2009/07/28 - PL. ÚS 9/09: EXCLUSION OF A DISCIPLINARY SENATE JUDGE OF THE SUPREME COURT

HEADNOTES

1) The legal arrangement of a dispute over the scope of jurisdictions between state bodies and self-governing bodies valid in the Czech Republic does not acknowledge the term "included body". The Constitutional Court of the Czech Republic, in Judgment file No. Pl. ÚS 17/06, defined the term "state body" (or "self-governing body") solely and exclusively according to the category of attributability, in other words according to whether power is granted by law to a certain person or a group of persons, such power being the capacity to act on behalf of the state authoritatively and with legal relevance (i.e. with legal consequences for other entities), in the field of public-law relationships. From the viewpoint of the so defined term of "state (self-governing) body", the same person (a group of persons) in a certain role may be an included state (self-governing) body, but in another role the same may acquire the nature of a peculiar state (self-governing) body. A contrary process, by reductione ad absurdum argument, would, in consequence, lead to denial of justice and violation of the principle of forbiddance of denegationis iustitiae, and thus also the principle of a law-based state (Article 1 paragraph 1 of the Constitution). Actually, the same would result, in the case of a negative dispute over the scope of jurisdictions of "included state (self-governing) bodies", in the absence of a process which would ensure further procedure of decision making in the given case.
2) The purposes of proceedings on disputes over the scope of jurisdictions must also include cases in which the normative framework is based on a legal arrangement no longer valid at the time of the petition. This is true under the precondition that the consequences of a jurisdictional dispute apply to proceedings which have not been completed with legally effective decisions, i.e. when the argument of legal certainty and protection of rights of third parties does not oppose the handling of the conflict of jurisdictions.
3) Section 25 of Act No. 7/2002 Coll. suggests that in the case of cumulation of the absence of an explicit arrangement and the impossibility of applying the Criminal Procedure Code resulting from the nature of the matter, judicial formation of law, consisting of filling "a genuine gap in law", must be employed.
4) If the cassational judgment annuls a legally effective decision of a body of public power, to which other decisions are related in terms of contents, and unless a situation is to be created by the same when legal conditions are not met for adopting such decisions as a result of cassation, the Constitutional Court shall, at the same time, annul such other decisions related in terms of contents to the annulled decision or an annulled part of the same, if the same, with respect to the modification which took place by such annulment, has lost its basis. In relation to the same, the Constitutional Court proceeds, in connection with the legal opinion declared in Judgment file No. III. ÚS 188/99, from the provisions of § 63 of Act No. 182/1993 Coll. in connection with the provisions of § 265k paragraph 2 and § 269 paragraph 2 of the Criminal Procedure Code.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 28 July 2009, the Constitutional Court Plenum, composed of Vlasta Formánková, Pavel Holländer, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, without an oral hearing and without the parties being present, adjudicated a case concerning a petition filed by the Chief Justice of the Supreme Court with respect to the dispute over the scope of jurisdictions of state bodies [Article 87 paragraph 1, clause k) of the Constitution, § 120 et seq. of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations] to determine a body competent to issue a decision on exclusion of a judge of the Supreme Court in disciplinary proceedings pursuant to § 10 paragraph 3 in fine of Act No. 7/2002 Coll. on Proceedings Concerning Judges and Public Prosecutors in the wording valid until 30 September 2008, as follows:

I. The body competent to decide on the exclusion of JUDr. Jiří Pácal, the Chairman of the Disciplinary Senate of the Supreme Court, from hearing and adjudicating a disciplinary case concerning Judge JUDr. Pavel Kučera, the Deputy Chief Justice of the Supreme Court, (file No. 1 Skno 20/2008), is the Chairperson of the Collegium of the Supreme Court appointed to substitute for the Chief Justice of the Supreme Court by the Standing Order and the Work Schedule of the Supreme Court.

II. The resolution of the Disciplinary Senate of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, on not excluding JUDr. Jiří Pácal, Chairman of the Disciplinary Senate of the Supreme Court, from hearing and adjudicating a case administered by the Supreme Court under file No. 1 Skno 20/2008, and the decision of the Disciplinary Senate of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, on withdrawing the case of Judge JUDr. Pavel Kučera, charged within disciplinary proceedings, administered by the High Court in Olomouc under file No. 1 Ds 2/2008, and assigning the same to the High Court in Prague, shall be annulled.

REASONING

I.
Specification of the case and recapitulation of the petition

On 4 May 2009, the Constitutional Court received a petition from the Chief Justice of the Supreme Court for declaring the competence of the Chief Justice of the Supreme Court to issue a decision on excluding a judge of the Supreme Court in disciplinary proceedings pursuant to § 10 paragraph 3 in fine of Act No. 7/2002 Coll. on Proceedings Concerning Judges and Public Prosecutors in the wording valid until 30 September 2008, and petitions related thereto for annulment of the decision of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, on

JUDr. Jiří Pácal, Chairman of the Disciplinary Senate of the Supreme Court, not being excluded from hearing and adjudicating the case administered by the Supreme Court under file No. 1 Skno 20/2008, and for annulment of the decision of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, on withdrawing the case of Judge JUDr. Pavel Kučera, charged within disciplinary proceedings, administered by the High Court in Olomouc under file No. 1 Ds 2/2008, and assigning the same to the High Court in Prague. In connection with the petitions in question, the petitioner filed a petition for a decision on the urgency of the case pursuant to § 39 of Act No. 182/1993 Coll. and for a decision in plenum in accordance with Article 1 paragraph 1, clause a) of the Constitutional Court Notice published under No. 185/2008 Coll.

On 4 March 2009, the Disciplinary Senate of the Supreme Court, composed of JUDr. Jiří Pácal as the Chairman, and JUDr. Karel Podolka, JUDr. Antonín Draštík, JUDr. Petr Gemmel and JUDr. Ivana Zlatohlávková as members, decided in the above-specified case, file No. 1 Skno 20/2008, that JUDr. Jiří Pácal, Chairman of the Disciplinary Senate of the Supreme Court, was not to be excluded from hearing and adjudicating a disciplinary case concerning Judge JUDr. Pavel Kučera, the Deputy Chief Justice of the Supreme Court; and furthermore, on the same date, decided that said disciplinary case be withdrawn from the High Court in Olomouc and assigned to the High Court in Prague. According to the criticism contained in the petition, they decided so despite the fact that the Chief Justice of the Supreme Court, in a memorandum dated 20 February 2009 and delivered on 26 February 2009 to the Chairman of the Disciplinary Senate, JUDr. Jiří Pácal, and thereafter in another memorandum dated 3 March 2009, delivered to all members of the Disciplinary Senate (on 4 March 2009 repeatedly to JUDr. Jiří Pácal, on 4 March to JUDr. Karel Podolka, on 3 March 2009 to JUDr. Antonín Draštík, on 3 March 2009 to JUDr. Petr Gemmel, and on 3 March 2009 to JUDr. Ivana Zlatohlávková), pointed out her own jurisdiction to decide on the exclusion of JUDr. Jiří Pácal pursuant to § 10 paragraph 3 in fine of Act No. 7/2002 Coll. in the wording valid until 30 September 2008.

