

**Pl. ÚS 31/10 of 22 May 2013
“Senior Judicial Officers”**

**CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT**

IN THE NAME OF THE REPUBLIC

HEADNOTES

The basic rule of a constitutional nature is therefore the exercise of the judicial power by a judge; other persons’ participation is the exception to the rule. The mentioned bases fully apply to the case of the assessment of to what extent senior judicial officers and judicial assistants are entitled to participate in the decision-making activities of courts.

It is clear that the legal regulation of acts which may be carried out by a senior judicial officer in the first instance of civil court and administrative court proceedings as contained in Section 11 of the Act on Senior Judicial Officers is not constitutionally conforming. Sections 10 and 11 of the Act on Senior Judicial Officers are apparently contradictory. Pursuant to Section 10 of the Act on Senior Judicial Officers, a senior judicial officer is only entitled to carry out what is explicitly stated therein, but under Section 11 of the Act on Senior Judicial Officers he or she is entitled to do everything except what he or she is explicitly forbidden to do. Such legislation raises a number of interpretation issues difficult to solve; however, it is evident that there is no reasonable relation between both provisions because both are the expression of two different legislative approaches that cannot stand side by side. Also the exceptions enumerated in Section 11 of the Act on Senior Judicial Officers under individual letters leads to hardly acceptable conclusions. Currently, the activity of judges cannot go without the assistance of others, namely senior judicial officers, judicial assistants, and others. The persons may only carry out the acts which do not exceed their aiding role. They can, of course, participate in the acts of other persons if instructed by a judge; however, those acts are merely prepared by them and must be made afterwards by the judge in his or her own name and at his or her own responsibility.

VERDICT

Under file No. Pl. ÚS 31/10, on 22 May 2013, the Plenum of the Constitutional Court, consisting of Stanislav Balík, Jaroslav Fenyk, Jan Filip, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů (judge-rapporteur), Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Pavel Rychetský, Milada Tomková, Miloslav Výborný, and Michaela Židlická ruled on the petition filed by the High Court in Prague seeking the annulment of Section 11 of Act No. 121/2008 Coll., on senior judicial officers and senior officers of public prosecutor’s offices and on amendments to related acts, as follows:

Section 11 of Act No. 121/2008 Coll., on senior judicial officers and senior officers of public prosecutor’s offices and on amendments to related acts, as amended by Act No. 396/2012 Coll., is annulled upon the expiry of 31 December 2013.

REASONING

I.

Definition of the case and recapitulation of the petition

1. The High Court in Prague has filed with the Constitutional Court a petition seeking the annulment of Section 11 of Act No. 121/2008 Coll., on senior judicial officers and senior officers of public prosecutor's offices and on amendments to related acts (hereinafter referred to as the "Act on Senior Judicial Officers"). As stated by the court, appellate proceedings are conducted before the High Court in Prague, under file No. 9 Cmo 114/2010, concerning a defendant's appeal against a resolution of the Regional Court in Ústí nad Labem. The mentioned resolution, which rejected the defendant's objections to the judicial bill of exchange payment order, was not issued by a judge but was issued by a judicial assistant pursuant to Section 11 of the Act on Senior Judicial Officers in connection with Section 36a (5) of Act No. 6/2002 Coll., on courts, judges, lay-judges and the state administration of courts and on amendments to some other acts (Act on Courts and Judges), as amended (hereinafter referred to as the "Act on Courts and Judges").

2. The petitioner gives two crucial grounds for its petition: an internal discrepancy within the Act on Senior Judicial Officers between Section 10 and Section 11 of that Act and the unconstitutional content of Section 11.

