. 810/0. The bill was adopted on 8 February 2006 at the 53rd Session of the Assembly of Deputies by Resolution No. 2186, with 98 of the 169 Deputies present (with 85 constituting a majority), voting in favor of the bill.

13. The Constitutional Court ascertained from the electronic library of the Senate of the Parliament of the Czech Republic, that the Assembly of Deputies transmitted

the bill to the Senate on 14 February 2006. On 15 March 2006, the full Senate debated the bill at its 10th Session of its 5th Electoral Term and rejected the bill by its Resolution No. 364. 57 of the 68 Senators present voted for the resolution. On 21 April 2006, at its 55th Session, the Assembly of Deputies voted once again on the returned bill and adhered to its support for the original bill, as 107 of the 171 Deputies present (with 101 constituting the relevant majority) voted in favor of the bill.

14. On 21 April 2006 the Act was delivered to the President of the Republic for his signature. The President of the Republic declined to sign the Act, and on 5 May 2006 he returned it to the Assembly of Deputies.

15. On 23 May 2006 at its 56th Session the Assembly of Deputies voted on the Act returned by the President of the Republic and overrode the President's veto (Resolution No. 2469). On 31 May 2006 the Act was promulgated in part 79 of the Collection of Laws as No. 245/2006 Coll.

16. Constitutional Court has ascertained that the Parliament of the Czech Republic adopted Act No. 245/2006 Coll. by means of a constitutionally conforming legislative process and that it was signed by the competent constitutional officials, was duly promulgated in the Collection of Laws, and came into force on 31 May 2006.

III. Summary of the Positions of the Government and the President of the Republic, and of the Deputies' Debate

17. As the foundation for its decision, the Constitutional Court procured the stenographic record, resolutions and Assembly printed documents freely accessible on the Assembly of Deputies' and Senate's web sites, at www.psp.cz. and www.senat.cz, as well as the position of the President of the Republic, Václav Klaus, on his return of Act No. 245/2006 Coll., found on the web site, www.hrad.cz.

18. It is stated, in the 1 December 2004 Government Position No. 1197 on draft Act No. 245/2006 Coll., that the Government discussed and evaluated the draft Act at its 1 December 2004 meeting. Although it agreed with the starting points and conclusions of this draft Act, it drew attention to the fact, that it was neither a thoroughly elaborated and polished, nor a comprehensive, draft, and had numerous substantive and legislative deficiencies, in particular in the following respects:
- insufficient regulation of the management of public non-profit institutional medical facilities, which could result in a further escalation of wastefulness and inefficient drawing upon public funds;
- the network of medical facilities is not entirely clearly defined;
- it fails to respect the competence of regions in matters of ensuring health care within their respective territories;
- the legal arrangements relating to the establishment and termination of public non-profit institutional medical facilities are internally conflicting and unclear;
- the Government does not agree with the conclusion, stated in the Explanatory Report submitted with the bill, that the adoption of the bill would have an overall

neutral impact in terms of the state budget, as well as on the budgets of municipalities and regions.

19. In the statement of reasons given for his 5 May 2005 decision to return to the Assembly of Deputies of the Parliament of the Czech Republic the adopted bill, No. 245/2006 Coll., the President of the Republic, V. K., stated that the Czech health care services need a fundamental systemic change, and this bill did not usher in such changes. In its logic, the bill entails the abandonment of the principles upon which our entire society – health care services included – has progressed since November, 1989, that is, on respect for private property, for the plurality of ownership relations, for the free choice of doctors and health care facilities. In the form it takes, this bill destabilizes health care services, needlessly divides doctors and other health care professionals, sharpens the political atmosphere in the country, and causes patients, as well as the entire Czech society, anxiety. Moreover, it creates the false impression that the financial crisis in health care will be resolved by the fact that hospitals are „non-profit". The bill favors public non-profit institutional medical facilities and in essence creates pressure for other types of health care facilities to switch over into this form. In consequence it violates the rule enshrined in Art. 11 para. 1 of the Charter, which provides that each owner's property right shall have the same content and enjoy the same protection. The objective of this bill, however, is to create an advantageous environment for the existence and operation of hospitals solely of the public type, instead of creating a suitable environment for all forms of ownership.

20. The Constitutional Court has ascertained from the stenographic record, resolutions, and assembly prints that, in the course of the legislative process in the Assembly of Deputies of the Parliament of the Czech Republic, a whole host of proposed amendments to Act No. 245/2006 Coll. were drafted and sizeable number of Deputies took part in the debate, often in emotive speeches.

21. The Organizational Committee designated as its rapporteur, Deputy J. J., which has from the beginning drawn attention to the fact that it is not appropriate for such a foundational norm to be drafted by Assembly initiative, and he illustrated this point by citing the Act on Credit Unions. He also concurred with the Government's reservations to the bill and repeatedly drew attention, in relation to the comments of the expert public, to the problems which the Act precipitates. He illustrated the Acts inadequacy also by the example of the Annex to the Act, when he stated that in the districts of Jeseník and Šumperk, for example, no medical facilities were registered into the network, so that such medical facilities will need to be constructed. He saw a further problem in the fact that there are hospitals listed in the Annex which do not exist, as their designation in the Annex does not correspond to their actual designation or identification number (for ex., the hospital Kroměříž contributory organization, in actuality the Kroměříž Hospital, a joint-stock company which also has a different identification number; the Planý Hospital, included in the list, which is in bankruptcy, etc.). Stated simply, he spotted in the bill a threat to the accessibility and quality of the health care as it currently stands.

22. In contrast thereto, the Minister of Health, D. R., stated that the main reason the Act was initiated and introduced, was to forestall the blanket privatization of

hospitals, further to establish clear, resolute, and permanent supervision of the management of public funds, and to introduce a systematic, regular, and directed quality control in individual hospitals.

IV. Summary of the Significant Portions of the Statements of Views of Parties to the Proceeding

23. In accordance with § 42 para. 4 and § 69 of the Act on the Constitutional Court, the Constitutional Court sent the petition proposing the annulment of the contested provisions of Act No. 245/2006 Coll. to the Assembly of Deputies and the Senate of the Parliament of the Czech Republic.

24. In its 18 August 2006 statement of views, the Assembly of Deputies of the Parliament of the Czech Republic stated that, in actuality, medical facilities of which the State is the founder only cover a part of the necessary, mostly specialized, health care and are not capable to satisfy all of the legitimate requirements of ensuring this care with a view to the constitutional and international law obligations laid down in Art. 31 of the Charter, Art. 12 of the International Covenant on Economic, Social and Cultural Rights, Art. 24 of the Convention on the Rights of the Child, and Arts. 11 and 13 of the European Social Charter. By its adoption of Act No. 245/2006 Coll., the legislature was pursuing the aim of ensuring, through the application of Art. 11 para. 2, the first sentence, of the Charter, the health care of the inhabitants, where in pursuance of this objective it defined the property and the manner of dealing with it such that it designated by a specific enumeration in the Annex to the Act the legal persons – the owners or users of this property – who are subject to regulation according to this Act. It thus does nothing other than to specify the property indispensable for ensuring the protection of health and lays down that solely certain legal persons, that is, public non-profit institutional medical facilities, may hold, and only under designated conditions, title to property individualized in this manner, unless their founder retains title thereto (§ 13 para. 2 of Act No. 245/2006 Coll.). However, not even this statutory limitation is absolute, as Act No. 245/2006 Coll. itself breaches it by allowing for legal transactions to be carried out by which the rights in the property of public medical facilities or their founders are alienated (§ 6 paras. 9 and 10 of Act No. 245/2006 Coll.). In its view, the legislature is authorized, in view of the constitutional responsibility of the State and the territorial self-governing units to secure the right to the protection of health, to select the instrument for securing these rights, as well as the instruments of supervision and regulation of the medical facilities providing health care. Territorial self-governing units are public corporations which can hold their own property and manage it in accordance with their own budget. If then Act No. 245/2006 Coll. provides for a certain manner of economic-legal form, in which the property of territorial self-governing units may be dealt with, which serve the public interest in ensuring health care as a public service, it thereby designates their tasks solely in conformity with the constitutional status of the regions and municipalities as public-law corporations, moreover in a manner permitted by constitutional and statutory norms. In this case the legislature laid down that this obligation should be ensured by the health insurance companies through the medical facilities with which the health insurance companies had concluded a

contract on the provision and reimbursement of health care, by means of which these medical facilities form a network of health insurance companies' contractual medical facilities. In order fully to ensure geographic accessibility and the quality of the provided health care, the legislature in addition ensured, by Act No. 245/2006 Coll., that the health insurance companies were obliged to conclude a contract on the provision and reimbursement of health care with public medical facilities (both public and private) included into the network of public medical facilities, moreover to the extent to which public medical facilities are obliged to provide health care. In conclusion of its statement, the Assembly of Deputies stated that the legislative body acted in the conviction that the adopted act is in harmony with the Constitution and with our legal order. It is up to the Constitutional Court to adjudge the constitutionality of the provisions of Act No. 245/2006 Coll. contested in the petition.

25. In its 9 August 2006 statement of views of the Senate of the Parliament of the Czech Republic described the procedure for the Senate's assessment of Act No. 245/2006 Coll. The Senate debated the bill on 15 March 2006 and adopted Resolution No. 364, which rejected the bill. In discussing the bill, the Senate held extensive debates, both in the committee to which the bill was assigned and in the full Senate, which focused in particular on the problem of the creation of that part of the network of public medical facilities which the Act forms from the medical facilities enumerated in the Annex to the Act and the problem of the proposed statutory scheme laying down the regions' responsibility to ensure that relevant requirements of the Act be carried out by the network of public medical facilities in the regions. The debate focused primarily on those provisions which it has been proposed be annulled. Since, by Acts Nos. 157/2000 Coll. and 290/2002 Coll., the State transferred title to certain of its medical facilities to the territorial self-governing units (although as the subject which, in the sense of the Charter, guaranteeing the provision of health care, it could itself have created the network of medical facilities already in 2000), at the present it is not in harmony with the constitutional principles of the protection of property to create a network of medical facilities to the detriment of the property rights of those subjects. It was also criticized that, in the creation of the list of medical facilities (the Annex to the Act) which should in fact form the backbone of the network of public non-profit institutional health facilities, insufficient account was taken of the consultations and opinions of various interested parties, whether they were the representative bodies of municipalities or regions, expert organizations of the medical profession, or subjects representing patients; and above all no unambiguous criterion was set down the effectuation of which would justify the inclusion or non-inclusion of appropriate medical facilities into the list. The Senate thus evaluated this list as being formed non-objectively and unsystematically. It stressed the fact that the list was also entirely at random, it was supplemented by 9 medical facilities on the basis of proposed amendments that were not submitted until the second reading in the Assembly of Deputies; it was also ascertained that in some cases the same facility was included on the list twice, for ex. the Litomyšl Hospital. In particular, it was pointed out that the existence of a list of selected medical facilities creates, without justification, unequal conditions and appears to be liquidating the existence of those medical facilities which will not form a part of the network of public non-profit institutional health facilities. It thereby violated the principle of equality which the Constitutional Court explained in a number of its judgments

(see Judgment No. Pl. US 22/1992 of 8 October 1992, in The Collection of Rulings and Judgments of the Constitutional Court of the ČSFR, under No. 11). As the conclusion of its statement, the Senate stated that a majority finds a violation of the above-mentioned constitutional principles and therefore rejected the bill.