The petitioner reprehends the Disciplinary Senate for incorrectly applying § 25 of Act No. 7/2002 Coll. in the wording valid at the decisive period of time, since the given statutory provisions establish the subsidiary validity of the Criminal Procedure Code for regulation of disciplinary proceedings, unless Act No. 7/2002 Coll. provides otherwise, which is actually the case in the given matter, which is covered by the explicit regulation of § 10 paragraph 3 in fine of Act No. 7/2002 Coll. in the wording valid until 30 September 2008. In the petitioner's opinion, the given case does not concern decision making on the objection of bias, but rather decision making on self-exclusion of a judge. She points out the fact that the difference between a situation in which self-exclusion of a judge is concerned and another concerning an objection of bias raised by a party to the proceedings is seen not only by Act No. 7/2002 Coll. but also by the Code of Administrative Justice in the provisions of § 8 paragraph 3 and § 8 paragraph 5, as well as the Civil Procedure Code in the provisions of § 14 and § 15 paragraph 2, and in the provisions of § 15a paragraph 1. In all these cases of self-exclusion it is the actual chairperson of the court who appoints another judge or another panel. The petitioner, in support of the above-specified argumentation, refers to the procedure of JUDr. Jaroslav Holubec, Chairman of the High Court in Olomouc, and JUDr. Vladimír Stibořík,

Chairman of the High Court in Prague, who also did not apply the provisions of § 25 of Act No. 7/2002 Coll. in the wording valid at the decisive period of time, but applied § 10 paragraph 3 of the same Act, this when they made decisions on the exclusion of judges in a disciplinary case concerning JUDr. Pavel Kučera, the Deputy Chief Justice of the Supreme Court – the former on excluding JUDr. Ivo Kouřil, the latter on excluding JUDr. Ludmila Říhová and JUDr. Romana Vostrejšková. When evaluating the jurisdiction of Chairpersons of High Courts and the Chief Justice of the Supreme Court, it is, according to the petitioner, not possible to proceed "from the contingency of who is a party to the proceedings in specific disciplinary proceedings".

The inappropriateness of applying § 25 of Act No. 7/2002 Coll. in the wording valid at the decisive period of time, thus also § 31 of the Criminal Procedure Code, is seen by the petitioner additionally in the fact that a remedy is permitted against a decision on exclusion pursuant to § 31 paragraph 2 of the Criminal Procedure Code, while no remedy is permitted in disciplinary proceedings. The petition also rejects the argumentation of the Disciplinary Senate of the Supreme Court referring to the fact that a chairperson of the court making a decision on exclusion is at the same time a party to the disciplinary proceedings, since exclusively the chairpersons of courts (with the exception of the Minister of Justice) are, pursuant to § 8 of Act No. 7/2002 Coll., petitioners in disciplinary proceedings, which means that should the fact that a chairperson of the court is also a party to disciplinary proceedings have been relevant, it would also have to be reflected in regulation concerning the provisions of § 10 paragraph 3 of the above-specified Act. Moreover, the petition points out that the provisions of § 10 paragraph 3 of Act No. 7/2002 Coll. in the wording valid at the decisive period of time, leave no room for discretion by the chairperson of the court and at the same time determine which judge succeeds in place of the judge excluded.

The petitioner believes that the decision of the Disciplinary Senate also contains an element of arbitrariness. She states that in the proceedings on the first petition for delegation of the case of disciplinary proceedings against JUDr. Pavel Kučera, the Deputy Chief Justice of the Supreme Court, (file No. 1 Skno 7/2008), JUDr. Jiří Pácal, through procedure pursuant to § 10 paragraph 3, first sentence of Act No. 7/2002 Coll., initiated, by a memorandum dated 23 April 2008, a decision of the Chief Justice on exclusion pursuant to the same provisions in fine by saying: "I wish to inform you that my long-term friendship with JUDr. Pavel Kučera may raise misgivings concerning my being biased in his disciplinary case and, therefore, I suggest procedure pursuant to § 10 paragraph 3, third sentence of Act No. 7/2002 Coll., as amended by later regulations". By the decision of the Chief Justice of the Supreme Court dated 2 May 2008, file No. 1 Skno 7/2008, Judge JUDr. Jiří Pácal was, for the above-given reasons, excluded from hearing and adjudicating the case in question. Therefore, the petitioner considers as inconsistent, without revocation of his subjective attitude, the different procedure adopted by JUDr. Jiří Pácal in other disciplinary proceedings against JUDr. Pavel Kučera, the Deputy Chief Justice of the Supreme Court, this by deciding on Judge Pácal not being excluded from the proceedings in question, as well as by deciding on delegation, when both these decisions were adopted by the Disciplinary Senate of the Supreme Court under his chairmanship. The Chief Justice of the Supreme Court criticises the decision on delegation because the same is supported by casting doubts on JUDr. Ivo Kouřil, a

judge of the High Court in Olomouc, who, having been excluded, could not adjudicate the disciplinary case, and completely ignores the independency and impartiality of lawful judges of the Disciplinary Senate of the High Court in Olomouc, who themselves did not give any report on circumstances for which they could be excluded pursuant to the provisions of § 10 paragraph 3, first sentence of Act No. 7/2002 Coll. in the wording valid at the given period of time, wherefore no reason exists for concluding the necessity to withdraw the case from the High Court in Olomouc.
For all these outlined reasons, the petitioner believes that a decision on self-exclusion of a judge – a member of a disciplinary panel – falls under the jurisdiction of the chairperson of the court, this including also the Supreme Court, and not under the jurisdiction of the disciplinary panel.

From the viewpoint of complying with conditions for active standing in a dispute over the scope of jurisdictions, the petitioner states, with reference to Judgment of the Constitutional Court file No. Pl. ÚS 17/06, that as the Chief Justice of the Supreme Court she is a representative of judicial power, being, according to Article 92 of the Constitution, the head of a paramount body of judicial power, may not be considered a court as specified by Article 90 and Article 91 of the Constitution, and further states that the petition is admissible since there is no shared superior authority entitled to resolve the conflict of jurisdictions between the Chief Justice of the Supreme Court and the Senate of the same court. Furthermore, she refers to the importance of the given case and points out that the subject of the disciplinary proceedings consists of the conduct of JUDr. Pavel Kučera, the Deputy Chief Justice of the Supreme Court, in connection with criminal proceedings administered against the former Deputy Prime Minister, Jiří Čunek.

The petitioner requested that her petition be adjudicated by the Plenum of the Constitutional Court [Article 1 paragraph 1, clause a) of the Constitutional Court Notice, published under No. 185/2008 Coll.]; additionally, the petitioner requested that a decision be adopted in preference to other petitions received before it for reasons of urgency (§ 39 of Act No. 182/1993 Coll.). With reference to the provisions of § 63 of Act No. 182/1993 Coll., under adequate application of § 243b paragraph 3, the second sentence of the Civil Procedure Code, and with respect to the settled case law of the Constitutional Court, annulling – within the scope of proceedings on a constitutional complaint against the ultimate means of protection of rights – all decisions that have their basis in a decision of a court of the first level, the Chief Justice of the Supreme Court proposes to annul the related decision of the Supreme Court on delegation, since non-compliance with the jurisdiction of the Chief Justice of the Supreme Court has resulted in the subsequent actual decision on delegation of the disciplinary case to the High Court in Prague.