3. As regards the first of the grounds, the petitioner points out that Section 10 of the Act on Senior Judicial Officers provides an exhaustive list of acts of the court of first instance which may be carried out in civil court proceedings and administrative court proceedings by senior judicial officers (as well as by judicial assistants under Section 36a (5) of the Act on Courts and Judges). On the contrary, subsequent Section 11 of the Act on Senior Judicial Officers provides that senior judicial officers (and therefore also judicial assistants) may make any decision except for those exhaustively listed under letters (a) to (j) – editorial comment: as in force before the amendment made by Act No. 396/2012 Coll. It is obvious that the two provisions are mutually exclusive: either an exhaustive list under Section 10 of the Act on Senior Judicial Officers applies and then neither a judicial assistant nor a senior judicial officer is entitled to decide to reject any objections to a judicial bill of exchange payment order, or Section 11 of the same Act applies and then both a senior judicial officer and a judicial assistant are entitled to make such decision. It cannot be concluded that Section 10 of the Act on Senior Judicial Officers contains an indicative list of acts which may be made by a senior judicial officer (or a judicial assistant) under Section 11 of the Act on Senior Judicial Officers; there is no relation between the two provisions and each of them would stand on its own. Given the fact that both provisions have been included in the Act since its coming into effect, the *lex posterior derogat priori* rule cannot be applied.

4. The petitioner also referred to the resolution of the Constitutional Court of 23 February 2010, under file No. III. ÚS 1531/09 (not published in the Collection of Judgments of the Constitutional Court, but available at nalus.usoud.cz), in which the court commented on the competence of senior judicial officers and expressed its opinion that in case of doubt whether a certain act may be carried out by a person other than a judge such provision of the Act must be interpreted narrowly, i.e. a person other than a judge is not entitled to carry out such act.

5. As regards the second of the grounds, the petitioner points out that the Constitution of the Czech Republic (hereinafter referred to as the "Constitution") implies that the judicial power is exercised by independent courts, especially through judges whose independence is guaranteed. The competence delegated to senior judicial officers and judicial assistants to make decisions as allowed by Article 94 (2) of the Constitution is an exception to the general rule and cannot become the rule. According to the opinion of the petitioner, it would be absurd if persons who are not judges, i.e. employees of courts who, by definition, do not and cannot guarantee the standard of independence, impartiality, and expertise as required by judges, would render decisions on the merits. The judiciary would then hardly be considered as one of the three pillars of independent and equal state powers.

6. Based on that, the petitioner infers that an exception to the rule, consisting in the courts' decision-making through senior judicial officers and judicial assistants, must be exhaustively defined by a law and, accordingly, what is not explicitly mentioned in that list does not fall within the scope of their competence. However, an opposite approach under Section 11 of the Act on Senior Judicial Officers results in an improper and unconstitutional concept that the judicial power is (can be) exercised on behalf of the Republic by such persons, except for a few cases that may only be decided by judges.

7. The petitioner, inter alia, pointed out also to the absurd consequences in which the application of Section 11 could result: a senior judicial officer or a judicial assistant could issue e.g. a judicial bill of exchange payment order, which is entirely unacceptable in the constitutional and procedural points of view.

8. On these grounds, the petitioner considers Section 11 of the Act on Senior Judicial Officers as contrary to Article 81 in relation to Articles 82 and 94 of the Constitution and Article 36 (1) and Article 38 (1) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") – a senior judicial officer or a judicial assistant making a decision pursuant to Section 11 of the Act on Senior Judicial Officers cannot be regarded as a lawful judge – and therefore seeks the annulment of that section.

II.

Recapitulation of substantial parts of the comments by the Chamber of Deputies of the Parliament of the Czech Republic, the Senate of the Parliament of the Czech Republic, and the Ministry of Justice

9. The President of the Chamber of Deputies of the Parliament of the Czech Republic described the course of the legislative process and stated that the Act had been passed by the required majority of deputies in the Chamber of Deputies, had been signed by the competent constitutional authorities, and had been properly published. The legislature acted based on its conviction that the passed Act is in accordance with the Constitution and our legal order. It is up to the Constitutional Court to assess the constitutionality of the Act and to make a decision based on the petition filed by the High Court in Prague seeking the annulment of Section 11 of the Act on Senior Judicial Officers.