26. On 18 August 2006, the Constitutional Court Plenum received the Ministry of Health's statement of views, in which is stated that the final version of the Act was adopted with its approval. The Ministry of Health does not concur with the objections raised by the petitioner, as in its view it places the obligation to provide for the inhabitants' health care solely on the State's shoulder and does not at all wish to recognize this task also as an obligation of territorial self-governing units – public law corporations. The Ministry of Health considers the petitioner's perspective on Art. 31 Charter to be a simplification, as this Article does not refer to the State at all and has not merely vertical, but also horizontal effects in relation to private-law subjects, above all in relation to health care providers. If Act No. 245/2006 Coll. prescribes a certain manner of economic-legal form in which it is possible to dispose of the property of territorial self-governing units which serve, in the public interest, to ensure the provision of health care as a public service, in harmony with the constitutional status of the regions and municipalities as public-law corporation, moreover in a manner permissible under the constitutional and statutory norms. In view of the purpose the property in question serves, the Ministry of Health considers as reasonable the interferences with proprietary relations which follow from the provisions of Act No. 245/2006 Coll., which authoritatively (ex lege) transform contributory organizations of the State, regions, and municipalities, as well as joint-stock companies and limited liability companies (§ 40 and the Annex), into public non-profit institutional medical facilities.

27. The statements of the parties to the proceeding as well as that of the Ministry of Health were sent to the attention of the petitioner. In its 1 September 2006 reply to the statement of the Assembly of Deputies of the Parliament of the Czech Republic, it stated that the Assembly of Deputies has closed its eyes to the fact that, even in cases where the State take a certain measure in the public interest but at the same time that measure interferes with the constitutionally guaranteed rights of other subjects, then it is imperative to scrutinize whether the chosen measures are legitimate and proportional in terms of the means used and the objective pursued. In reply to the statement of the Senate of the Parliament of the Czech Republic, the petitioner stated that it entirely concurs with the grounds which led the Senate to reject the bill and emphasized that the minority support for the bill rested precisely upon the State's obligation to ensure the protection of the health of inhabitants without, however, taking into account the necessity to weigh whether the adopted measures were commensurate in relation to the necessary limitation upon the constitutionally guaranteed rights, which the effectuation of the Act brought about. In reply to the Ministry of Health's position, the petitioner then noted that the obligatory establishment of a network of non-profit medical facilities accompanied by an interference with constitutionally guaranteed rights was not indispensable, the created network of non-state medical facilities (cf. the Annex to the Act) then lacked any sort of rationality in terms of the selection of individual medical facilities. The petitioner is of the view that the chaotic selection of medical facilities which occurred is in no way congruous with

the adoption of measure with such serious consequences for the rights of territorial self-governing units and other persons, in consequence of which such a solution is deprived of the legitimacy resting upon its rationality.

V. The Wording of the Contested Provisions

28. The text of the contested provisions of Act No. 245/2006 Coll. reads as follows:
- § 34 para. 2, second sentence:
„The regions shall ensure that in each district within their territory is located at least 1 public medical facilities".

- § 34 para. 3, lit. a):
§ 34 para. 3: the network of public medical facilities is made up of
„a) public medical facilities created in accordance with § 40 para. 1

- § 34 para. 6:
„If the network of public medical facilities in a region does not satisfy the requirement in accordance with paragraph 2, the region shall discuss the supplementation of the network of public medical facilities with the municipality within whose territory, in terms of the requirements of the network of public medical facilities in accordance with paragraph 2, health care to the prescribed extent should be provided by a public medical facility, should that municipality, or some other founder, not establish a public medical facility, then the region shall establish it".
- § 40:
„(1) The legal persons listed in the Annex to this Act shall become, upon the expiry of the 180 day period running from the day this Act enters into force, public medical facilities. Should a legal person listed in the Annex to this Act be dissolved or transformed prior to the expiry of the period in the preceding sentence, then such transaction shall be invalid.
(2) Persons who established or founded the legal persons listed in the Annex to this Act, they shall have the status of a founder in accordance with this Act.
(3) On the day a public medical facility comes into being in accordance with paragraph 1, all rights and obligations, including the rights and obligations from employment law relations of the legal person listed in the Annex to this Act, from which the public medical facility originated, shall pass to the public medical facility.
(4) The property which contributory organizations referred to in the Annex to this Act are competent to manage, shall, in the amount which their founders invested into the contributory organizations when founding it, be deemed in accordance with this Act to be property invested by the founder into a public medical facility as of the day that public medical facility comes into being.
(5) Ownership rights in the property of the joint-stock companies listed in the Annex to this Act, which their incorporators invested into them when establishing them, shall, on the day a public medical facility comes into being, pass to the founder.
(6) On the day a public medical facility comes into being pursuant to paragraph 1, the proprietor who established a limited liability company listed in the Annex to this Act shall become entitled to a settlement share. The settlement share shall be

covered by the State. The payment of the settlement share shall be made by the Ministry of Finance on the proposal of the founder, substantiated with detailed computations and financial statements, certified by an auditor, relating to the day immediately preceding the coming into being of the public medical facility. Such proposal may be submitted within 3 months of the day the public medical facility comes into being, and, if it is not, the right to the settlement share shall be extinguished.
(7) The medical facility referred to in § 34 para. 4, the last sentence, may be substituted for by a public medical facility by the founder deciding on its dissolution, in the case of a commercial company on its dissolution without liquidation, so that the property and all rights and obligations of the dissolved medical facility, including rights and obligations from employment law relations, pass to the public medical facility on the day it comes into being, which immediately follows the day on which the medical facility was dissolved.
(8) The founder of a public medical facility referred to in paragraph 1 is obliged, no later than 30 days prior to the public medical facility coming into being, to inform the Ministry of Health of all necessary data recorded in the register of public medical facilities and to submit all necessary documents which form a part of the register of public medical facilities.

- Annex to Act No. 245/2006 Coll.:
In the Annex to Act No. 245/2006 Coll. are enumerated the legal persons which become public medical facilities upon the expiry of the 180 day period running from the day this Act enters into force (§ 40 para. 1).

VI. The Oral Hearing

29. At the 27 September 2006 oral hearing, the petitioner's legal representative referred to the written petition, as well as to all further submissions in this matter. The petitioner has no objection in principle to Act No. 245/2006 Coll. as such, and is only proposing the annulment of those provisions which are manifestly unconstitutional. The legislature worked from the situation that existed in 2000, when the State was the owner of medical facilities and could have established a network of medical facilities from medical facilities to which it held title. When it did so in 2005, by virtue of the contested provisions of Act No. 245/2006 Coll., this resulted in an intrusion upon the right of self-government and an interference with the right of property. Such interferences must preserve the essence of the right. As a result of adoption of the contested provisions, the State has overstepped its lawful bounds and violated the principle of proportionality. The petitioner's legal representative proposed the annulment of the contested provisions of Act No. 245/2006 Coll.

30. The Chairman of the Assembly of Deputies of the Parliament of the Czech Republic, Ing. M. V., stated that the Assembly of Deputies had expressed its views on the petition in its written position. The Ministry of Health also submitted its position. The Ministry of Health's statement of views is in harmony with that of the Assembly of Deputies, and the Assembly of Deputies agrees with it in its entirety and refers to the views stated therein. It further emphasized its disagreement with the petitioner's assertion that the State may establish a

network of private non-profit institutional medical facilities solely from the medical facilities to which it retained title. The legislative intent was to ensure, through private non-profit institutional medical facilities, the fulfillment of its obligation to provide care also to citizens of Member States of the European Union and citizens of other foreign states, as well as to those of its citizens who are not registered in the Czech Republic's system of health insurance. He reminded the Court that the provision of health care is financed from public health insurance and public budgets. In its petition proposing the annulment of the contested provisions of Act No. 245/2006 Coll., the group of Senators takes issue also with further provisions of this Act, but which it did not propose be annulled. In conclusion, the Chairman of the Assembly of Deputies expressed the hope that the Constitutional Court would not take into consideration previous political interests and by its decision take upon itself responsibility for ensuring citizens' health care. He therefore proposed that the petition be rejected on the merits.

VII. Actual Review

31. The petitioner proposes the annulment of the contested provisions of Act No. 245/2006 Coll., which modifies in a fundamental way the system of health care for citizens of the Czech Republic.

32. The petitioner's constitutional objections against the contested provisions proceed along two lines: on the one hand, in terms of the protection of property rights and, on the other, in terms of encroachment upon self-government. The petitioner finds the contested provisions of Act No. 245/2006 Coll. to be unconstitutional because they affect the independent competence of autonomous territorial units and they do not respect the property rights of autonomous territorial units and, as the case may be, other natural and legal persons; it therefore reproaches them as in conflict with Art. 11 of the Charter and Arts. 8 and 101 of the Constitution:

Art. 11 of the Charter reads:
(1) Everyone has the right to own property. Each owner's property right shall have the same content and enjoy the same protection. Inheritance is guaranteed.
(2) The law shall designate that property necessary for securing the needs of the entire society, the development of the national economy, and the public welfare, which may be owned exclusively by the state, a municipality, or by designated legal persons; the law may also provide that certain items of property may be owned exclusively by citizens or legal persons with their headquarters in the Czech and Slovak Federal Republic.
(3) Ownership entails obligations. It may not be misused to the detriment of the rights of others or in conflict with legally protected public interests. Property rights may not be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law.
(4) Expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation.
(5) Taxes and fees shall be levied only pursuant to law.
Art. 8 of the Constitution reads:
The right of autonomous territorial units to self-government is guaranteed.

Art. 101 of the Constitution reads:
(1) Municipalities shall be independently administered by their representative body.
(2) Higher self-governing regions shall be independently administered by their representative body.
(3) Territorial self-governing units are public law corporations which may own property and manage their affairs on the basis of their own budget.
(4) The state may intervene in the affairs of territorial self-governing units only if such is required for the protection of law and only in the manner provided for by statute.

33. The assessment on the part of the Constitutional Court Plenum of the given arguments necessitates a reconstruction of the intent and wording of those provisions of ordinary (sub-constitutional) law which relate to the issue of the conditions for health care delivery.

34. The cited articles establish the constitutional foundation for the exercise of territorial self-government, to which is linked and is further developed (within constitutional bounds) by ordinary legislation, represented primarily by Act No. 128/2000 Coll., on Municipalities, as subsequently amended (hereinafter „Act No. 128/2000 Coll.“), by Act No. 129/2000 Coll., on Regions, as subsequently amended (hereinafter „Act No. 129/2000 Coll.“) and by Act No. 131/2000 Coll., on the Capitol City of Prague, as subsequently amended (hereinafter „Act No. 131/2000 Coll.“).

35. According to § 7 para. 1 of Act No. 128/2000 Coll., municipalities administer their affairs independently (hereinafter „independent competence“). State bodies and bodies of the regions may intervene into the independent competence only if such is required to protect the law and only in the manner laid down by statute. The ambit of their independent competence can be restricted solely by statute. Section 35 para. 2 of Act No. 128/2000 Coll. further obliges municipalities in their independent competence to take care, within their territory in harmony with local conditions and customs, to create the conditions for the development of social care and for the satisfaction of the needs of their citizens. This is primarily a matter of satisfying their need for housing, the protection and promotion of health, transportation, the needs for information, training and education, overall cultural development and the protection of public order.

36. A similar legislative scheme is found also in Act No. 129/2000 Coll., which in its § 2 para. 1 obliges the regions to administer their affairs independently (hereinafter „independent competence“). State bodies may intervene into their independent competence, only if such is required to protect the law and only in the manner laid down by statute. In addition, the ambit of their independent competence can be restricted solely by statute. The regions are to take care of the overall conditions within their territory and the needs of their citizens (§ 1 para. 4). In conformity with the corresponding provisions of § 35 para. 2 of Act No. 128/2000 Coll., the issues of the protection and promotion of health and the delivery of health care can also be classified as coming within the needs of citizens of a region, even though (in contrast to Act No. 128/2000 Coll.,) Act No. 129/2000 Coll. does not explicitly so state. According to § 14 para. 1 of Act No. 129/2000

Coll., matters fall under the independent competence of a region if they are in the interest of the region and of that region's citizens, unless it is a matter within the delegated competence of regions. With the exception of issuing regional regulations, the matters listed in §§ 11, 35, 36, and 59 of Act No. 129/2000 Coll., in particular, fall within the independent competence of regions, as do also those matters when are entrusted to their independent competence by statute (§ 14 para. 2). In the exercise of their independent competence, regions may found and establish legal persons and organizational components of the regions, unless provided otherwise by statute (§ 14 para. 3).