II.
Recapitulation of substantial sections of the statement by the party to the proceedings

Pursuant to § 42 paragraph 4 and § 121 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, the Constitutional Court sent the petition in question to the Supreme Court. JUDr. Jiří Pácal, Chairman of

the Disciplinary Senate of the Supreme Court, in his statement delivered to the Constitutional Court on 28 May 2009, detailed that the dispute in the given case is not over the scope of jurisdictions, but rather over decision making on excluding the Chairman of the Senate in disciplinary proceedings before the Supreme Court, i.e. resolving a procedural issue in disciplinary proceedings, wherefore he proposed that the petitions by the Chief Justice of the Supreme Court be rejected as inadmissible pursuant to § 43 paragraph 1, clause e) of Act No. 182/1993 Coll., as amended by later regulations. The party to the proceedings further referred to the reasoning of the resolution of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, and moreover accentuated that the Chief Justice of the Supreme Court as a petitioner in the disciplinary proceedings, i.e. as a party to the same, cannot decide on exclusion of the Chairman of the Disciplinary Senate, this due to contradiction with Article 38 paragraph 1 of the Charter of Fundamental Rights and Basic Freedoms. This circumstance was accepted by JUDr. Iva Brožová in disciplinary proceedings administered under file No. 1 Skno 1/2007 against JUDr. Z. S., a judge of the Supreme Court, when she delegated the decision making on exclusion of the Chairman of the Disciplinary Senate to the Deputy Chief Justice of the Supreme Court pursuant to Article 26 paragraph 1 of the Standing Order of the Supreme Court. According to the Chairman of the Disciplinary Senate of the Supreme Court, however, such procedure in the given case is not possible; likewise, it is not possible to authorise, pursuant to § 29 of the Standing Order of the Supreme Court, the Chairperson of the Collegium of the Supreme Court to make such a decision, as the Chairperson of the Collegium of the Supreme Court deputises for the Chief Justice and the Deputy Chief Justice of the Supreme Court only in their absence with the exception of their powers reserved by the Act on Judges and Courts; in his opinion, the Act on Disciplinary Proceedings of Judges may be interpreted analogously. Thus the Disciplinary Senate of the Supreme Court had only one option left, which was to apply § 25 of Act No. 7/2002 Coll. in the wording effective until 30 September 2008, as well as § 31 of the Criminal Procedure Code.

For the reasons specified above, the party to the proceedings proposes that the petitions filed be rejected pursuant to § 43 paragraph 1, clause e) of Act No. 182/1993 Coll., as amended by later regulations, and possibly pursuant to § 43 paragraph 2, clause a) of the same Act.

III.
Dispensation of an oral hearing

According to the provisions of § 44 paragraph 2 of Act No. 182/1993 Coll., as amended by later regulations, the Constitutional Court may, upon consent by the parties concerned, dispense with an oral hearing if further clarification of the matter cannot be expected from said hearing. With respect to the fact that both the petitioner (by not responding within the term specified to a notice from the Constitutional Court containing an explicit note concerning the presumption of consent) and the party to the proceedings (explicitly in a memorandum delivered to the Constitutional Court on 20 July 2009) expressed their consent with dispensation of an oral hearing, and, with respect to the fact that the Constitutional Court deems that further clarification of the matter cannot be

expected from such a hearing, the same was dispensed with in respect of the given case.

IV.
Conditions for active standing of the petitioner

The petition for commencement of proceedings in the case of a dispute over the scope of jurisdictions of state bodies was filed by the Chief Justice of the Supreme Court pursuant to the provisions of § 120 paragraph 2, clause a) of Act No. 182/1993 Coll. In Judgment file No. Pl. ÚS 17/06, the Constitutional Court acknowledged the active standing of the Chief Justice of the Supreme Court in the given type of proceedings: "From the viewpoint of legal theory, the Chief Justice of the Supreme Court is a body of another body – the Supreme Court. However, this does not affect the fact that the Chief Justice of the Supreme Court has, within the confines of their exclusive authorities… also the exclusive authority to file a petition for settling a jurisdictional dispute, if they believe that the same has arisen, for example, by actually ignoring authorities granted to them by law. For the jurisdictions so granted are not bestowed on the Supreme Court, but solely on the Chief Justice of the Supreme Court (cf. Weyr, F.: Teorie práva / Theory of Law, Brno-Prague, Orbis, 1936, p. 117). If certain authorities are granted exclusively to the Chief Justice of the Supreme Court, then the Chief Justice of the Supreme Court must also be permitted the necessary discretion to enforce such authorities and protect the same by legal proceedings, independently of the standpoint of other bodies. Thus it may be stated that the Chief Justice of the Supreme Court is a state body competent of raising a petition according to Article 87 paragraph 1, clause k) of the Constitution, or the provisions of § 120 et seq. of the Act on the Constitutional Court."

The Federal Constitutional Court of the Federal Republic of Germany, in accordance with the statutory arrangement, interprets the term of a body in proceedings in a case of a dispute over the scope of jurisdictions by granting active standing in the same not only to the "body" but also to parts of the same, if such parts have their own jurisdictions (establishing a special designation for such a part of the state body: "Teilorgan"). An example consists of the acceptance of active standing of parliamentary factions in the Federal Bundestag (see BVerfGE 2, 143 (165); 45, 1 (28); 90, 286 (336); 100, 266 (268); 103, 81 (86); 104, 151 (193); 105, 197 (220); 113, 113 (121), BVerfG, 2 BvE 1/07 dated 12 March 2007, K. Schleich, Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidungen. 2. Aufl., C. H. Beck, Munich 1991, p. 56 et seq.).

The legal arrangement of a dispute over the scope of jurisdictions between state bodies and self-governing bodies valid in the Czech Republic, however, does not acknowledge the term "included body". Therefore, the Constitutional Court of the Czech Republic, in Judgment file No. Pl. ÚS 17/06 quoted above, defined the term "state body" (or "self-governing body") solely and exclusively according to the category of attributability, in other words according to whether power is granted by law to a certain person or a group of persons, such power being the capacity to act on behalf of the state authoritatively and with legal relevance (i.e. with legal consequences for other entities), in the field of public-law relationships. From the viewpoint of the so defined term of "state (self-governing) body", the same person

(a group of persons) in a certain role may be an included state (self-governing) body, but in another role the same may acquire the nature of a peculiar state (self-governing) body. A contrary process, by reductione ad absurdum argument, would, in consequence, lead to denial of justice and violation of the principle of forbiddance of denegationis iustitiae, and thus also the principle of a law-based state (Article 1 paragraph 1 of the Constitution). Actually, the same would result, in the case of a negative dispute over the scope of jurisdictions of "included state (self-governing) bodies", in the absence of a process which would ensure further procedure of decision making in the given case.

According to the declaration of the petitioner, the provisions of § 10 paragraph 3, the third sentence of Act No. 7/2002 Coll. in the wording valid until 30 September 2008, the jurisdiction to make decisions on each case of exclusion of a member (chairperson) of the Disciplinary Senate of the Supreme Court was her prerogative, i.e. belonged to the Chief Justice of the Supreme Court. By contrast, according to the opinion of the Disciplinary Senate of the Supreme Court (expressed firstly in their decision dated 4 March 2009, file No. 1 Skno 20/2008, and also in the statement of their Chairman, delivered to the Constitutional Court on 28 May 2009), under circumstances which occurred in the case under consideration according to § 25 of Act No. 7/2002 Coll. in the wording valid until 30 September 2008, in connection with § 31 of the Criminal Procedure Code, this jurisdiction comes under the Disciplinary Senate of the Supreme Court.

From a judicial point of view (see, for example, Judgment of the Constitutional Court file No. Pl. ÚS 17/06) as well as doctrinal one, the case in question concerns a positive jurisdictional dispute between two state bodies which claim the exklusive jurisdiction to make a decision in the same case.

For the reasons above, as results from the description of the dispute according to the proposed verdict of the petition as well as settled standpoints resulting from the case law of the Constitutional Court covering Article 87 paragraph 1, clause k) of the Constitution and § 120 paragraph 2, clause a) of Act No. 182/1993 Coll., it may be stated that on the part of the petitioner, conditions for active standing in the proceedings on disputes over the scope of jurisdictions of state bodies have been met.