10. The President of the Senate of the Czech Republic in his statement noted that the contested Act had been based on the concept of the judiciary reform dated to the period from 2008 to 2010, acknowledged by the Government in its Resolution No. 65 of 23 January 2008, which was, inter alia, to transfer as many tasks performed by judges or public prosecutors as possible to senior judicial officers and senior officers of public prosecutor's offices. With regard to the limits superior to national legislation, resulting, inter alia, from the right to a lawful judge, the scope of activities of senior judicial officers was subject to the directive pursuant to which a senior judicial officer does not work alone but is part of the judicial department established to cooperate with a panel of judges or a single judge. The President of the Senate also described the legislative process in this Chamber of the Parliament of the Czech Republic and stated that the Senate had acted within the limits of its constitutionally established competence and in a constitutionally prescribed manner. He also stated that the Senate "had not disputed the legislative act in question" in whole or in parts or in individual provisions. The bill was passed without a single contribution to the discussion; only the Minister of Justice for the petitioner and the rapporteur of the Constitutional Law Committee commented on it compulsorily. Finally, the President of the Senate left entirely to the discretion of the Constitutional Court to assess the constitutionality of contested Section 11 of the Act on Senior Judicial Officers.

11. At the request of the Constitutional Court, the Ministry of Justice commented on the petition. In its opinion, Section 11 of the Act on Senior Judicial Officers is not contrary to the constitutional order. In accordance with Sections 10 and 11 of the Act on Senior Judicial Officers, the intention of the Ministry of Justice was to define the broadest possible competence of senior judicial officers (saying that "the competence of senior judicial officers ends where the exclusive competence of judges starts"). As regards the very issue raised by the petition seeking the annulment of Section 11 of the Act on Senior Judicial Officers, apart from referring to part of commentaries, the Ministry of Justice holds

that the function of Section 11 of the Act on Senior Judicial Officers is to restrict the range of acts senior judicial officers may carry out in the proceedings as listed in Section 10 (1) of the Act on Senior Judicial Officers. Were it not for Section 11 of the Act on Senior Judicial Officers, senior judicial officers could “in the given cases entirely substitute for the activities of judges” according to the concept of the Ministry of Justice.

III.

Waiver of hearing

12. Pursuant to Section 44 (2) of Act No. 182/1993 Coll., the Constitutional Court, as amended, (hereinafter referred to as the “Act on the Constitutional Court”), the Constitutional Court is entitled to waive a hearing with the consent of the parties to the proceedings, should any further clarification of the case cannot be expected from that hearing. Given that both the petitioner and other parties to the proceedings have agreed to waive a hearing and, in addition, that the Constitutional Court considers that any further clarification of the case cannot be expected from that hearing, it has waived a hearing in this case.

IV.

Conditions of the *locus standi* of the petitioner

13. The petition seeking the annulment of Section 11 of the Act on Senior Judicial Officers has been filed by the High Court in Prague under Section 64 (3) of the Act on the Constitutional Court.

14. The purpose of the specific review of regulations under Article 95 (2) of the Constitution is a judicial review of the constitutionality of the Act, or its individual provisions which is to be applied by an ordinary court when considering and deciding on a particular case. This also defines the competence of an ordinary court to proceed under Article 95 (2) of the Constitution, which is limited solely and exclusively to substantive and procedural law relevant in the given case.

15. The High Court in Prague filed a petition seeking the annulment of Section 11 of the Act on Senior Judicial Officers in connection with the appellate proceedings contesting the resolution to reject the defendant’s objections against the judicial bill of exchange payment order. Given that this resolution has been issued by a judicial assistant pursuant to Section 11 of the Act on Senior Judicial Officers in connection with Section 36a (5) of the Act on Courts and Judges, Section 11 of the Act on Senior Judicial Officers must be regarded as a provision of law which is to be or has been used. Also the *locus standi* of the petitioner is given by that.

V.

Prayer for relief and the text of the relevant provisions

16. Under the prayer for relief, the High Court in Prague is praying the Constitutional Court to annul Section 11 of the Act on Senior Judicial Officers. With regard to the content of the petition, as well as to the manner of the regulation of the competence of senior judicial officers, not only contested Section 11 but also preceding Section 10 of the Act on Senior Judicial Officers is cited below:

“Section 10

(1) Senior judicial officers are entitled to carry out the acts of the court of first instance in civil court proceedings in the following cases:

(a) Proceedings to issue payment orders and in those cases also deciding on the protests filed late, to discontinue the proceedings for withdrawal of an action or on an application for a payment order or to cancel payment orders which cannot be delivered, proceedings to issue electronic payment orders and in those cases also deciding on the protests against the electronic payment order filed late, to cancel electronic payment orders or to discontinue the proceedings for withdrawal of an application for an electronic payment order, proceedings to issue European payment orders and in those cases also

deciding on the protests against the European payment orders filed late, to cancel European payment orders or to discontinue the proceedings for withdrawal of an application for an European payment order, and making decisions pursuant to Section 114b (1) of the Civil Procedure Code, if any case has been decided through a payment order, an European payment order or an electronic payment order;