37. Health is one of the most significant factors influencing the quality of human life and it belongs among the absolute fundamental rights and values. The Constitutional Court bases its considerations on the constitutional conception of the protection of health, which is enshrined in Art. 6 para. 1 of the Charter (according to which: „Everyone has the right to life. Human life is worthy of protection even before birth.") and in Art. 31 of the Charter (which provides: „Everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.").

38. Further fundamental starting points of constitutional law are the following:
- Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (published in the Collection of Laws as No. 209/1992 Coll.), which provides that everyone's right to life shall be protected by law.
- Art. 12 of the International Covenant on Economic, Social and Cultural Rights (proclaimed in the Collection of Laws as No. 12/1976 Coll.), which provides in its para. 1, that the States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In para. 2, lit. d) of the cited Article, the States Parties bind themselves to take the steps necessary to achieve the full realization of this right, such steps to include the creation of conditions which would assure to all medical service and medical attention in the event of sickness.
- Art. 24 of the Convention on the Rights of the Child (proclaimed in the Collection of Laws as No. 104/1991 Coll.), in which the States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
- Arts. 11 and 13 of the European Social Charter (proclaimed as No. 14/2000 in the Collection of International Agreements) in which the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures to ensure the effective exercise of the right to protection of health and to provide each person adequate assistance, and, in case of sickness, the care necessitated by his condition.
- Arts. 2 and 3 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, as amended by its Supplemental Protocol of 12 January 1998 (proclaimed as Nos. 96/2001 and 97/2001 in the Collection of International Agreements) provide that the interests and welfare of the human being shall prevail over the sole interest of society or science and bind the parties to the Convention to take appropriate measures with a view to providing, within

their jurisdiction, equitable access to health care of appropriate quality.

39. According to the Conclusions of the Council of the European Union (2006/C 146/01) published in the Official Journal of the European Union on 22 June 2006, the health systems are a fundamental part of Europe‘s social infrastructure. Its members do not under-estimate the challenges that lie ahead in reconciling individual needs with the available finances. In discussing future strategies, their shared concern should be to protect the values and principles that underpin the health systems of the European Union. The Council of the European Union also noted that the European Commission had stated that it will develop a Community framework for safe, high quality and efficient health services, by reinforcing cooperation between Member States and providing clarity and certainty over the application of Community law to health services and healthcare. The Statement on common values and principles, which is a statement by the 25 Health Ministers of the European Union about the common values and principles that underpin Europe's health systems, and which is an Annex to the mentioned Conclusions of the Council of the European Union, designates, as overarching values, universality, access to good quality care, equity, and solidarity, which are shared by different European Union institutions in their work. Universality means that no-one is barred access to health care; equity relates to equal access according to need, regardless of ethnicity, gender, age, social status or ability to pay; solidarity is closely linked to the financial arrangement of our national health systems and the need to ensure accessibility to all. All health systems in the EU aim to make provision, which is patient-centered and responsive to individual need. However, different Member States have different approaches to making a practical reality of these values. As Health Ministers, noted increasing interest in the question of the role of market mechanisms (including competitive pressure) in the management of health systems; at the same time, they declared that it is for individual Member States to determine their own approach with specific interventions tailored to the health system concerned.

40. As far as concerns the concept of health care itself, its legal regulation and administration in the health care sector, Doc. JUDr. Petr Průcha, CSc., stated in his publication Public Administration and Regional Self-Government (Advanced School of Applied Law, s. r. o., Prague, 2004): „ . . . [I]n and of itself, health care is a concept encompassing a system of health care services, or care for health, together with the system of medical facilities and other medical organizations arranged into a system of medical facilities which provide this care. The performance of public administration in the health care sector is focused on the effectuation of measures directed at the care of health, including the protection of, and assistance for, „public health“. Both the content and the legal regulation of the performance of public administration has, in the past decade, undergone a number of changes corresponding to the changes that have, up until now, been made not only in public administration as such, but also in the field of health care itself. In instituting a system that both makes possible and ensures the provision of health care, the conditions have been established for the genuine effectuation of the constitutionally guaranteed right to life and the right to the protection of health. This is manifested in the administrative organization within the sector of health care, in part by the fact that the public administration of health care is differentiated vertically (or rather by levels), and further by the fact that both the

state administrative bodies and autonomous subjects play a role in it. The Ministry of Health is the central body of state administration in the health care sector. Within its competence falls the central exercise of state administration for health care, the protection of public health, medical science research activities, medical facilities in its direct administrative competence, the search for, protection and exploitation of natural curative resources, natural therapeutic spas and sources of natural mineral water, medications and medical technological devices for the prevention, diagnosis, and treatment of people, health insurance and health care information system. In performing activities within its competence, the Ministry acts in coordination with other central state administrative bodies, while the Ministry of Defense and the Ministry of Interior have a special status in this sector. The regions and municipalities are entitled to perform public administration at the territorial level. The existing legal framework differentiates, in such cases, between the performance of state administration and of self-government. In certain matters, state administration is performed by regional offices and municipal offices with expanded competence; on their own level, the regions and municipalities then perform self-government to the appropriate extent. In addition thereto, regional hygienic stations are entitled, at the territorial level, to perform state administration in matters of the protection of public health. Also playing a role in the administration of health care are the „professional autonomous“ subjects, which consists of the Czech Medical Chamber, the Czech Dental Chamber, and the Czech Pharmaceutical Chamber. A special form of the care of health is the “protection of public health”. Public health is understood to mean the condition of health of the inhabitants, and groups thereof. The protection and support of public health is then the aggregate of actions and measures taken to create and protect healthy living and working conditions and to prevent the spread of infectious diseases and epidemics, job-related illnesses, as well as other significant breakdowns in health and the supervision of its monitoring.”

41. The statutory framework for the protection of health and health care, which is linked to the constitutional framework, is concentrated especially in Act No. 20/1966 Coll., on Human Health Care, as subsequently amended (hereinafter „Act No. 20/1966 Coll.“), Art. III § 11 para. 1 of which lays down that medical facilities of the State, municipalities, and natural and legal persons shall provide health care in conformity with knowledge currently available from medical science. As follows from §§ 33 and 39 para. 1 of this Act, apart from the Ministry of Health, medical facilities are founded also by regions, within their independent competence, municipalities, and natural and legal persons. Authorization to operate non-state medical facilities arises by a registration decision of the regional office competent in accordance with the place where the non-state facility operates, in the sense of § 8 of Act No. 160/1992 Coll., on Health Care in the Non-State Medical Facilities, as subsequently amended. Act No. 48/1997 Coll. then imposes upon health care insurance companies the obligation to ensure the delivery of health care to the persons they insure. It carries out this obligation through the medical facilities with which it has entered into a contract on the delivery and reimbursement of health care. These medical facilities form a network of contractual medical facilities of the health care insurance company. The system of bodies concerned with the protection of public health, and the rights and duties of natural and legal persons in the area of the protection and support of public health, are regulated by

Act No. 258/2000 Coll., on the Public Health and on Changes to certain related Acts, as subsequently amended (hereinafter „Act No. 258/2000 Coll.“). In § 2 para. 2 of the cited Act, public health is defined as the state of health of the population and its groups; state administrative bodies concerned with the protection of public health, as well as their tasks, are defined in § 78 and foll. of this Act.

42. In terms of the historical development, the governing rules during the period of central management of health care were found in §§ 33 and 42 of Act No. 20/1966 on the System of Medical Facilities, and in Regulation No. 43/1966 Coll., on the System of Medical Facilities. That Regulation was repealed by Regulation No. 121/1974 Coll., on the System of Medical Facilities. This Regulation was also subsequently repealed by Regulation No. 242/1991 Coll., on the System of Medical Facilities Founded by District Offices and Municipalities, which is still in effect. At the same time the Ministry of Health issued Regulation No. 394/1991 Coll., on the Status, Organization, and Activity of Faculty Hospitals and further Hospitals, selected Expert Therapeutic Institutions, and Regional Hygienic Stations within the Managerial Competence of the Ministry of Health of the Czech Republic, which is still in effect. In connection with the change of social-economic conditions after 1989, health care insurance was regulated by means of Act No. 550/1991 Coll., on the General Health Care Insurance, then by Act No. 48/1997 Coll. and by Act 258/2000 Coll. As was already stated above, within the framework of the reform of public administration, the State transferred, by Acts Nos. 157/2000 Coll. and 290/2002 Coll., the title to certain of its medical facilities, which were state contributory organizations, to the regions and the municipalities, as their contributory organizations. As follows from the general part of the Explanatory Report to Act No. 290/2002 Coll. (in www.psp.cz, print 1151/0), this was the transfer of title to a part of the State's property and the transformation of existing state organizations and organizational units of the State operating in the field of health care, among others. It was expected that citizens‘ needs in the fields which the transfer of property concerns were to be satisfied and ensured primarily by the territorial self-governing units. The regions were also meant to assess the necessity of providing services, both as concerns the number and their geographical reach. In view of the fact that it was not possible to exclude from the adopted version of the Act changes in the number of medical facilities (especially on grounds of the possible organizational changes consisting, for ex., in the merger, division, or dissolution of certain organizational units, or the dissolution of certain contributory organizations), they were not enumerated directly in the Act.

43. As follows from the above-designated provisions of § 33 of Act No. 20/1966 Coll., the regions and municipalities shall, within their independent competence, found and direct medical facilities. The provision of health care thus falls within the independent competence of territorial self-governing units, into which the State may intervene, pursuant to Art. 101 para. 4 of the Constitution, only if such is required to protect the law and only in the manner laid down by statute.

44. Act No. 245/2006 Coll. introduces into the legal order of the Czech Republic a new type of legal person and modifies the conditions for health care delivery in the Czech Republic. Its proclaimed objective is the creation of an effective legal environment for the existence and operation of hospitals in the public domain and for the establishment of a basic network of these hospitals, by means of which the

State will be capable of ensuring the right to the protection of health and to equal access to free health care to each citizen in the case of need on the basis of public insurance, such as is envisaged in Art. 31 of the Charter.

45. Sec 1 Act No. 245/2006 Coll. defines the term, „public medical facility“, and either the State, a region or municipality, or some other legal or natural person can be the founder of such a facility (§ 2 para. 1, 2 and 3). The coming into being of a public medical facility precedes its founding (§ 3 para. 1), and the Act regulates that procedure in detail. In addition to that, the group of legal persons (medical facilities) exhaustively enumerated in the Annex to the Act shall become public medical facilities upon the expiry of the 180 day period running from the day the Act enters into force (§ 40 para. 1). On the day a public medical facility comes into being in accordance with the cited provisions of § 40 para. 1, all rights and obligations, including the rights and obligations from employment law relations of the legal person listed in the Annex to the Act, from which the public medical facility originated, shall pass to the public medical facility (§ 40 para. 3).

46. Sec. 34 para. 2 establishes a network of public medical facilities. This network must be organized in such a way as to ensure that the territories for which each particular facility is responsible are sensibly interconnected also that accessibility of care is ensured; in addition, the Act imposes on the regions (§ 34 para. 2, the second sentence) the obligation to ensure that in each district within their respective territories is located at least one public medical facilities. According to the Act, the network of public medical facilities is composed in part of public medical facilities which came into being pursuant to § 34 para. 3, lit. a) and § 40 para. 1 (that is, medical facilities exhaustively enumerated in the Annex to the Act) and in part of those public medical facilities which will be founded in accordance with this Act; further, the Ministry of Health will decide on the inclusion into the network of public medical facilities [§ 34 para. 3, lit. b) and para. 4]. Then § 34 para. 6 imposes upon the regions the obligation to found public medical facilities in the case that the network does not satisfy the requirements laid down in § 34 para. 2 (linkage and accessibility) and that some other founder does not do so.