V.
Admissibility of the petition

In Judgment file No. III. ÚS 429/2000, the Constitutional Court stated that "the purpose of proceedings on disputes over the scope of jurisdictions of state bodies and bodies of a self-governing region in accordance with § 120 et seq. of Act No. 182/1993 Coll., as amended by later regulations, does not consist of an abstract interpretation of the Constitution ('frame of government') or ordinary law, but rather of making a decision in such a dispute merely within the context of a specific matter in which the given dispute occurred, this after enforcing the disputed jurisdiction either by issuing a decision on the merits of the case, or by rejecting their own competence (similarly see the decision of the Constitutional Court in case file No. Pl. ÚS 58/2000)". Such a premise is analogous to that which the Constitutional Court repeatedly declared in proceedings on a specific norm

control (file Nos. Pl. ÚS 33/2000, Pl. ÚS 42/03, Pl. ÚS 38/06), according to which if a judge of an ordinary court concludes that an act which is to be used to solve a case (i.e. not only an act valid at the given time, but also an act no longer valid at the given time, yet still applicable) is in contravention of a constitutional act, such a judge shall be obliged to submit the case to the Constitutional Court (Article 95 paragraph 2 of the Constitution), and refusal to aid the ordinary court via a decision by the Constitutional Court on the constitutionality or otherwise of the applicable act was considered by the Constitutional Court as a reason for origination of an inextricable situation of an artificial legal vacuum (Article 83 and Article 95 paragraph 1 and paragraph 2 of the Constitution).

Therefore, it may be concluded that the purposes of proceedings on disputes over the scope of jurisdictions must also include cases in which the normative framework is based on a legal arrangement no longer valid at the time of the petition. This is true under the precondition that the consequences of a jurisdictional dispute apply to proceedings which have not been completed with legally effective decisions, i.e. when the argument of legal certainty and protection of rights of third parties does not oppose the handling of the conflict of jurisdictions.

Moreover, the Act on the Constitutional Court specifies no deadline for filing such a petition that necessarily reflects a decision which has been already issued (as specified by § 125). The Constitutional Court has not inferred any such deadline in their hitherto case law, not even by possible procedural analogy (such as to § 72 paragraph 2 of the Act on the Constitutional Court), or from the nature of the matter (for example, by a requirement for immediate filing of the petition). First of all, this creates inequality within the legal order, when in civil proceedings a term of three months from the delivery of the given decision (§ 234 paragraph 1 of the Civil Procedure Code) is determined for filing an action to declare mistrial due to a decision having been adopted that does not pertain to the powers of courts (§ 229 paragraph 1, clause a) of the Civil Procedure Code), while in criminal proceedings, the possibility of filing a complaint on a violation of the law to the detriment of the defendant is limited to the term of six months from the date on which the contested decision becomes legally effective (§ 272 of the Criminal Procedure Code). Non-existence of a term for filing a petition in proceedings on disputes over the scope of jurisdictions related to a previously issued disputed decision establishes uncertainty in legal relationships, the associated risks of which are, to a decisive degree, not borne by entities involved in the jurisdictional dispute but natural persons and legal entities, the rights of which were being decided upon. On the basis of the above-outlined reasons, it may be considered justified to require that a petition in the given cases be filed without undue delay.

Since the petition in question meets such defined conditions, there is no reason to deny such a petition on the grounds of lack of jurisdiction [§ 43 paragraph 1, clause d) of Act No. 182/1993 Coll., as amended by later regulations] or on the grounds of late submission [§ 43 paragraph 1, clause b) of Act No. 182/1993 Coll., as amended by later regulations], and finally, with respect to the fact that no other body pursuant to a special act or shared superior authority is competent to decide on the given jurisdictional dispute, there is no reason to reject the petition for

inadmissibility [§ 43 paragraph 1, clause e) in connection with § 122 of Act No. 182/1993 Coll., as amended by later regulations].

VI.
Ratio decidendi

The petitioner supports the jurisdiction she claims with the provisions of § 10 paragraph 3, the third sentence of Act No. 7/2002 Coll. in the wording valid until 30 September 2008, according to which: "Should the chairperson of a court rule that there are grounds for excluding a member of a panel, the chairperson shall select in the stead of the chairperson of the panel a deputy of such a person, and in the case of a member of the panel, the chairperson shall determine, for such a position, the first judge on the list of substitutes, or determine another associate judge by drawing lots."

The party to the proceedings then, in the instance that the chairperson of the court is the petitioner in the disciplinary proceedings and the deputy chairperson of the court is the judge against whom the disciplinary proceedings are administered, exercises the jurisdiction to make a decision on exclusion of a judge (chairperson) of the disciplinary panel according to § 25 of Act No. 7/2002 Coll. in the wording valid until 30 September 2008 ("Unless this Act provides otherwise or unless the nature of the matter suggests something else, disciplinary proceedings shall adequately employ the provisions of the Criminal Procedure Code.") in connection with § 31 of the Criminal Procedure Code (in accordance with paragraph 1 of which "exclusion of a judge or an associate judge when they adjudicate in a panel shall be decided upon by that panel").

The provisions of § 25 of Act No. 7/2002 Coll. have adopted literally the wording of the provisions of § 24 of Act No. 412/1991 Coll. on the Disciplinary Responsibility of Judges. Adequate application of the Criminal Procedure Code to the disciplinary proceedings of judges is preconditioned by an absence of an explicit arrangement in Act No. 7/2002 Coll. on Proceedings Concerning Judges and Public Prosecutors, or by a different conclusion as suggested by the nature of the matter. In other words, an explicit arrangement negates application of the Criminal Procedure Code and equally, application of the Criminal Procedure Code is impossible in cases when an explicit arrangement is lacking, but the nature of the matter suggests "something else", that means the impossibility of adequate application of the Criminal Procedure Code is suggested. The statutory provisions in question thus determine the following application sequence: an explicit arrangement; in the absence of the same, the Criminal Procedure Code; and in the case of cumulation of both absence of an explicit arrangement and the impossibility of applying the Criminal Procedure Code suggested by the nature of the matter, the judicial formation of law, consisting of filling "a genuine gap in law".

The party to the proceedings in a decision dated 4 March 2009, file No. 1 Skno 20/2008, in spite of an explicit arrangement (contained in § 10 paragraph 3, the third sentence of Act No. 7/2002 Coll. in the wording valid until 30 September 2008), proceeded pursuant to § 25 of Act No. 7/2002 Coll. in the wording valid until 30 September 2008, in connection with § 31 of the Criminal Procedure Code, and thus adjudicated contra legem.

In a number of judgments, the Constitutional Court addressed the issue of conditions under which interpretation and application contra legem may be accepted. In Judgment file No. Pl. ÚS 21/96, in this connection, the Constitutional Court stated: “In this, the court is not absolutely bound by verbatim wording of the statutory provisions; to the contrary, the court may and must deviate from the same in situations when the same is required for serious reasons by the purpose of the act, history of origination of the same, systematic nexus or any of the principles which are based in a constitutionally conformable legal order as a meaningful whole. In relation to this it is necessary to eschew arbitrariness; a decision of the court must be based on rational argumentation.” A similar conclusion was also reached in cases of tension between literal and teleological interpretation (file No. III. ÚS 258/03).

In the case under consideration, literal interpretation, and application of § 10 paragraph 3, the third sentence of Act No. 7/2002 Coll. in the wording valid until 30 September 2008 resulting from the same, would be of such consequence that the same entity as is a party to the proceedings would decide on exclusion of a judge.