(b) The inheritance proceedings where there is no need to order a hearing in a court of law and which do not include or decide on

1. Procedure pursuant to Section 175k (1) and (2) of the Civil Procedure Code;

2. The withdrawal of the case pursuant to Section 175zb of the Civil Procedure Code;

3. The remand of the case pursuant to Section 175zb of the Civil Procedure Code;

4. The deceased's estate located in a foreign country;

5. The estate of the deceased who was a foreigner;

6. The realisation of the deceased's estate pursuant to Section 175t of the Civil Procedure Code; or

7. Passing the deceased's estate to creditors for the payment of the deceased's debts pursuant to Section 175p (1) of the Civil Procedure Code;

(c) Proceedings concerning the care of minors and concerning curatorship relating to the persons deprived of legal capacity or restricted in their legal capacity and the persons absent or unknown where there is no need to order a hearing;

(d) Proceedings concerning the granting of a permit to detain a person in a medical institution;

(e) Proceedings concerning custodies;

(f) Proceedings concerning the redemption of deeds;

(g) Proceedings concerning the enforcement of a decision by the attachment of wages, attachment of an account or sale of movables, concerning the garnishment of a bank account where there is no need to order a hearing, and concerning the enforcement of a decision by the sale of immovables where a hearing need not be ordered;

(h) Conciliation;

(i) Proceedings to determine paternity by the consensual declaration of parents;

(j) Proceedings to order the enforcement of a decision to recover payment unless the enforcement order is constituted by an enforcement officer's or notarial deed, including deciding on the motion to discontinue the enforcement filed by an entitled person or an enforcement officer, unless protested by either party to the proceedings; and

(k) Deciding to discontinue the proceedings and to cancel the judicial bill of exchange payment order due to withdrawal of an action.

(2) A senior judicial officer in the proceedings concerning the matters of the commercial register, the register of public service companies, the register of foundations, the insolvency register, and the register of private housing associations is entitled to carry out all the acts including entries in the registers, where it is not necessary to order a hearing.

(3) Unless otherwise specified by law, a senior judicial officer is entitled to carry out in civil court proceedings and administrative court proceedings the following acts of court:

(a) Drawing up submissions and applications and motions to be filed with the court;

(b) Handling letters of request, except for the letters of request from foreign countries, excluding the Slovak Republic;

(c) Removing defects of submissions and rejecting submissions due to failure to remove defects;

(d) Deciding on advance payments or the return of advance payments made;

(e) Deciding on court fees, including decisions on exemptions from the obligation to pay a court fee, a decision to discontinue proceedings for failure to pay a court fee and to cancel that decision, except where the imposition of the obligation to pay a court fee relates to the decision on the merits;

(f) Authorising an enforcement officer to carry out other activities pursuant to Section 76 (1) of the Enforcement Procedure Code;

(g) Deciding to reject an appeal filed late;

(h) Identifying data in the proceedings on granting international protection in the database of the Ministry of the Interior;

(i) Deciding to appoint a representative of parties to the proceedings pursuant to Section 30 of the Civil Procedure Code and Section 35 (8) of the Administrative Procedure Code and to reimburse such representative for the costs thus incurred;