47. The obligation to provide health care is governed by § 33 para. 1 of Act No. 245/2006 Coll., according to which, for each public medical facility included in the network of medical facilities, the Ministry of Health shall, following discussions with the region, the health insurance companies and with the relevant Councils, set by decision, for each particular type of health care, the extent of the obligation to provide health care and to define the territory for which a particular facility is responsible. The Administrative Procedure Code does not apply to proceedings under § 33 para. 1 (§ 33 para. 4).

48. As follows from the foregoing, Act No. 245/2006 Coll. represents a basic intrusion into the competence of territorial self-governing units entrusted to them by §§ 33 and 39 of Act No. 20/1966 Coll., in view of the fact that, independently of the wish of these territorial units it changes the legal form of medical facilities and further by making the operation of these facilities (the founders of which are regions or municipalities) subject to the administrative and supervisory authority of the Ministry of Health, which is a sector of the executive power. By ceding to the

Minister of Health a decision-making role in this field, the new legislative scheme, introduced by Act No. 245/2006 Coll., minimalizes the scope of the exercise of territorial autonomy in the field of health care, as is envisaged by acts. nos. 20/1966 Coll., 128/2000 Coll., 129/2000 Coll., and 131/2000 Coll.

49. The Constitutional Court has repeatedly declared that it considers local self-government as an irreplaceable component of the advancement of democracy. It has concerned itself, in a number of its decisions, with the issue of the independent competence of territorial self-governing units and the protection of the property rights of territorial self-governing units. Since it has repeatedly faced this issue, then it should make, at least in outline, a recapitulation the preceding decisions.

50. In its 9 July 2003 Judgment, No. Pl. US 5/03 (published in the Collection of Laws as No. 211/2003 Coll.), in connection with the petition of a group of Deputies of the Assembly of Deputies of the Parliament of the Czech Republic proposing the annulment of § 1 para. 2, lit. b), § 2 para. 2, the second sentence, § 3, § 4 para. 2, lit. b), § 5 para. 2, the second sentence, and § 6 Act No. 290/2002 Coll., the Constitutional Court stated: "[L]ocal self-government is a manifestation of the right and capacity of local bodies to regulate and administer a portion of public affairs, within the limits of the law, within the framework of their responsibility, and in the interests of the local population. According to the starting thesis, on which this conception of self-government is built, free municipalities constitute the foundation of a free State, then, in terms of regional significance, at a higher level of the territorial hierarchy a self-governing society of citizens, which, under the Constitution, is a region. It also declared that territorial self-governing units representing the territorial society of citizens must thus have - through autonomous decision-making by their representative bodies - the ability to freely choose how they will manage the financial resources made available to them to carry out the tasks of self-government. It is this management of one's own property independently, on one's own account and own responsibility which is an attribute of self-government. The group of Deputies substantiated their petition by the argument that the contested provisions, without giving the affected regions and municipalities the opportunity appropriately to express their agreement or disagreement, unilaterally determine that selected property items, rights and obligations previously belonging to the State shall pass to these self-governing units, and at the same time determine that the defined state organizational components and contributory organizations shall become administered departments or funded organizations of the relevant self-governing units. The petitioners in particular charge that the Act does not address such fundamental issues as the payment of state obligations arising until 31 December 2002, which passed to the regions or municipalities as of 1 January 2003. According to the group of Deputies' line of argument, the Act thus impermissibly burdens the financial position of territorial self-governing units." The Constitutional Court also declared " . . . that the justification for the step, whereby the state, as part of the reform of public administration, transferred certain property to territorial self-governing units, cannot be called into question, as the reasons for it come from the historically-validated conviction on the basis of which it is precisely those who are affected by matters tied to property, and whom the property directly serves, are capable, and in the nature of the matter also willing and motivated, to manage it with due care,

very often better than the central state power, and in a much more efficacious, full-value manner. Nor is the decentralization of tasks, or the transfer of property related thereto, something constitutionally unacceptable. However, the tying of this step to the consequent transfer or further continuation of obligations connected to this property assumes a further solution, in connection with the system of taxes, subsidies and similar payments. The State should not – without anything further – rid itself of liability for debts which arose during the period when it managed the transferred property and which are a result of its previous loss-making exercise of property rights, perhaps even the failure to observe legal enactments. It certainly should not do so in relation to entities through whose intermediation it is also to fulfill its responsibilities consisting of ensuring the fundamental rights arising from Art. 31 of the Charter, the observance of which the State itself guarantees. Such conduct by the sovereign power raises questions about abuse of state power to the detriment of territorial self-governing units. However, the Constitutional Court's intervention consisting of annulling the contested provisions would not by itself eliminate this undesirable situation, as the Constitutional Court had to take into consideration that the contested Act is a transformational act of a one-off nature and the legal consequences connected with the reviewed statutory provisions and anticipated by this Act arose ex lege as of 1 January 2003, thus these norms fully exhausted their capacity to create legal consequences in the future. A Constitutional Court judgment granting the petition, having effects ex nunc, would thus no longer be capable to change anything about the existing situation. For that reason, the Constitutional Court had no other choice but to deny that part of the petition." On the other hand, however, in the cited judgment the Constitutional Court annulled the provisions of §§ 3 and 6 of Act No. 290/2002 Coll., which had laid down a limitation on the use of the property items, title to which the regions and municipalities had acquired, for a period of ten years from the day of their acquisition, restricting their use solely to the specifically designated purposes for which they had been employed on the day of the conveyance, as it found that, in this regard, the provisions had markedly exceeded the bounds of, and criteria justifying, permissible interference with property rights. The ten-year period did not seem appropriate in the given contexts. The Constitutional Court concluded ". . . that the limitation of property rights in those provision does not, in relation to all the components required by the principle of proportionality, satisfy the conditions for limiting a fundamental right, and therefore it annulled these provisions due to their conflict with Art. 4 para. 4, in conjunction with Art. 11 para. 1, of the Charter."

51. In its 5 February 2003 Judgment, No. Pl. US 34/02 (published in the Collection of Laws as No. 53/2003 Coll.), the Constitutional Court stated: „The Constitution establishes the legal personality of territorial self-governing units, and envisages that self-governing units will hold their own property and administer from their own budget (Art. 101 para. 3). Of course, the Constitution also anticipates that there will be uniform State regulation of self-government in the form of a statutory framework. The delimitation of that part of public affairs which a local or regional association of citizens is capable of managing is entrusted to the legislature, i.e. the state power (Art. 104), not left to the Constitutient Assembly, which would define matters of local significance at the highest level of domestic law. In its Art. 105, the Constitution expressly envisages that territorial self-governing units will share in the exercise of state power on the basis of statutory

authorization. Naturally such exercise of state power through an intermediary necessarily entails that self-governing units are subject to state supervision, the purpose of which is to ensure the proper exercise of state power. The constitutional text does not state unambiguously whether the exercise of state administration can be imposed upon territorial self-governing units compulsorily, or whether it is possible to effect such a statutory transfer solely on the basis of an agreement between the State and the relevant territorial self-governing unit. Decision making about the competence of territorial self-government is always political."

52. The Constitutional Court makes reference chiefly to its conclusions stated in the judgments of the Constitutional Court Plenum, Nos. Pl. US 5/03 and Pl. US 34/02, as it sees no grounds for departing from them.

53. Also the European Charter of Local Self-Government, which was adopted within the framework of the Council of Europe adopted in Strasbourg on 15 October 1985 and was signed on behalf of the Czech Republic on 28 May 1998 (published in the Collection of Laws as No. 181/1999 Coll.) is premised on the principle that local authorities are one of the main foundations of any sort of democratic regime. Art. 9 provides that local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks. Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.

54. On the issue of the constitutionality of the statutory limitation upon the right of property and the competence of self-governing units to administer a part of public affairs in relation to the protection of health, the following propositions can be deduced.

55. The line of argument contained in the petition of the group of Senators proposing the annulment of the contested provisions of Act No. 245/2006 Coll. contains a measure of the public interest in ensuring care of the peoples' health in relation to the public interest, on the one hand, and in ensuring the protection of the right to property and the protection of the independent competence of territorial self-governing units, on the other hand. It is premised on the priority of the protection of the right of territorial self-governing units and on an emphasis on the independence from the State of territorial self-governing units. But the Constitutional Court emphasizes its consciousness of the fact that the rights to life and to health, such as they are laid down in Art. 6 para. 1 and Art. 31 of the Charter, are absolute fundamental rights and values and that it is necessary to weigh the right to self-government and the right to property precisely in relation to these absolute values.

56. With this information, it is now possible to assess the changes and impact, which Act No. 245/2006 Coll. has had, or rather will have, on health care delivery

and the exercise of the independent competence of territorial self-governing units in the field of health services.

The Principle of Proportionality

57. Similarly as is the case for all democratic constitutional courts, also the Constitutional Court of the Czech Republic applies the principle of proportionality to resolve, within a norm control proceeding, a conflict of fundamental rights, or of public goods protected under the constitutional order.

58. In order to come to a conclusion in the case of a conflict of fundamental rights, alternatively of public goods, the Constitutional Court follows, in contrast to the case of a conflict of norms of ordinary (sub-constitutional) law, the optimization imperative, that is, the postulate that it is necessary to minimalize limitations upon the fundamental rights and basic freedoms, alternatively upon public goods. This imperative contains a maxim, according to which, in the case it is concluded that it is justified to give precedence to one of two conflicting fundamental rights, or public goods, it is a necessary condition of a final decision also to make use of all possible minimalization of intrusion into them. Normatively, the optimalization imperative can be deduced from Art. 4 para. 4 of the Charter, according to which, in applying the provisions on the limits of fundamental rights and basic freedoms, those rights and freedoms must be preserved, hence it also applies analogously in the case of their limitation in consequence of mutual conflict between them (cf. Judgment of the Constitutional Court Plenum, No. Pl. US 41/02, published in the Collection of Laws as No. 98/2004 Coll.).

59. In its Judgment of 20 June 2006, No. Pl. US 38/04 (published in the Collection of Laws as No. 409/2006 Coll.), the Constitutional Court, similarly as in its Judgment of 13 August 2002, No. Pl. US 3/02 (published in the Collection of Laws as No. 405/2002 Coll.), stated that in cases of the conflict of fundamental rights or basic freedoms with public interests, or other fundamental rights or basic freedoms: ". . . it is necessary to evaluate the purpose (aim) of such interference in relation to the means used, and the measure for this evaluation is the principle of proportionality (in the wider sense), which can also be called a ban on excessive interference with rights and freedoms. This general principle contains three principles, or criteria, for evaluating the admissibility of interference. The first of these is the principle of capability of meeting the purpose (or suitability), under which the relevant measure must be capable of achieving the intended aim, which is the protection of another fundamental right or public good. Next is the principle of necessity, under which it is permitted to use, out of several possible ones, only the means which most preserve the affected fundamental rights and freedoms. The third principle is the principle of proportionality (in the narrower sense) under which detriment in a fundamental right may not be disproportionate in relation to the intended aim, i.e. measures restricting fundamental human rights and freedoms may not, in the event of conflict between a fundamental right or freedom with the public interest, by their negative consequences exceed the positive elements represented by the public interest in these measures."