Such literal interpretation and application would result in affecting the principle of independency and impartiality of judicial decision making (as specified by Article 81 et seq. of the Constitution, as well as by Article 36 paragraph 1 of the Charter), since the judicial body (chairperson of the court) would make a decision on the bias of a judge in proceedings to which such a body is a party. The above reason must be considered acceptable for employing procedure contra legem. The above-outlined algorithm of application of § 25 of Act No. 7/2002 Coll. suggests the necessity to address the issue of whether “something else” is suggested by the nature of the matter with respect to the case under consideration, which makes adequate application of the Criminal Procedure Code impossible.

In Judgment file No. III. ÚS 182/99, the Constitutional Court addressed the issue of application of § 31 paragraph 1 of the Criminal Procedure Code, and concluded that the procedure established therein may be considered as constitutionally conformal only under the condition of a review by a superior court: pursuant to § 31 paragraph 1 of the Criminal Procedure Code, exclusion for reason of bias in criminal proceedings shall be decided upon by a body which is affected by these reasons; exclusion of a judge or associate judge, if they adjudicate in a panel, shall be decided upon by such a panel. Accepting the interpretation of § 141 paragraph 2 of the Criminal Procedure Code, which, in the case of objection of bias of a judge of an appellate instance, would bar a review by a superior court, would result in the condition that in such a case the body concerned would be in charge of making the decision, in other words, in proceedings on exclusion for the reason of bias, a ‘party to the proceedings’. Such a construct would create conflict with the elementary procedural principle, according to which no-one can be a judge in their own case, this being a principle which is a component of the fundamental right to claim one’s rights at an independent and impartial court in accordance with Article 36 paragraph 1 of the Charter.

In other words, the mechanism contained in § 31 of the Criminal Procedure Code,

which would not be amended with a guarantee of independent and impartial judicial review, was designated by the Constitutional Court to be in conflict with Article 36 paragraph 1 of the Charter, as well as with Article 81 et seq. of the Constitution.

On the basis of the proposition detailed above, the only conclusion that can be reached is that the procedure of the Disciplinary Senate of the Supreme Court in the case under consideration was in contravention of the provisions of § 10 paragraph 3, the third sentence, as well as of § 25 of Act No. 7/2002 Coll. in the wording valid until 30 September 2008, and thus – without any other substantiation being necessary – the Disciplinary Senate of the Supreme Court was not competent to issue a decision on excluding a judge of the Supreme Court in disciplinary proceedings.

As stated earlier, § 25 of Act No. 7/2002 Coll. suggests that in the case of cumulation of the absence of an explicit arrangement and the impossibility of applying the Criminal Procedure Code resulting from the nature of the matter, judicial formation of law, consisting of filling "a genuine gap in law", must be employed.

If similar reasons which prevent the Chief Justice from executing jurisdiction pursuant to § 10 paragraph 3, the third sentence of Act No. 7/2002 Coll. in the wording valid until 30 September 2008 are valid in the case in question due to the impossibility of transferring the above-specified jurisdiction from the Chief Justice to the Deputy Chief Justice of the Supreme Court, it is necessary to determine a relevant judicial body that could fully adhere to the requirements resulting from Article 36 paragraph 1 of the Charter and Article 81 et seq. of the Constitution. According to Article 29 of the Standing Order of the Supreme Court, in the absence of the Chief Justice and the Deputy Chief Justice of the Supreme Court, the Chief Justice of the Supreme Court is substituted for by a Chairperson of the Collegium authorised by the Chief Justice; such a Chairperson, however, is not entitled to exercise the powers reserved by the Act on Courts and Judges exclusively for the Chief Justice and, in the absence of the Chief Justice, to the Deputy Chief Justice of the Supreme Court. Since the powers that would be in contravention of the provisions above of the constitutional order cannot be considered to be such, such a body shall be the Chairperson of the Collegium as authorised, by a general rule, to substitute for the Chief Justice of the Supreme Court in the absence of the Chief Justice and the Deputy Chief Justice of the Supreme Court (by their Work Schedule).

On the basis of the reasons so explained, the Plenum of the Constitutional Court adjudicated the petition of the Chief Justice of the Supreme Court in a dispute over the scope of jurisdictions of state bodies [Article 87 paragraph 1, clause k) of the Constitution, § 120 et seq. of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations] for determining a body competent to issue a decision on excluding a judge of the Supreme Court in disciplinary proceedings pursuant to § 10 paragraph 3 in fine of Act No. 7/2002 Coll. on Proceedings Concerning Judges and Public Prosecutors in the wording valid until 30 September 2008, in such a way that the body competent to make a decision on excluding the Chairman of the Disciplinary Senate of the Supreme Court, JUDr. Jiří Pácal, from

hearing and adjudicating the disciplinary case of Judge JUDr. Pavel Kučera, the Deputy Chief Justice of the Supreme Court, (file No. 1 Skno 20/2008), is the Chairperson of the Collegium of the Supreme Court designated to substitute for the Chief Justice of the Supreme Court by the Standing Order and the Work Schedule of the Supreme Court.

VII.
Cassational consequences of the Judgment

A consequence of adopting a verdict of the Judgment in accordance with § 124 paragraph 1 of Act No. 182/1993 Coll. consists, as specified by § 125 paragraph 1 of Act No. 182/1993 Coll., of annulling the resolution of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, concerning the fact that JUDr. Jiří Pácal, Chairman of the Disciplinary Senate of the Supreme Court, is not excluded from hearing and adjudicating the case administered by the Supreme Court under file No. 1 Skno 20/2008.

In Judgment file No. III. ÚS 188/99, the Constitutional Court stated that according to the marginal heading of § 63 of Act No. 182/1993 Coll., the application of procedural orders is anticipated in proceedings before the Constitutional Court, while the wording itself of the above-specified provisions refers only to the Civil Procedure Code and regulations issued for the implementation thereof. The above-specified contradiction between the plural contained in the marginal heading and the specific reference in the wording of the norm must be interpreted in such a sense that unless the Act on the Constitutional Court provides otherwise, the provisions of the Civil Procedure Code and regulations issued for the implementation of the same shall be adequately applied to the proceedings before the Constitutional Court, unless adequate application of solely the Criminal Procedure Code relates, from the nature of the matter, to the given procedural situation.

If the cassational judgment annuls a legally effective decision of a body of public power, to which other decisions are related in terms of contents, and unless a situation is to be created by the same when legal conditions are not met for adopting such decisions as a result of cassation, the Constitutional Court shall, at the same time, annul such other decisions related in terms of contents to the annulled decision or an annulled part of the same, if the same, with respect to the modification which took place by such annulment, has lost its basis. In relation to the same, the Constitutional Court proceeds, in connection with the above-specified legal opinion declared in Judgment file No. III. ÚS 188/99, from the provisions of § 63 of Act No. 182/1993 Coll. in connection with the provisions of § 265k paragraph 2 and § 269 paragraph 2 of the Criminal Procedure Code.

Due to the above, the Constitutional Court also annulled the resolution of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, concerning the fact that JUDr. Jiří Pácal, Chairman of the Disciplinary Senate of the Supreme Court, is not excluded from hearing and adjudicating the case administered by the Supreme Court under file No. 1 Skno 20/2008, as well as the related decision of the Supreme Court dated 4 March 2009, file No. 1 Skno 20/2008, on withdrawing the case of Judge JUDr. Pavel Kučera, charged within disciplinary proceedings, administered

by the High Court in Olomouc under file No. 1 Ds 2/2008, and assigning the same to the High Court in Prague.