- (j) Indicating the legal force on the original decision in all cases and indicating the enforceability of decisions;
- (k) Deciding on witness's fees, expert's fees, and interpreter's fees;
- (l) Deciding on the costs of proceedings not decided in the decision terminating the proceedings;
- (m) Examining the voting rights of each of the creditors and deciding to transfer a claim pursuant to Section 18 of the Insolvency Act;
- (n) Carrying out acts to ascertain the place of residence of the parties to the proceedings and making a decision to appoint a curator representing a party to the proceedings if the place of residence of such party is not known;
- (o) Deciding to appoint an interpreter or an expert, including decisions on advance payments of the expense of evidence;
- (p) Carrying out acts in insolvency proceedings, except for a hearing and deciding
 1. To appoint an insolvency administrator;
 2. To remove an insolvency administrator from office;
 3. To discharge an insolvency administrator from his/her duties;
 4. To cancel a resolution of the creditors' meeting;
 5. To appoint an interim creditors' committee;
 6. On an application for an interim order that is to restrict the right of the debtor to dispose of the estate;
 7. On an application for moratorium;
 8. To declare a debtor insolvent;
 9. To dismiss an insolvency petition;
 10. To cancel insolvency proceedings;
 11. To declare someone bankrupt or cancel bankruptcy proceedings;
 12. To approve a final report and a resolution to distribute the estate;
 13. To approve a reorganisation or a reorganisation plan and its amendments and to transform a reorganisation into bankruptcy;
 14. To approve the plan of discharging from debts and its amendments, to grant exemption from the payment of claims included in the plan, and to withdraw such exemption or to cancel the plan of discharging from debts;
 15. To terminate the operations of the debtor's establishment; and
 16. On the merits in incidental disputes;
- (r) Carrying out acts pursuant to Section 260 (1) and (2) of the Civil Procedure Code;
- (s) Carrying out acts concerning the declaration on the obligated party's assets, except for the procedure pursuant to Section 260e of the Civil Procedure Code;
- (t) Deciding to withdraw an application or a motion before the commencement of a hearing or a petition for dissolution, nullity of marriage or determining whether a marriage has been entered into or not, and/or to withdraw a petition for the dissolution, invalidity or absence of a partnership pursuant to Section 96 (2) and (4) of the Civil Procedure Code;
- (u) Carrying out the acts of the court of first instance before an appeal has been lodged; and
- (v) Carrying out the acts of the court of first instance before an appeal on point of law has been applied for."

“Section 11

Unless otherwise specified by law, a senior judicial officer is entitled to carry out in civil court proceedings and administrative court proceedings all the acts of the court of first instance except for:

- (a) Conducting a hearing on the merits;
- (b) Deciding on the merits in the form of a judgment;
- (c) Deciding on an interim order;
- (d) Deciding to order the enforcement of a decision by means of the sale of immovables, the sale of establishment or the creation of a judicial lien;
- (e) Deciding to order the enforcement of a decision to recover payment if the enforcement order is constituted by a notarial deed, including deciding to discontinue the enforcement unless

the application is filed by an entitled person or an enforcement officer or if an appeal has been lodged against the application;

(f) Deciding to satisfy the rights to non-monetary performance;

(g) Deciding to order the enforcement of a decision on the upbringing and maintenance of a minor;

(h) Deciding in the proceedings concerning the confirmation of a European enforcement order;

(i) Deciding to discontinue or postpone the enforcement if it is necessary to order a hearing and deciding to exclude an enforcement officer;

(j) Deciding on the suspensive effect of an action in the administrative court proceedings; and

(k) The cases where acts are explicitly entrusted to judges by a special legislation.”

17. Section 11 of the Act on Senior Judicial Officers as cited above was amended by Act No. 396/2012 Coll. after the petition has been filed. However, this amendment is only partial and does not change the overall concept of the cited section or its relation to Section 10 of the Act on Senior Judicial Officers and, therefore, does not eliminate the deficiencies complained of by the petitioner.

VI.

Constitutional conformity of the competence and legislative process

18. In accordance with Section 68 (2) of Act No. 182/1993 Coll., on the Constitutional Court, as amended by Act No. 48/2002 Coll., the Constitutional Court is obliged to assess in the proceedings concerning the review of regulations whether the contested Act, any of its individual provisions or other legal regulations or any of its individual provisions has been passed and published within the limits of competence set by the Constitution and in a constitutionally prescribed manner.

19. Based on parliamentary publications and stenographic reports, as well as the statements of the President of the Chamber of Deputies and the President of the Senate of the Czech Republic, it has been found that the Chamber of Deputies had passed in vote No. 280 (Resolution No. 661) the Senior Judicial Officers Bill, in the 3rd reading at its 27th meeting on 13 February 2008; out of 180 deputies present, 169 voted in favour and none against. The bill was submitted to the Senate on 26 February 2008, discussed at its 12th meeting on 19 March 2008, and passed by the Senate as it was submitted by the Chamber of Deputies (Resolution No. 329). Out of 51 senators present, 48 senators voted in favour of and none against the passing of the bill in vote No. 32.