60. To carry out the proportionality test necessitates the search for and identification of the objective of the provisions limiting a fundamental right. As was stated above, in the Explanatory Report to Act No. 245/2006 the objective of this Act is the creation of the optimal legal environment for the existence and operation of hospitals in the public domain and for the establishment of a basic network of these hospitals. The Constitutional Court is aware of the fact that the establishment of a network of public medical facilities is a component of the general complex of issues relating to health care, which are premised on certain constitutional principles and whose overall legislative scheme should respond to the solutions prevalent in mature democratic states as well as internationally agreed or recommended positions (Art. 1 para. 2 of the Constitution). The Constitutional Court has found that the contested provisions are capable of attaining the intended objective, that is, to ensure the delivery of public services in the field of health care, and this objective was found to be legitimate.

61. A further criterion which must be reviewed is the necessity of the selected means in terms of its less intrusive nature in relation to fundamental rights – that is, in relation to the right of self-governing units to independently manage their property and to the right to the protection of property. The Constitutional Court considers, as one of its main reasons for why the issue of self-government is governed by constitutional law, the need to protect self-government from unauthorized intervention by the State (see Art. 100 and Art. 101 of the Constitution). In the given case, by acts nos. 157/2000 Coll. and 290/2002 Coll., the State conveyed a portion of its property to the territorial self-governing units and at the same time entrusted to them the exercise of a part of state power in the area of ensuring health care. However, the legislature in no way explained the necessity of its interference, effected by Act No. 245/2006 Coll., with the property of territorial self-governing units in relation to the medical facilities. Art. 101 para. 4 of the Constitution permits the State to intervene in the affairs of territorial self-governing units only if such is required for the protection of law and only in the manner provided for by statute. The necessity of such intervention does not emerge with desirable precision from the Explanatory Report to Act No. 245/2006 Coll. While the assertion made in the Explanatory Report, namely, that during the time which has elapsed since the adoption of Act No. 290/2002 Coll., due to various reasons there has been a transformation of hospitals - contributory organizations of the regions (municipalities) into commercial companies, is an observation on the current state of affairs; on the other hand, however, that does not explain the State's lack of an overall conceptual approach to this problem, whereby it initially transferred title to certain medical facilities to the territorial self-governing units and then included certain of them into a network of public medical facilities, which move it substantiates in view of its obligation to fulfill its responsibility for the genuine securing of constitutional rights. It is not possible to accept the proposition put forward in the General Part of the Explanatory Report to Act No. 245/2006 Coll., that in the given case the territorial self-governing units are not capable of taking care of the protection of the public interest and that it is the State's responsibility to adopt the appropriate measures, including legislative measures, to secure the implicated constitutional rights, as these considerations are in no way substantiated, not even in the Explanatory Report. The Constitutional Court cannot overlook the fact that, when considering the necessity of the new legislative scheme, the legislature disregarded, for example, the legal

rules for scrutiny of the management of territorial self-governing units introduced by Act No. 250/2000 Coll., on the Budget Rules of the Territorial Budgets, as subsequently amended, which is ensured by Act No. 420/2004 Coll., on the Scrutiny of the Management of Territorial Self-Governing Units and Voluntary Federations of Municipalities, as subsequently amended. By means of the cited acts the State created an effective instrument for the supervision of the management of territorial self-governing units, for increasing the transparency of public finances and for limiting deficits in the management of those units in conformity with Art. 104 (ex Art. 104c) of the Treaty Establishing the European Community. While it is true that the State is empowered to choose the instrument for securing the rights arising from Art. 31 of the Charter, still in conjunction with the trends of the European Union in discussing the European Union's future strategies and also in conjunction with the above-cited conclusions of the Council of the European Union (2006/C 146/01), in the situation where the Council of the European Union noted that the European Commission will develop the Community principles for safe, high quality and efficient health services, the proposed scheme of Act No. 245/2006 Coll. appears to the Constitutional Court Plenum to be more or less unsystematic, to say the least.

62. It is further necessary to take into account that the forced limitation of property rights is made possible only on the basis of a statute and for compensation. In the given case, the property rights of the regions are violated, even if by means of a statute, by § 34 para. 2, the second sentence, and § 34 para. 6 of Act No. 245/2006 Coll. On the one hand, the contested provisions impose upon regions an obligation to ensure that in each district within their territory is located at least 1 public medical facilities and should the municipality not establish it, nor any other founder do so, then the region shall have the obligation to establish it. The obligation is thus placed upon regions to carry out, at their own expense, those tasks which follows from the constitutional order of the State (the Charter and international agreements), without it being able, in any effective manner, to influence the inclusion of particular medical facilities into the network. As follows from the contested provisions, on the other hand, the State is not obliged in any manner to ensure the financial arrangements from public funds for the newly founded public health facilities. As the Constitutional Court has already stated in its above-cited Judgment No. Pl. US 5/03: „It is precisely the management of their own property independently, on their own account and responsibility which is the attribute of self-government. Thus, a necessary prerequisite for effective performance of the functions of territorial self-government is the existence of their own, and adequate, financial or property resources."

63. In view of what was stated above, the Constitutional Court that in relation to § 34 para. 2, the second sentence, and § 34 para. 6, which oblige the regions to ensure, and in the case of need, to found in each district at least one public medical facility, without the State making any sort of prior guarantee to ensure the sources of financing toward that design, the legislature did not comply with the second of the components of the proportionality test, the principle of necessity. Under the current circumstances, the Constitutional Court had to work from the assumption, that the State is not intending to compensate in any way for the limitation upon the right of self-government, nor the right to property, upon

which the possibility for the actual exercise of self-government is conditioned (Art. 11 para. 4 of the Charter), a fact which inevitably leads to the conclusion that the objective pursued by the Act, in the given case being the protection of a public good (health), can be achieved by alternative means. Hence, the cited provisions intrude upon the autonomy of will of the territorial self-governing units beyond the limits set in of Art. 101 para. 4 of the Constitution.

64. Also in relation to § 34 para. 3, lit. a), § 40 and the Annex to Act No. 245/2006 Coll., on the basis of the wording of which specific medical facilities, listed in the Annex to Act No. 245/2006 Coll., which shall become, upon the expiry of the 180 day period running from the day this Act enters into force, public medical facilities and form a network of public medical facilities, the Constitutional Court has found that the legislature has not satisfied the criterion of necessity. If the second step in applying the principle of proportionality is to assess ordinary (sub-constitutional) law in terms of its necessity, which involves an analysis of the range of possible normative means in relation to the intended aim and their subsidiarity in terms of the limitation upon values protected by the Constitution (fundamental rights or public goods), the Constitutional Court is of the view that the aim pursued can be achieved – from among several possible means – by a less intrusive means. A violation of the principle of proportionality established in this way must be proclaimed to be a manifestation of arbitrariness. After all, it cannot be overlooked that the purpose of the protection and support of public health is not for public health facilities included into the relevant network to draw upon the financial resources from public health insurance without unambiguous criteria being laid down in advance, rather it is the effectuation of the constitutionally guaranteed rights to life and to the protection of health.

65. As follows from what has been stated, the solution chosen by the legislature does not satisfy the criteria of necessity. Accordingly it was not necessary to continue in the test of proportionality and scrutinize whether the contested provisions would satisfy the principle of proportionality in the narrow sense.

The Principle of the Protection of Fundamental Rights
a) The Principle of Legitimate Expectations

66. In its 8 March 2006 Judgment, No Pl. US 50/04 (published in the Collection of Laws as No. 154/2006 Coll.), the Constitutional Court stated that „it has adjudicated on the principle of legitimate expectation in conformity with the case-law of the European Court of Human Rights, from which has clearly emerged the conception of the protection of legitimate expectations as a property claim, which has already been individualized by an individual legal act, or is individualizable directly on the basis of legal rules“ (cf. the judgment in case No. Pl. US 2/02, published as No. 278/2004 Coll.). On the basis of these principles, the Constitutional Court has established that the principle of the protection of legitimate expectations was violated by § 34 para. 3, lit. a), § 40, and the Annex to Act No. 245/2006 Coll. The heart of the matter is that individual medical facilities, be they of whatever legal form, have the right, after satisfying certain conditions imposed upon them by legal norms, to draw upon financial resources from the public health insurance. Their individualized claims have been violated by the

cited provisions of Act No. 245/2006 Coll., as the medical facilities that are not included in the Annex to Act No. 245/2006 Coll. have unilaterally been discriminated against in comparison to those subjects listed in the Annex, as the legislature has not defined its selection criteria. The protection of legitimate expectations moreover constitutes an integral element of the rule of law.

b) The Principle of Equality in Rights, Legal Certainty and the General Character of Statutes

67. The Annex to Act No. 245/2006 Coll. contains a list of the 146 medical facilities which, in accordance with § 40 para. 1 of Act No. 245/2006 Coll. will become, upon the expiry of the 180 day period running from the day this Act enters into force, public medical facilities. In the view of the Constitutional Court Plenum, the State may, in the exercise of its power, expand the non-profit sector by creating new legal subjects, so-called non-profit institutional medical facilities, just as it had done in the case of the generally beneficial society by Act No. 248/1995 Coll., on General Beneficial Societies and on Amendments to and Supplementation of Certain Acts, as subsequently amended, which by coincidence was originally submitted to the Assembly of Deputies of the Parliament of the Czech Republic the Government as an act on „Non-Profit Legal Persons“ and it was only in the course of the legislative process that the words, „on Non-Profit Legal Persons“, were replaced by the words, „on General Beneficial Societies“. The cited act regulated the status and legal relations of general beneficial societies, for which there is no basic definition but which are characterized by certain features such as formal establishment in accordance with a specific statute, non-state character (separation from the State apparatus), self-government (carrying out supervision by its own actions), the use of earnings for the provision of generally beneficial services and services in the public welfare. In contrast thereto, Act No. 245/2006 Coll. has introduced into the Czech legal order the institute of the public non-profit organization, the mission of which is to effectuate the public interest in the area of health care delivery. On the one hand, then, in spite of the fact that § 3 and foll. regulate the founding and coming into existence of public medical facilities such that they can be founded in accordance with Act No. 245/2006 Coll., on the other hand, § 40 para. 1 provides that the legal persons listed in the Annex to that Act by means of an enumeration shall become public medical facilities, upon the expiry of a specifically prescribed period. The enumeration of these medical facilities making up the Annex to Act No. 245/2006 Coll. lacks the characteristic, typical of a statute, of generality and introduces an unequal status for existing medical facilities.

68. The Constitutional Court had already previously decided that among the foundational principles of the material law-based state belongs the maxim that legal rules be of a general character (the requirement of the generality of statutes). The general character of the content is an ideal, typical, and essential characteristic of a statute, as distinct from governmental and administrative acts, or court judgments. The purpose of the division of state power into legislative, executive and judicial powers is to entrust the state‘s general and primary power of regulation to legislation, its derived general power of regulation, as well as decision-making in individual cases, to administration, and exclusively decision-

making of individual cases to the judiciary (see the 18 April 2001 Judgment of the Constitutional Court Plenum, No. Pl. US 55/2000, published in the Collection of Laws as No. 241/2001 Coll.).

69. If the group of medical facilities which are to become public medical facilities are exhaustively enumerated in the Annex to Act No. 245/2006 Coll., than one cannot, either from the Explanatory Report or from the course of the legislative process, deduce any, much less an objective, criterion of their selection. In spite of this, the health insurance companies are obliged to enter into appropriate contracts with the medical facilities in the group defined in this way. That the medical facilities listed in the enumeration were randomly selected is evidenced by the fact that they are included in it repeatedly with the incorrect legal form stated, with the incorrect name or identification number, as was ascertained even during the course of the legislative process. The Constitutional Court has already previously stated that one of the basic prerequisites for the functioning of a law-based state is the existence of internal harmony within its legal order. It is therefore also necessary that particular legal enactments be comprehensible and that foreseeable results follow from them. In the case of the contested Annex to Act No. 245/2006 Coll., however, it is evident that these requirements have not been satisfied, not even in relation to those medical facilities whose founder is the State. Accordingly, the Constitutional Court has come to the conclusion that contested provision is in conflict with Art. 1 of the Constitution, and its unconstitutionality cannot be overcome even by interpretation.