With respect to the immediate hearing and adjudication of the case in question, the Constitutional Court deems the decision on the urgency of the case pursuant to § 39 of Act No. 182/1993 Coll. to be unfounded.

Note: Decisions of the Constitutional Court cannot be appealed.

In Brno on 28 July 2009

Dissenting opinion of Justices Pavel Rychetský and Jan Musil

The dissenting opinion which, pursuant to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, we express, is aimed against the Judgment whereby a decision was taken on the scope of jurisdictions in the dispute between the Chief Justice of the Supreme Court and the Disciplinary Senate of the same court over determining which body of the Supreme Court was competent to make a decision on possibly excluding JUDr. Pácal, Chairman of the Disciplinary Senate of the Supreme Court, due to bias in proceedings on the petition by JUDr. Kučera, the Deputy Chief Justice of the Supreme Court charged within disciplinary proceedings, for withdrawal of the disciplinary proceedings from the High Court in Olomouc and for assignment of the same to the High Court in Prague. In the given case, the Chief Justice of the Supreme Court, who acts at the same time as a disciplinary plaintiff, proposed the annulment of the resolution of the Disciplinary Senate concerning the fact that its Chairman is not excluded from hearing the petition for delegating the disciplinary proceedings, and the subsequent resolution of the same Senate, whereby the petition for delegation was granted, given that, in the first case, the jurisdiction of the Disciplinary Senate did not cover issuing such a decision, and in the second, “a residual decision” was concerned, that is one directly based on a decision issued by a non-competent body. The petitioner supports her active standing with the provisions of § 10 paragraph 3 in fine of Act No. 7/2002 Coll. in the wording valid until 30 September 2008.

We believe that the petition should have been rejected pursuant to § 43 paragraph 1, clauses c) and d) of the Act on the Constitutional Court. Our disapproval of the Judgment is supported by the conclusion that, in the given case, the basic condition for the proceedings pursuant to Article 87 paragraph 1, clause k) of the Constitution and § 120 of the Act on the Constitutional Court has not been fulfilled. According to the above-quoted provisions, the Constitutional Court makes decisions concerning disputes of state bodies over the scope of their jurisdictions. In the given case, the petition by the Chief Justice of the Supreme Court contested two decisions of the Disciplinary Senate of the Supreme Court – decision file No. 1 Skno 20/2008 on the fact that JUDr. Jiří Pácal, its Chairman, is not excluded from hearing and adjudicating the disciplinary case of Judge JUDr. Pavel Kučera, charged within disciplinary proceedings, as well as a decision with the same file

number, whereby this case was withdrawn from the agenda of the High Court in Olomouc and assigned to the High Court in Prague. The petitioner regarded the core of the dispute over jurisdictions being the statement that she herself was competent to adjudicate as to possibly excluding the Chairman of the Disciplinary Senate of the Supreme Court from hearing the case in question, not the Senate to whose decision making the case was assigned by decision of both Chairpersons of the Collegia of the Supreme Court with respect to the fact that she herself as a disciplinary plaintiff is a party to the proceedings and, therefore, cannot adjudicate "in her own case". The crucial issue is the definition of the parties to the jurisdictional dispute administered before the Constitutional Court. Pursuant to Article 87 paragraph 1, clause k) of the Constitution and pursuant to § 120 of the Act on the Constitutional Court, the Constitutional Court adjudicates disputes over the scope of jurisdictions between state bodies mutually or between state bodies and bodies of the self-governing regions. In the case under examination, however, the action on determining jurisdiction was filed by the Chief Justice of the Supreme Court against one of the Senates of the same court in the form of a quasi-positive conflict of jurisdictions. Undoubtedly, this is merely a dispute over determining material competence for the procedural decision in proceedings taking place within one and the same state body – the Supreme Court. Such a body of state power to which, by the Constitution or by way of law, execution of state power is entrusted, i.e. decision making on rights and obligations of other entities by way of individual or generally binding acts, must be considered a state body. In our dissenting opinions concerning Judgment file No. Pl. ÚS 17/06 we have already explained why we do not consider the position of the Chief Justice of the Supreme Court to be a state body as specified by Article 87 paragraph 1, clause k) of the Constitution, but instead that of an official authorised to execute administrative duties; besides, § 118 and § 119 of the Act on Judges and Courts establishes that chairpersons of courts are authorised to execute state administration, while they "must not interfere with the independence of the courts". Thus they do not stand outside the court as a specific body of state power, but are part of such a court. Therefore, and even more so, an individual Senate of the Supreme Court, which in accordance (or possibly in conflict) with the valid Work Schedule and internal regulations of the court exercises judicial activities, cannot be considered a state body. From a constitutional viewpoint, each court (but not any internal sections of the same) must be considered a body of state power (judicial power, in the given case), which actually results from both Article 90 and Article 91 of the Constitution, and from the provisions of § 8 of the Act on Judges and Courts ("The system of courts shall be formed by…. The courts shall form accounting units."), § 3 paragraph 1 of Act No. 219/2000 Coll. (courts shall be organisational units of the state), or, for example, § 33 paragraph 7 (a court shall be composed of panels and single judges). Therefore, we cannot identify ourselves with the argumentation of the Judgment, which grants to the individual sections of the Supreme Court the nature of a "peculiar state body" solely and exclusively according to the category of attributability, in other words according to whether a power is granted by law to a certain person or a group of persons, such power being the capacity to act on behalf of the state authoritatively and with legal relevance. Such deliberation would then result in a situation when all disputes over competence within the Supreme Court between the individual sections of the same (Senates, Collegia, officials, and suchlike) would be dealt with as disputes over the scope of jurisdictions by the Constitutional Court. The Supreme Court represents the peak of

the system of ordinary courts, to which the Constitution and the legal order entrust exclusive jurisdiction on behalf of the state ("in the name of the Republic") to provide protection of rights and decide on guilt and punishment (Article 90 of the Constitution). The way of exercising this jurisdiction granted by the Constitution from the level of the Supreme Court is then governed by legal regulations (in particular, norms of procedural law and organisational norms) and internal organisational regulations of the Supreme Court (in particular, the Standing Order and the Work Schedule of the same). However, in our opinion, a possible lapse in their application, which in the given case presumably actually occurred, cannot be solved by way of a jurisdictional dispute conducted between the individual branches of the Supreme Court before the Constitutional Court.

Dissenting opinion of Justice Eliška Wagnerová

1. I disagree with the majority opinion expressed in the verdict and reasoning of the Judgment in the given case for the following reasons.

2. First of all I believe that the petition should have been rejected either pursuant to § 43 paragraph 1, clause c) of the Act on the Constitutional Court as a petition filed by a person who is clearly not authorised for the same, or pursuant to clause e) of the same provision as an inadmissible petition, or pursuant to clause d) of the same provision as a petition over which the Constitutional Court has no jurisdiction.

I. A person clearly not authorised

3. The following deliberation led to my conclusion specified above as the first option:
A judicial decision on protection of their entitlement or jurisdiction may only be claimed by an individual who personally represents a body whose jurisdiction is concerned, and who may realistically exercise the same in the given case. In other words, such a person must not be excluded from exercising the jurisdiction of the given body for reasons typical of bias, as anticipated by law. If statutory reasons for their exclusion are prima facie perceptible (as in the given case), such a person must be able to present a legally effective decision on the fact that such a person is, nevertheless, not excluded from exercising said jurisdiction. If such a condition is not met, then such a person cannot be considered as a person authorised to file a petition, since in such a way, it is the Constitutional Court who is actually called upon to assess their exclusion from decision making on the case, which is what actually happened in the given situation, even though assessing the bias of the Chief Justice of the Supreme Court surely does not fall under the jurisdiction of the Constitutional Court. A clear lack of authorisation of the petitioner must be interpreted, in my opinion, as also including a requirement consisting of exclusion of a circumstance when the petitioner, by a filing provided to the Constitutional Court, wants to solve a situation which the petitioner themself established by their evidently erroneous conduct or omission. For this reason, acceptance of the petition for substantive examination was mistaken.

II. Inadmissible petition

4. As for the second option above, I wish to raise the following arguments: The petitioner is the disciplinary plaintiff in the given case. Yet she, through the petition for settlement of the jurisdictional dispute, claimed for herself the entitlement to decide on possible bias on the part of the Chairman of the Disciplinary Senate who was to decide on the petition by the Deputy Chief Justice of the Supreme Court, the same having been charged by the petitioner within disciplinary proceedings, for delegation of the Deputy Chief Justice's disciplinary case. The petitioner has not excluded herself from the decision-making process even though she unambiguously was obliged to do so on the basis of adequate application of § 30 paragraph 2 in connection with § 31 paragraph 1 of the Criminal Procedure Code, as she was so commanded by the provisions of § 25 of Act No. 7/2002, and thus she triggered the situation when the algorithm could not be applied, such an algorithm being anticipated by the Standing Order of the Supreme Court of the Czech Republic in the provisions of Article 26 and Article 29, when the latter provision anticipates that the Chief Justice and the Deputy Chief Justice are substituted for by the Chairperson of the Collegium in charge. Besides, the Judgment reached the solution anticipated by the Standing Order, even though it declares that judicial formation of law was necessary to find such a result. I cannot agree with this, as it is a mere application of the Standing Order of the Supreme Court, in other words an internal regulation of the Supreme Court, which is also binding on representatives of the Supreme Court, i.e. the Chief Justice and the Deputy Chief Justice. Besides, the judicial formation of law in the case of determining the scope of jurisdictions (as opposed to refining substantive law and procedural law) is very unusual, clearly problematic from the viewpoint of constitutional law (Article 2 paragraph 2 of the Charter surely serves also for excluding movements in the area of jurisdictions, which could ultimately lead to distortion or factual drift in the separation of powers) and, therefore, rather dangerous phenomenon. The outlined algorithm, however, could not be practically applied, since the petitioner failed to adhere to the obligation imposed on her by law (the above-quoted provisions of the Criminal Procedure Code) and did not request, not having done the same herself, the Deputy Chief Justice charged within disciplinary proceedings, to employ the same procedure. From the above it is implied that there actually was a mechanism in place through the application of which the case would have been solved and the action of the Constitutional Court would not have been necessary. As it is clear that also in jurisdictional disputes it is surely necessary to apply the principle of subsidiarity, ordering that the Constitutional Court intervene only in such cases and as a last resort when the matter cannot be solved before other bodies, it is possible to conclude that the petitioner applied an inadmissible petition. However, on the contrary, inadmissibility of the petition as specified by § 122 of the Act on the Constitutional Court cannot be inferred.

III. Lack of jurisdiction of the Constitutional Court

5. Possible application of the third option above is supported by the following reasoning:
The given case cannot be assessed by the Constitutional Court at all, since the case does not include a dispute over applying jurisdictions in such a way as is meant by

the provisions of Article 87 paragraph 1, clause k) of the Constitution of the Czech Republic, which may be applied in proceedings before the Constitutional Court, regulated in the ninth division of chapter two of the second part of the Act on the Constitutional Court (§ 120 to § 125). The purpose of the above-quoted provisions of the Constitution is undoubtedly the protection of separation of powers (both horizontal and vertical) in the state. In my opinion (which is in accord with my dissenting colleagues), the petitioner in fact claimed that a decision be issued whereby merely her material competence would be confirmed for decision making on the bias of the Chairman of the Disciplinary Senate, which was, in her opinion in an unauthorised manner, arrogated by the Disciplinary Senate of the Supreme Court. The purpose of all the provisions on determining material jurisdiction contained in various procedural regulations, however, is to determine, as appropriately as possible, a lawful judge who is to effectively be a guarantee of expert, independent and impartial decision making. It is clear from the above that the purposes of both institutes are very different.

6. Nevertheless, the petitioner somewhat implicitly considers the Disciplinary Senate to be a state body, though within her petition she designates the Supreme Court as the party to the proceedings without any closer specification; that is without, in any detail, specifying the body against which she wishes to administer the jurisdictional dispute. The matter may also be perceived in such a way that the petitioner believes that the Constitutional Court has in the past (in Judgment Pl. ÚS 17/06) confirmed that the Chief Justice of the Supreme Court possesses the properties of a body, which are apparently to pertain to the same in all relationships, including those with other judicial bodies of the Supreme Court, and which thus also apparently empower her to submit a petition against the institution of the Supreme Court as a body, however, without clarifying who is to represent this Court under such circumstances. The Disciplinary Senate, however, surely has no statutory authorisation to represent the Supreme Court as a whole, and perhaps this is why the Judgment infers that it is, in this case, a body, even when the same was not designated by the petition, even though the Constitutional Court asked the same for its opinion, and dealt with the same as with a party to the proceedings, i.e. as with a body. In the given case, however, in my opinion, the petitioner must be seen as a judge appointed under a procedural act (§ 10 paragraph 3 of Act No. 7/2002 Coll.), whose material competence includes assessing issues of exclusion of judges from decision making. Therefore, this is not a relationship in which the petitioner herself would act as a representative of the Supreme Court, and thus as a body representing the judiciary in relation to other powers.

7. Another problem is that the Judgment eventually entrusted the “jurisdiction” to decide on the possible, not prima facie given, bias of the Chairman of the Disciplinary Senate (who had not asked for his exclusion but only for assessment of whether he could be perceived as biased by his connections, due to his long-term friendship with the Deputy Chief Justice being charged within disciplinary proceedings, which is a circumstance that the Constitutional Court alone, within its case law as well as practice, evaluates as not leading in itself to exclusion of a judge) to a third “body” of the Supreme Court, that is to the Chairperson of the Collegium, who was, according to the Standing Order of the Supreme Court, appointed to substitute for the petitioner, or her Deputy Chief Justice, which, however, represents another problematic procedure. This due to the fact that

“jurisdiction” was thus established for yet another “body” of the Supreme Court, which, however, was not in any way a party to the proceedings, was not given any leeway for procedural acts as a party to the proceedings, in particular not having been given the opportunity to express their opinion (in particular with respect to the possibility of their potential bias). The fact that merely the jurisdiction of a person who is a party to the proceedings may be established is not doubted by commentaries (implicitly Filip/Hollander/Šimíček: Zákon o Ústavním soudu, komentář / Act on the Constitutional Court, Commentary, 2nd edition, C. H. Beck, Prague, 2007, p. 785; explicitly Wagnerová, Dostál, Langášek, Pospíšil: Zákon o Ústavním soudu s komentářem / Act on the Constitutional Court with Commentary, Aspi, Prague, 2007, p. 567). In addition, the majority opinion contained in the Judgment evidently relies on the fact that, with respect to this Chairperson of the Collegium, not even a trace of bias resulting from a long-term friendship with the Chairman of the Disciplinary Senate will be ascertained, which is a pre-condition that may somewhat be rather unrealistic. Should the circumstance mentioned above actually occur, then another jurisdictional dispute would be predictable, as it would be the same situation in terms of general pattern.