70. The Constitutional Court is aware of the fact that certain legislative arrangements which favor one group or class of persons over another cannot, in and of itself, be designated as a violation of the principle of equality. The legislature has a certain room for discretion whether it will enact such preferential treatment. At the same time it must see to it that the approach favoring one group is based on objective and reasonable grounds (the legitimate objective of the legislature) and that there exist a relation of proportionality between this objective and the means employed to attain it (legal advantages).

71. The constitutional principle of equality ranks among the basic human rights, which form the value order of modern democratic societies. It can generally be said that „inequality“, that is, a one legal regime for parties to already existing legal relations, on the one hand, and another for parties to legal relations newly being formed, on the other, always comes about whenever a legislative scheme is amended. That results in a violation, however, only if various subjects, who find themselves in the same or comparable situations, are treated in a dissimilar manner without there existing objective and rational grounds for applying the divergent approach. The assessment of this conflict must be governed by the principle of proportionality, which was not satisfied in the given case.

72. In no case does the Constitutional Court call into doubt the right of the State, in view of its constitutional responsibility to secure the rights flowing from Art. 31 of the Charter, to select the instruments for securing these rights, as well as the instruments for the supervision and regulation of medical facilities providing health care, since it thereby pursues a legitimate aim. This right cannot be conceived of in absolute terms, however, that is, in the sense that, in the interest of securing it,

all other rights and constitutionally protected values, thus even the right to self-government, would be eliminated entirely. The legislative scheme contained in Act No. 245/2006 Coll. represents a chosen conception of the health care system premised on the obligation to ensure the protection of health and the delivery of health care to citizens. To the extent this obligation is met by the health insurance companies by means of medical facilities with which they have entered into contracts for the provision and reimbursement of health care in accordance with § 46 of Act No. 48/1997 Coll. and in accordance with para. 2 of the cited provision, then an obligation is placed upon the health insurance companies, prior to entering into contracts for the provision and reimbursement of health care, to hold a selection competition (meanwhile, either a health insurance company or a medical facility authorized to provide medical care in the relevant field can propose that a selection competition be held), then § 34 para. 3, lit. a) of Act No. 245/2006 Coll. circumvents the above cited provision and also places medical facilities into unequal positions – those subjects placed into the list as against the medical facilities not place on the list. That is, it creates two classes of medical facilities, from which the medical facilities placed into the network of public medical facilities on the strength of § 34 para. 3, lit. a) and § 40 of Act No. 245/2006 Coll. are given preferential treatment in against the group of medical facilities not listed in the Annex to the Act, without providing clear and concrete rules for the inclusion of one or another medical facility into the list in the Annex to Act No. 245/2006 Coll. For completeness, the Constitutional Court would add that the State could have set up medical facilities, in the sense of its guarantee of fundamental rights defined in Art. 6 para. 1 and Art. 31 of the Charter, already before it had conveyed its property, to the extent prescribed by Act No. 290/2002 Coll., to the regions and municipalities.

73. In judging the seriousness of the constitutionally protected values of the territorial self-governing units and even of individual medical facilities, the contested provisions of Act No. 245/2006 Coll. appear in terms of content as limitations that are incommensurate, unwarranted, and, in light of the generally acceptable and shared hierarchy of values, disproportionate.

74. From the perspective of the principle of proportionality, then, the contested provisions of Act No. 245/2006 Coll. fail to respect the requirements of the criterion of necessity, nor do they satisfy the requirements of the principles of the protection of legitimate expectations, the equal status of legal subjects, the generality of statutes, and legal certainty. Consequently, Art. 11 para. 1 of the Charter and Arts. 8 and 101 para. 4 of the Constitution have been infringed.

75. According to Art. 1 of the Constitution, the Czech Republic is a democratic law-based state. The Constitutional Court has already previously stated that the Czech Republic adheres to the principles not only of the formal, but also and above all of the material law-based state. The Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose. As stated above, one of the basic prerequisites for the functioning of a law-based state is the existence of internal harmony within its legal order. It is therefore also necessary that particular legal enactments be comprehensible and that foreseeable

results follow from them.

76. Based on the foregoing, the Constitutional Court Plenum has decided to derogate the statutory provisions at issue in the version as they were listed in the statement of judgment. That means that, by its judgment, the Constitutional Court Plenum has annulled § 34 para. 2, the second sentence, § 34 para. 3, lit. a), § 34 para. 6, § 40, and the Annex to Act No. 245/2006 Coll. In view of the annulment of § 34 para. 2, second sentence, the Constitutional Court Plenum has decided to annul as well § 34 para. 2, the third sentence, which reads „[t]he second sentence shall not apply to the Capital City of Prague," even though that was not proposed by the petitioners, since, in consequence of the annulment of § 34 para. 2, the second sentence, this sentence has entirely lost any purpose (see Judgment of the Constitutional Court Plenum of 31 October 2001, No. Pl. US 15/01, published in the Collection of Laws as No. 424/2001 Coll.). The other provisions of Act No. 245/2006 Coll. remain unaffected by this judgment of the Constitutional Court Plenum, as they were not contested.

77. The Constitutional Court would at the same time emphasize that the subject of review by the Constitutional Court Plenum were § 34 para. 2, second sentence, § 34 para. 3, lit. a), § 34 para. 6, § 40 and the Annex to Act No. 245/2006 Coll. That means that the Constitutional Court has not assessed the constitutionality of other provision of Act No. 245/2006 Coll. Even though, in its statement of judgment, the Constitutional Court annulled the mentioned provisions of Act No. 245/2006 Coll., the process of the founding, coming into existence, and functioning of the public non-profit institutional medical facilities established by this Act has been retained, as that was not contested by the petition at issue. Accordingly, the Constitutional Court has not put forward any further specific potential solutions in the area of the protection of life and health and has left to the executive and legislative powers their statutory regulation

78. According to § 58 para. 1 of the Act on the Constitutional Court, judgments in which the Constitutional Court decides, under Article 87 para. 1, lit. a) or b) of the Constitution, on a petition proposing the annulment of a statute or other legal enactment, are enforceable on the day they are published in the Collection of Laws, unless the Court decides otherwise. The Constitutional Court is of the view that the petition proposing the annulment of the contested provisions of § 34 para. 2, second sentence, § 34 para. 3, lit. a), § 34 para. 6, § 40 and the Annex to Act No. 245/2006 Coll. is well-founded and, therefore, has annulled them on the day this Judgment is announced. That is to say, it would be in conflict with the principles of the democratic law-based state and in conflict with the principles of legal certainty if the contested provisions of Act No. 245/2006 Coll. were to be applicable in the period from the Judgment's announcement until its publication.

79. As far as concerns the petitioner's request for the case to be heard as a matter of priority, the Constitutional Court did not consider it necessary to pronounce, in a separate ruling issued pursuant to § 39 of the Act on the Constitutional Court, that the matter is urgent. However, even without such a formal ruling, the Constitutional Court heard the case as a matter of priority on the grounds of legal certainty both of those medical facilities listed in the Annex to Act No. 245/2006 Coll., and those which are not listed in the Annex to the Act.

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

Brno, 27 September 2006

Dissenting Opinion
Separate Opinion of Justice Vojen Güttler, dissenting from the Reasoning of the Constitutional Court Judgment in the Matter of the Petition submitted by a Group of Senators of the Senate of the Parliament of the Czech Republic proposing the Annulment of § 34 para. 2, second sentence, § 34 para. 3, lit. a), § 34 para. 6, § 40 of, and the Annex to, Act No. 245/2006 Coll., on Public Non-Profit Health Facilities and on Amendments to Certain Acts

1) Within the framework of the proportionality test (in particular, points 55, 57 and following of the Judgment's reasoning) the Constitutional Court should have – in the view of this concurring Justice – more markedly emphasized the need to protect the fundamental rights to life and health, which it correctly designated as absolute fundamental rights and values.

2) Accordingly, the Constitutional Court should have, in points 63 and 64 – in which it speaks of „alternative means" and of „less intrusive means" – stated, or at least suggested, which such alternatives come into consideration, and without regard to the conclusion in point 77 of the judgment.

Examples of such alternatives might be to impose a duty upon the relevant health care providers to ensure the basic extent of this care, or to impose an obligation upon health insurance companies to enter into contracts with the health care operators in any particular region under the condition that it will provide certain basic medical capacity and certain basic health care procedures. This is due to the fact that one cannot permit medical facility operators to provide health care only in lucrative areas and ensure only lucrative health care procedures.

Brno, 27 September 2006

Dissenting Opinion
of Justice Vladimír Kůrka dissenting from the Reasoning of the Constitutional Court Judgment in Matter No. Pl. US 51/06

I do not intend, in this separate opinion, to dispute the conclusions as to the unconstitutionality of the provisions of Act No. 245/2006 Coll., on Public Non-Profit Health Facilities and on Amendments to Certain Acts, which the Constitutional Court annulled in its Judgment, No. Pl. US 51/06. Above all, I feel the need to emphasize to what – on to that alone – the Constitutional Court spoke and what are

the consequences that follow therefrom.

The outer limits of the review were set by the petition itself, which was concentrated on certain provisions of the contested Act, not on the Act as such. It was therefore should have been thoroughly expressed that the Court did not leave out of consideration (and assessment) the constitutionality of the organization of health care delivery by „public non-profit institutional medical facilities“, which the Act founded, or the legislative scheme for their coming into existence and their legal status, much less the statutorily selected manner of incorporating their financing into the régime of public health insurance.

The Constitutional Court Plenum's tolerance for the solution which the legislature adopted in this instance cannot, therefore, be understood as a consequence of its (positive) assessment, rather, in contrast, as a consequence of the fact that the Constitutional Court did not, and could not, adjudge, these issues.

The focal point of attention in the review process was the adjudication of the constitutional law aspects of the manner in which and the circumstances under which into the network of public medical facilities were included certain existing medical facilities whose property and designation as a public-law entity were linked (on the basis of acts nos. 157/2000 Coll. and 290/2002 Coll.) with the territorial self-governing units, or title to whose property had previously passed to the regions or municipalities and which should have become „public medical facilities“ ex lege (see § 34 para. 3, lit. a), § 40 para. 1, and the Annex to the Act). It was manifestly correct to conclude that it was unconstitutional to proceed in this manner and under these circumstances; however, as to that conclusion specifically, it was appropriate to attach the test of proportionality, and the result reached by the Judgment that the condition of less intrusive means, or of proportionality, had not been satisfied, would have been more persuasive; it cannot be ruled out that, in terms of this test, the statutory solution – that is, in consequence of the intensity of the interference with the rights there compared – was entirely unacceptable.

The scrutinized conflict, of constitutionally guaranteed rights of property and the rights of territorial self-governing units (Art. 100 para. 1, Art. 101 para. 4 of the Constitution) with the right to the protection of health (Art. 31 of the Charter of Fundamental Rights and Basic Freedoms), did not then have to appear accentuated to such a degree; otherwise, the circumstance that the protection of this right is in fact accomplished by Act No. 245/2006 Coll., should have, for the purposes of constitutional review, remained only on the plain of an assumption, of which it is known that there is an ongoing expert and political controversy as to its correctness.

Brno, 17 October 2006

Dissenting Opinion
of Justice Pavel Rychetský dissenting from the reasoning of Judgment No. Pl. US 51/06

The separate opinion, which I have adopted pursuant to § 14 of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended, is directed solely against certain passages contained in the judgment's reasoning.