8. The problems outlined above are removed if we proceed from the opinion that it is necessary to make a difference between jurisdictions dealt with in jurisdictional disputes before the Constitutional Court, and dealing with disputes over material competence of judicial bodies within a single court, which should be solved by the internal regulations of the given court, that is the Standing Order or the Work Schedule. This opinion is supported by the differing purposes of both institutes, as is explained above, when proceedings on jurisdictional disputes may only be conducted when procedural protection of jurisdictions understood as implied by the Constitution (see above) is concerned. To the contrary, proceedings on jurisdictional disputes cannot be used (abused) for remedying material competence within a court, perhaps an erroneously established one. The fact that the internal regulations actually did provide for the settlement of the resulting situation is, eventually, paradoxically proven by the very verdict of the Judgment itself. However, the fact that the above-mentioned regulations could not be applied is related to the inactivity of the petitioner, who caused the Disciplinary Senate to be forced to seek a way and pass a decision, where the Chairperson of the Collegium substituting for the Chief Justice should have passed one. It is barely possible to claim that the Disciplinary Senate, assigned to make a decision on delegating a case of a disciplinary charge of the Deputy Chief Justice of the Supreme Court, approach, regarding assessment of possible bias by its Chairman, the substitute Chairperson of the Collegium, when neither the Chief Justice nor Deputy Chief Justice, who are superior to the substituting Chairperson of the Collegium, made any formal steps to create leeway for this deputy of theirs – the relevant Chairperson of the Collegium – to make a decision.

9. In my opinion, the Judgment does not deal with the conflict of jurisdictions, but merely the material competence of judicial bodies inside the Supreme Court. In doing so, however, the Judgment extends the jurisdiction of the Constitutional Court itself. I perceive that the extension of jurisdiction of the Constitutional Court consists also of the fact that this decision actually raises another on the apparent exclusion of the petitioner from decision making on excluding Judge Pácal from decision making on delegation of the given disciplinary case, as well as a decision

on possible reasons for excluding Judge Pácal from such decision making, even though these were not at all analysed. First of all, however, decision making on bias (be it as a preliminary reference) is not an agenda soluble within the scope of a jurisdictional dispute, since the Constitutional Court is not competent to assess the bias of judges of ordinary courts, and less so within the scope of a jurisdictional dispute. In my opinion, all I have stated above can be summarised in the conclusion that the matter proposed by the petitioner to be decided upon by the Constitutional Court actually consists of issues which the Constitutional Court is not competent to assess and decide.

Dissenting opinion of Justice Jiří Nykodým

Pursuant to the provisions of § 120 paragraph 1 of the Act on the Constitutional Court, in proceedings on a jurisdictional dispute between a state body and the body of a self-governing region under Article 87 paragraph 1, clause k) of the Constitution, the Constitutional Court shall decide the dispute between the state body and the body of the self-governing region over jurisdiction to issue a decision, to take measures or other actions in the matter referred to in the petition instituting the proceeding. The Act thus defines jurisdictional disputes in particular as those between independent state bodies, or state bodies and the bodies of self-government, not as disputes between bodies belonging to the same state body.

In the case under examination, the dispute was over material competence for dealing with an objection of bias of a member of the Disciplinary Senate, which was to make a decision on the procedural issue of withdrawal of the case of a person charged within disciplinary proceedings by the Chief Justice of the Supreme Court, administered by the High Court in Olomouc, and assignment of the same to the High Court in Prague. Pursuant to the wording of the Act valid at the time of decision making, the matter of bias of a member of the Disciplinary Senate was decided upon by a chairperson of the disciplinary court. The chairperson of the disciplinary court and the Disciplinary Senate are not independent state bodies, instead they are bodies of the disciplinary court. That is why the dispute over who is in charge of deciding on the bias of a member of the Disciplinary Senate in proceedings in which the chairperson of the disciplinary court is at the same time a disciplinary plaintiff, is not a jurisdictional dispute as specified by the above-quoted provisions of the Act on the Constitutional Court, rather it is a dispute over material competence for deciding the given issue. The Chief Justice of the Supreme Court, therefore, did not have material active standing to file a petition for declaring the competence of the Chief Justice of the Supreme Court to issue a decision on exclusion of a judge of the Supreme Court in disciplinary proceedings pursuant to § 10 paragraph 3 in fine of Act No. 7/2002 Coll. on Proceedings Concerning Judges and Public Prosecutors in the wording valid until 30 September 2008, since the provisions above do not suggest that she would act as an independent state body but as a chairperson of the disciplinary court. In this respect, her position is different from that in which she acted in case file No. Pl. ÚS 17/06, where the Constitutional Court formulated a conclusion that the Chief Justice of the Supreme Court as a body of another body has, within the confines of their exclusive entitlements, also an entitlement to file a petition for settling a

jurisdictional dispute, if she believes that the same has occurred by, for example, the very ignoring of such entitlements which are granted to them by law. The fact is that this is not an exclusive power of the Chief Justice of the Supreme Court, but instead the power of a chairperson of the disciplinary court, whose position is held not only by the Chief Justice of the Supreme Court, but also by chairpersons of other disciplinary courts.

Even if I disregarded the argumentation above and admitted that in the case of collision on competence for making a decision on exclusion of a member of the Disciplinary Senate, a jurisdictional dispute is concerned, then in this specific case the Chief Justice of the Supreme Court could not hold material active standing, this due to the fact that in the case under consideration she herself was a disciplinary plaintiff, and, therefore, she could not be in charge of deciding on exclusion of a judge of the Disciplinary Senate in this matter. The opposite situation would result in affecting the principle of independency and impartiality of judicial decision making (as specified by Article 81 et seq. of the Constitution, as well as Article 36 paragraph 1 of the Charter), since the party to the proceedings would be deciding on the bias of a judge in proceedings to which they are a party. If her competence for making a decision could not be affected, through her not being able to decide on exclusion of a member of the Disciplinary Senate due to bias, then she could not have active standing for filing a jurisdictional petition.

In addition, the Plenum has not coped well with Judgment of the Constitutional Court file No. I. ÚS 182/05, in which the First Panel of the Constitutional Court, in addition to other points, formulated a conclusion that filing a petition for commencement of disciplinary proceedings on disciplinary responsibility of a public prosecutor is an act of the state – a party to labour-law relationships (and, therefore, a legal entity and employer), and consequently, in this case, the state was not a holder of public power. From this they inferred that the District Public Prosecutor was entitled to file a constitutional complaint. In this connection, the Constitutional Court referred to the fact that the legislature in the legal order differentiates between the position of the state as a “state – holder of public power” and that of “a state – legal entity”, which is also based on the Act on the Constitutional Court, which has explicitly acknowledged that legal entities have the right to file a constitutional complaint [provisions of § 72 paragraph 1, clause a) of the Act on the Constitutional Court]. If the Constitutional Court once acknowledged that the disciplinary plaintiff in specific proceedings administered pursuant to Act No. 7/2002 Coll. on Proceedings Concerning Judges and Public Prosecutors holds a position of a party to a labour-law relationship, it is not possible to grant them a dual position in the same proceedings – one as an independent state body and another as a party to a labour-law relationship. If then the Chief Justice of the Supreme Court in the position of a disciplinary plaintiff had held reservations about the advancement of the Disciplinary Senate for the reason that the latter had not been materially competent to make a decision in the case under consideration, an opportunity was given, upon compliance with conditions determined by law, for filing a constitutional complaint.

For the reasons specified above I voted against the majority opinion of the Plenum.