First and foremost I consider it as necessary to emphasize that the very conception of Act No. 245/2006 Coll., on Public Non-Profit Institutional Medical Facilities corresponds to the requirements laid down in the modern democratic, law-based state, on the task of the State in ensuring health care, and in my view it is one of the possible and constitutionally legitimate ways in which to effectuate the requirements following from Art. 6 and Art. 31 of the Charter of Fundamental Rights and Basic Freedoms. I consider the right to life, in conjunction with the right to health care as one of the fundamental rights which, in weighing it against other rights and freedoms protected by the constitutional order, must be accorded a distinct priority. I concurred in the majority judgment of the Constitutional Court Plenum, which derogated the contested provision of the statute, in view of the fact that the contested statutory arrangement was adopted in delay, when prior thereto the State had, by means of a statute, transferred what until then been state inpatient medical facilities into non-state subjects and even permitted them to be transformed into various sorts of commercial companies and then only afterwards, by means of a statute, attempted make them subject once again to a regime which had not, until that time, existed in the legal order. I consider it to be an undoubted defect in the process of the transformation from a legal system conforming to an authoritarian regime with central management of all spheres of human existence to a system of a democratic law-based state, the fact that Art. 11 para. 2 of the Charter has not been implemented by the statutory definition of the State's reservation of property interests or competencies, not even in relation to legally defined basic institutions, such as the „public corporation" , „public goods", etc. I do not concur with the line or argument in this judgment's reasoning to the extent that the annulled provisions are considered to be in conflict with Articles 8 and 101 of the Constitution, as regions (like other territorial self-governing units) cannot be evaluated as if they were private-law subjects. Territorial self-governing units are defined in the Constitution as public-law corporations and, on the contrary, the Constitution permits the State to intervene into their competencies, provided it is accomplished by means of a statute and for the protection of interests protected by statute or even, as in this case, by the constitutional order. In my view, then, the State is empowered to impose obligations, by statute, even upon public-law corporations – even obligations directed towards the performance of tasks in the area of the health care of citizens, naturally under the presupposition, however, that it at the same time procures funds from the state budget or from other public sources (for ex., health insurance) to cover these costs. In the given case, however, the annulled provisions were in conflict with Art. 11 of the Charter, which constitutes an absolute prohibition of expropriation or other limitations upon property rights without compensation. The contested statutory provisions were thus not constitutionally conforming in relation to the medical facilities which were, at the Act came into force, in the form of commercial companies, that is, private-law

subjects. If the State had defined the basic network of non-profit medical facilities as being formed exclusively from facilities owned by the State, provided them with advantages consisting in contractual obligations on the part of health insurance companies, and at the same time laid down clear criteria for the entry of additional medical facilities into this network, then it would have chosen a constitutionally conforming, even if not the sole, route towards carrying out its obligations arising Articles 6 and 31 of the Charter. In the given case, however, the State opted for the opposite route and „forcibly" included into the network even the facilities of other owners, moreover without their consent.

Brno, 27 September 2006

Dissenting Opinion
of Justice of the Constitutional Court Jan Musil

I do not concur either in the statement of judgment or the reasoning of Judgment No. Pl. US 51/06, in which the Court granted the petition of the group of Senators proposing the annulment of the contested provisions of Act No. 245/2006 Coll., on Public Non-Profit Institutional Medical Facilities and on Amendments to Certain Acts (hereinafter „Act No. 245/2006 Coll."). In accordance with § 14 of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended, I have adopted a separate opinion, the reasons for which are as follows.

1. The Constitutional Court rests its decision on the test of proportionality, by which it verified whether the legislature has correctly assessed the weight of various, partly conflicting basic rights and constitutionally protected public goods, and whether in limiting them by statute the legislature has made correct and constitutionally-conforming inferences, as to which of the weighed values should be accorded precedence. These interests which are in conflict with each other are, on the one hand, everyone's constitutionally guaranteed right to life (Art. 6 para. 1 of the Charter), the right to the protection of health and the right of citizens to free medical care on the basis of public insurance (Art. 31 of the Charter), on the other hand then, the right to own property (Art. 11 of the Charter), and the right to self-government (Art. 8 of the Charter). In its judgment, the Constitutional Court pronounced the view that, by adopting the contested provisions of the Act, the legislature resolved this conflict unconstitutionally, because it allegedly violated the principle of proportionality (points 57 to 65 of the judgment's reasoning). The legislature is upbraided because the solution it selected does not satisfy the criterion of necessity. The Constitutional Court, therefore, did not even consider it necessary to continue with the test of proportionality and to scrutinize „whether the contested provisions respected the principle of proportionality in the narrow sense" (point 65).

I do not consider this line of reasoning to be convincing.

2. I regret that, in its judgment, the Constitutional Court did not pronounce with sufficient urgency the proposition that the protection of life and health hold no less than an existential significance for humans and that in the contemporary European civilization, to which the Czech Republic has declared its allegiance, it has taken

on high stature. Such a consideration holds, in my view, basic importance for the weighing of other balanced values.

I believe that the limitation on property rights and on the right to self-government, which the legislature introduced into the contested provisions of the Act in order to resolve the conflict of those rights and the right to the protection of life and health, are proportionate in their intensity and preserve the essence and significance of these rights (Art. 4 para. 4 of the Charter).
3. The judgment substantiates its conclusion that the criterion of necessity was not observed in part by means of very vague arguments to the effect that „[t]he necessity of such intervention does not emerge with desirable precision from the Explanatory Report to Act No. 245/2006 Coll." or that „the proposed scheme of Act No. 245/2006 Coll. appears to be more or less unsystematic to say the least" (point 61 of the judgment's reasoning).

I do not consider these reproaches, directed at the legislature, to be convincing. I think that the necessity of the proposed scheme follows sufficiently clearly both from the Explanatory Report and from the parliamentary debate and public discussion carried on while the Act was under consideration. In relation to the contested provisions, it is necessary to consider whether it was necessary:
a) to impose upon each region the obligation to ensure that at least 1 public medical facilities is located in each district within its territory, and if there is not one, or if the availability of health care is not ensured, then obligation for the region itself to found a public medical facility;
b) to transform the legal persons listed in the Annex to the Act into public medical facilities.

In my view, the legislature sufficiently substantiated the necessity of this legislative scheme and the intervention into self-government and the interference with property rights following therefrom.

The legislature deemed it necessary to establish the principle that the regions will share in the task of ensuring constitutionally protected rights – everyone's right to life, the right to the protection of health, and the right of citizens to free medical care on the basis of public insurance. In order to bring these rights to fruition in actuality presupposes that basic hospital care be geographically accessible, which is the point of view that is without dispute very important for ill persons. The legislature was forced to take this step by provable cases, where certain medical facilities within the competence of the territorial self-governing units (recently transformed to commercial companies) refused to provide certain forms of indispensably necessary medical care, which signaled the danger that territorial self-governing units will not be willing to play a role in the effectuation of the mentioned constitutional rights and that they assign all responsibility for the protection of public health solely on the State.

The legislature premised the adopted act on the notion that the right to the protection of health, enshrined in Art. 31 of the Charter, imposes an obligation to guarantee its effectuation not only upon the State, but also, as public-law corporations, upon territorial self-governing units. I am of the opinion that a conception of the co-responsibility of the State and of territorial self-governing

units for the protection of health is essentially correct and not in conflict with any constitutional acts. Otherwise also other legal norms, in particular Act No. 20/1966 Coll., on Human Health Care, as subsequently amended, presuppose such participation. The principle of the participation of the State and of territorial self-governing units in ensuring the effectuation of fundamental human rights is traditionally conceived as a self-evident attribute of democratic society and, especially in the case of social rights, is quite commonplace and time-tested – just as is the case, for ex., in the effectuation of the right to education (Article 33 of the Charter) or the right to a favorable environment (Article 35 of the Charter).

The denial of co-responsibility on the part of public-law corporations in effectuating fundamental social rights, which the petitioners express in the text, for ex., by the fact that they speak of the regions‘ obligation as of the „burden“ of ensuring free medical care, strikes me as a warning sign of diminishing social cohesion and solidarity in the area of health care; I cannot acquiesce in this trend.

4. In my view, the transformation of legal persons listed in the Annex to the Act into public health facilities is rationally justifiable by the need to form a backbone network of public non-profit hospitals, primarily from the existing facilities which are already available. In order to ensure the basic medical care, it is entirely understandable to select the legal form of a non-profit hospital; these hospitals should be financed mainly from public sources (first and foremost from public health insurance) and it is necessary to ensure that these public funds are tied to the purpose for which they are designated (that is, health care), not for the accumulation of profit. In discussions when this Act was being adopted, it was substantiated that certain medical facilities which in the very recent past (in 2000 and 2002) were transferred from the State to the regions, had refused, after they were transformed from contributory organizations to commercial companies, to provide certain of the areas of health care, as a result of which the geographical accessibility of basic health care has worsened. This situation would consequently create pressure to found new medical institutions that would ensure from public funds the full range of health care, which in many cases would be an approach that is unbearably costly and wasteful, since the existing network of hospitals has sufficient capacity, if not excess capacity. I consider this line of argument, made by those supporting the adopted statutory scheme, as rational and sufficient to substantiate its necessity.
5. I regard certain of the arguments given in the reasoning of the Judgment as imprecise and inapposite.
It is asserted in point 48 of the reasoning, that it is a cardinal breach of the territorial self-governing units‘ competence that the operation of medical facilities, of which a region or a municipality is the founder, are „subject to the administrative and supervisory authority of the Ministry of Health“. This assertion is only true in part, however. Any founder whatsoever (thus even a territorial self-governing unit) is, in relation to public medical facilities, is endowed with extensive powers resulting from § 12, among which are included, in particular, the power to issue founding documents containing, among other things, the delimitation of the types, forms, and areas of health care to be provided (§ 3 para. 4, lit. d) of the Act), to issue the medical facility’s statutes, the appointment of the medical facility’s officials, and the approval of the medical facility’s budget. The direct management of the medical facility is performed by its own

bodies (its director and her deputy, the supervisory board), who are appointed and removed by the founder.

It is a fact that the Ministry of Health is endowed, in relation to public medical facilities, with significant powers flowing in particular from § 33 of the Act, that is, the authority to set the extent of the obligation to provide health care and to define the territory for which a particular facility is responsible. I believe that, in these cases, the need for a certain restriction on the founder's authority is rationally justifiable by the need to ensure for all citizens within the whole territory of the Republic a certain minimal level of free health care, as well as the geographic accessibility of that care. Certain of the obligations placed upon medical facilities by the Act (§ 33 para. 5), such as, for ex., to provide health care in the case of mass accidents, poisonings or natural disasters, are without doubt entirely justifiable in the public interest or result from international obligations (for ex., to provide health care to citizens of the European Union states).

The Act takes into account the fact that decision-making by the Ministry in these cases occurs following discussions with the region, the health insurance companies and with the relevant Councils (§ 33 para. 1).

I believe that the intrusion, thus defined by statute, into the autonomous competence of regions and municipalities (in its position as founder of public medical facilities) is both necessary and proportional.

6. Nor do I agree with the statement of judgment annulling § 34 para. 2 of the Act with the reasoning in point 62 of the Judgment's reasoning that this provision violated the regions' property rights.

The mentioned provision states that „[t]he regions shall ensure that in each district within their territory is located at least 1 public medical facilities". According to § 2 of the Act, the State, a region, a municipality or a natural or legal person can be the founder of a public medical facility. There is not doubt that the regions' obligation to ensure the placement of medical facilities can be met by various means, which need not affect the regions' property rights, if the region arranges for someone else to become the founder or if the funds needed to found come, for ex., from subsidies, gifts, etc.

One cannot spot, in the very obligation to create the conditions for geographical accessibility of health care, a disturbance of the independent competence of territorial self-governing units – for that matter, this obligation follows from other legal enactments, for ex. from the Act on Human Health Care. The analogous assertion applies also for that portion of § 34 para. 6, annulled as well by the Judgment, which, regarding the need to found a public medical facility, imposed upon regions the obligation to discuss that the municipality in which the health care should be provided. Neither do I regard this as an unconstitutional interference with property rights or an intrusion upon the regions' independent competence.

7. In contrast thereto, the imposition of the duty to found public medical facilities (if such is not done by some other founder), such as is laid down in § 34 para. 6 in

fine, could be regarded as an interference with property rights or the intrusion upon the autonomous competence of the regions. However, I consider that, even in this case, such a limitation is necessary and proportionate.

I do not agree with the assertion, found in point 62 of the Judgment, that „[t]he obligation is thus placed upon regions to carry out, at their own expense, those tasks which follows from the constitutional order of the State (the Charter and international agreements)". As I have already stated above in Part 3 of this Separate Opinion, I believe that it is erroneous to conceive of the effectuation of the right to the protection of health, enshrined in Article 32 of the Charter, solely as an obligation imposed upon the „State" in the sense of the central institutions of power and organizational units of the State. I consider it self-evident that territorial self-governing units are also bearers of public-law obligations in guaranteeing the protection of civil rights and freedoms.

8. I believe that, in terms of constitutional law, even the provisions of § 40 para. 5 pass muster, where they state that „[o]wnership rights in the property of the joint-stock companies listed in the Annex to this Act, which their incorporators invested into them when establishing them, shall, on the day a public medical facility comes into being, pass to the founder". Even if this is an instance of an interference with the private property of a commercial company, thus a private-law subject, in my view it meets the conditions in Art. 11 para. 4 of the Charter, which provides that „[e]xpropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation".

I see the satisfaction of the condition of public interest in the circumstance which was already mentioned above. The compensation for the assignment of ownership rights is ensured by the State's obligation to cover the settlement share of a co-proprietor of a limited liability company, as follows from § 40 para. 6 of the contested Act.

9. The line of reasoning in point 62 of the Judgment's reasoning is imprecise where it asserts that, in founding a public medical facility, a region will not be able „to influence the inclusion of particular medical facilities into the network". Sec. 34 para. 4 of the Act presumes at least participation by the regions, where it states that, concerning inclusion into the network, „the Minister of Health shall decide following agreement with the relevant Council and the region on whose territory the public medical facility will be located, and following prior discussion with health insurance companies".
10. I also do not agree with the assertions contained in points 62 and 63 of the Judgment's reasoning to the effect that „as follows from the contested provisions, on the other hand, the State is not obliged in any manner to ensure the financial arrangements from public funds for the newly founded public health facilities", and that this obligation is being imposed „without the State making any sort of prior guarantee to ensure the sources of financing toward that design".

I believe that the adopted Act does create such a guarantee in its § 15 para. 5, where among the revenues of public health care facilities are included also finances from public health insurance and from other public sources and, in particular, then in § 43, which amends § 17 of Act No. 48/1997 Coll., on Public

Health Insurance. This last stated provision imposes upon the health insurance companies the statutory obligation to conclude with public health care facilities a contract for the provision and reimbursement of health care.

11. I do not agree with the assertion contained in point 66 of the Judgment's reasoning to the effect that § 34 para. 3, lit. a), § 40, and the Annex to Act No. 245/2006 Coll. violate the principle of the protection of legitimate expectations, as „the medical facilities that are not included in the Annex to Act No. 245/2006 Coll. have unilaterally been discriminated against in comparison to those subjects listed in the Annex, as the legislature has not defined its selection criteria". An analogous assertion concerning the failure to define selection criteria is also contained in point 69 and point 72 of the Judgment's reasoning.

This assertion is not entirely precise because such criteria are included, at least as examples in § 34 para. 4 of the Act. The criterion is, in part, to ensure the accessibility of health care and, in part, the possibilities of the system of public health facilities. It can be presumed that criteria defined in this way are broadly vague, at the same time however, the question must arise as to whether, for the resolution of such a complicated and multi-faceted process, it is even possible to define in law more precise normative criteria for selection.

12. In points 67, 68, and 69 of the Judgment's reasoning, Act No. 245/2006 Coll. is criticized because the method of enumeration was use in its Annex, as it individually named 146 facilities, which become ex lege public medical facilities. Allegedly the maxim of the generality of legal regulation, a fundamental principle of the law-based state, is thereby violated.

Although I do not in any way call into doubt the correctness of this general requirement, also recalled in several previous Constitutional Court judgments (for ex. nos. Pl. US 55/2000, Pl. US 24/04), I believe that, under certain specific conditions, the „method of enumeration" for regulation is permissible and constitutionally conforming. A situation which would justify such an approach would be, for ex., the creation of a new type of legal person by a public law norm, into which the legislature comprehensively assigns a group of individually designated subjects which satisfy certain statutorily declared criteria. That is the case in this very instance. We can find examples of such an approach from past Czech legislation, for ex. in the enumeration of public schools of higher education in the Annex to Act No. 111/1998 Coll., on Schools of Higher Education; otherwise, even individual subjects, for ex., Czech Television, the Czech Railways, the General Health Insurance Company, were declared, in special statutes, to be legal persons in the sense of § 18 para. 2 of the Civil Code.

In conclusion I would observe that one can no doubt espouse the view that the contested legislative scheme is not ideal and that better alternatives could hypothetically be imagined. I acknowledge that certain provisions of the contested act would require partial revision, which would, however, be accomplished by the ordinary legislative procedure.

I consider it an exceedingly demanding task to successfully manage the reform of the health care system, in particular, its financing from public funds, which are

genuinely limited,

Foreign experience demonstrates that no guaranteed instructions exist for the solution of this task, that various approaches may be chosen. A comprehensive legislative regulation of this problem demands that all aspects of it, not only juristic but also economic and social, be thoroughly considered, alone due to the fact that the organizational and legal regulation of health care involves enormous expense covered from public finances. A defective resolution of this problem might arouse social consequences capable of threatening the stability of society and the State. Responsibility for finding the optimal ways in which to organize public health and its financing must be borne first and foremost by the state-forming political forces and the democratic legislature.

Even if I were to concede that the approach elected by the legislature in this case were not optimal, I still do not regard it as an unconstitutional approach.

For all the given reasons, I believe that the provisions of Act No. 245/2006 Coll. contested by the petition are not in conflict with the constitutional order of the Czech Republic and that the petition should have been rejected on the merits in accordance with § 70 para. 2 of the Act on the Constitutional Court.

Brno, 27 September 2006

Dissenting Opinion
of Justice Eliška Wagnerová Dissenting from the Reasoning of Judgment
No. Pl. US 51/06

In paragraph 32 of the above-mentioned Judgment is stated that the petitioner advanced objections along two lines. On the one hand, it objects to an interference with the protection of property rights guaranteed by Art. 11 of the Charter and, on the other, to an encroachment upon self-government guaranteed by Art. 8 and Art. 101 of the Constitution.

1. It is apparent from the reasoning that the majority began by dealing, first of all, with the issue of self-government, into which it incorporated also the issue of the protection of health and health care delivery, even though this is not one of the competences enumerated in the Act on Regions. Generally speaking, only those affairs which relate to their citizens, that is, citizens of the region or the municipality, generally fall within the independent competence of territorial self-governing units. Taken to its logical conclusion, this claim would entail, in the case of hospitals, that they would be designated for the use precisely and only of citizens of the territorial self-governing unit, which would naturally be in conflict with the principle of the free choice of physician and medical facility. Otherwise, also the media has in the recent past referred to attempts to direct citizens only to the „territorially appropriate“ hospital. It would naturally be a different situation if the task of hospitals founded within the independent competence of a region (municipality) were not to ensure the needs of its inhabitants; however, the line of argument in the Judgment does not lead in this direction and it is a question whether it could have with the current positive legal arrangement.

2. It would be difficult to agree with the approach chosen for the constitutional review of the contested provisions, which the Judgment divides into two units – „the Principle of Proportionality“ and „the Principle of the Protection of Fundamental Rights“. I do not understand this division, as each limitation upon a fundamental right or a constitutional principle is then scrutinized in terms of proportionality.
Moreover, it is apparent from the part entitled „the Principle of Proportionality“ (moreover, only in paragraph 61), that the proportionality of the limitation was scrutinized „in relation to a fundamental right – that is, in relation to the right of self-governing units to independently manage their property and to the right to the protection of property“. From the perspective of doctrine, both of civil law and of fundamental rights, I consider it as baseless to conceive of the right of self-governing units independently to manage their own property as some sort of free-standing fundamental right, which should be a manifestation of self-government as such. In contrast, I am of the view that in performing this activity, they effectuates their property rights in their various components according to which legal transaction is concerned in relation to which item of property possessed by a self-governing units.

Accordingly, in my view it would have been appropriate to review the matter solely in terms of the proportionality of the limitation upon the right of property, for the protection of which it is anyway entirely irrelevant who the owner is, as follows from Art. 11 para. 1, second sentence, of the Charter, whereas the range of owners is naturally limited only by the principle that they must be persons capable of bearing fundamental rights.
I am of the view that, in adjudicating the proportionality of the limitation on the right to property, the Constitutional Court should have followed upon its Judgment No. Pl. US 5/03, particularly the portion thereof in which it found to be disproportionate the limitation upon the right to property of regions and municipalities in relation to items of property acquired from the State, which consisted in the fact that these items should be, for a period of 10 years, used solely for the purpose for which it was used on the day that title to it passed. The relevant provisions envisaging this limitation were accordingly annulled as a disproportionate limitation upon the right to property. Although the majority judgment refers to the 2003 judgment, it does not further work with, or does not develop, its conclusions, which is the direction of review which I would have preferred.

3. Since I am of the view that the contested provisions did not pass the test of proportionality of restrictions upon property rights (which conclusion the judgment also reached by certain detours and among other grounds), it was necessary to annul the contested provisions on this precise ground, and on it alone. In my view, it is illogical and lacking in purpose to further review them in relation to other constitutional principles, as is done in the Judgment, as it subjects to further review legal norms which have already been found to be unconstitutional and which therefore must be annulled solely and exclusively for that reason.

Brno, 27 September 2006

Supplemental Dissenting Opinion
of Justice Ivana Janů and Justice Miloslav Výborný Dissenting from the Reasoning of the Judgment of the Constitutional Court Plenum in matter No. Pl. US 51/06

In the sense of § 14 of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended, we submit a supplemental separate opinion dissenting from the reasoning of the Judgment, since – in our opinion – when annulling the contested provisions of Act No. 245/2006 Coll., the Constitutional Court Plenum should have accentuate the following principles.

The legislature may also safeguard the effectuation of the fundamental rights enshrined in Art. 31 of the Charter of Fundamental Rights and Basic Freedoms („Everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.“) by establishing a network of non-profit inpatient medical facilities. One need not view as unconstitutional an approach whereby the legislature grants appropriate advantages to medical facilities in this network (consisting, for ex., in the certainty of entering into contracts with health insurance companies). The establishment of the network in the manner which the legislature employed in the case of the contested provisions cannot, however, pass muster in terms of constitutional law, as the State has, by the obligatory inclusion, without clear and reviewable criteria, of selected subjects into the mentioned network, interfered with the rights and legally protected interests of other subjects (chiefly of the regions and municipalities), moreover in a situation where it had, in the preceding period, divested itself of title to a large number of medical facilities, by transferring them, by statute, to regions or municipalities.

There is nothing hindering the legislature in laying down clear criteria and rules making, on the satisfaction of which is conditioned the entry of medical facilities of municipalities and regions (just as other non-state subjects) into a non-profit network. In this way, not only can the principle of the protection of and respect for the rights of self-governing units and its property be satisfied, but also the maxim of co-responsibility of municipalities and regions for the health of inhabitants of their territory. It is precisely through the independent competence of territorial units that the preponderant part of public medical services are performed. Thus, there is not doubt that, in order for health care reform to be successfully carried out, it is indispensable for the municipalities and regions, public law corporations, and the State to act in common.

27 September 2006