20. The Act was signed by the competent constitutional authorities and properly published under No. 121/2008 Coll. in Chapter 39 of the Collection of Laws, distributed on 15 April 2008, and became effective pursuant to its Section 32 on 1 July 2008.

21. Based on the foregoing, the Constitutional Court states that the Act on Senior Judicial Officers has been passed in accordance with constitutional interpretative principles relating to the competence and legislative process.

VII.

Compliance of the content of the contested legal provision with the constitutional order

22. The judicial power is exercised on behalf of the Republic by independent courts (Article 81 of the Constitution). The provisions of Article 82 (1) and Article 94 (2) of the Constitution imply that the judiciary is exercised by judges in the courts. Other persons may participate in the exercise of the judicial power if so provided by law. The basic rule of a constitutional nature is therefore the exercise of the judicial power by a judge; other persons' participation is the exception to the rule.

23. This exception has material grounds consisting in the very bases of the judiciary of the democratic rule of law an essential feature of which is primarily the independence of judges. The case-law and literature usually distinguish between the independence of courts and the independence of judges. At the same time, however, they point out that both are inextricably linked together as one independence without the other is unthinkable; it is hard to think of the independence of court if the independence of

judges is not guaranteed and vice versa. In that regard, e.g. the judgment of the Constitutional Court of 18 June 2002, file No. Pl. ÚS 7/02 (N 78/26 of the Collection of Judgments of the Constitutional Court 273; 349/2002 of the Collection of Laws), can be cited: “The aforementioned Article 81 of the Constitution provides that the judicial power is exercised on behalf of the Republic by independent courts. Article 82 (1) of the Constitution then lays down that judges exercise their duties independently and their impartiality must not be threatened by anyone. The independence of judges and the independence of the judiciary are therefore interrelated and conditional on each other and the same applies to the impartiality of judges and courts. The independence and impartiality are essential attributes of the judiciary. The impartiality and independence of courts are beneficial to all as it is one of the guarantees of equality and legal security in a democratic society. Only an impartial court is capable of providing real justice for all and always, while one of the means of ensuring the court’s impartiality is the independence of judges.”

24. To this end, the legal order provides a number of guarantees of the independence of judges. The subject-matter independence is expressed by the principle that judges are bound only by law and international treaties being part of the legal order, and the related authority to assess the compliance of secondary legislation with law (Article 95 (1) of the Constitution). The personal independence of judges is guaranteed especially by the long-term nature of judge’s office (Article 93 (1) of the Constitution), the impossibility to dismiss and transfer judges (Article 82 (2) of the Constitution), and the incompatibility between the discharge of duties of judges and the discharge of other duties (Article 82 (3) of the Constitution), and is reflected in the material welfare and possibly other aspects repeatedly commented on by the Constitutional Court in its case-law.

25. The indicated guarantees of the subject-matter and personal independence of judges are not an end in itself but together with institutional guarantees of court’s independence are to ensure the independence of judges without which the justice would only be arbitrary. Any participation of other persons in the exercise of the judicial power must then be regulated by law in order not to impair the independence of the judiciary.

26. The modern judiciary is also characterised by high demands on judges, both personal and professional. Every judge must successfully complete tertiary education in law and a training of trainee judges or any training at the same level and must demonstrate his or her experience, knowledge, and skills by passing a judicial (or other recognisable) exam. The personality of judge must always guarantee the proper discharge of judge’s duties, which is directly related to the requirements for having no criminal record and reaching a certain age. As to the respective legislation in force, cf. especially Section 60 of the Act on Courts and Judges.

27. As regards the above-mentioned requirements, the conditions as stated in the case of the independence of judges apply by analogy here: should other persons than judges participate in the exercise of the judicial power, this must impair neither the professional nor the general level of the exercise of the judicial power.

28. The mentioned bases fully apply to the case of the assessment of to what extent senior judicial officers and (as in the present case) judicial assistants who are entitled to participate in the decision-making activities of courts to the extent laid down in a special legal regulation applicable to senior judicial officers, within the meaning of Section 36a (5) of Act No. 6/2002 Coll., on courts, judges, lay-judges and state administration of court and on amendments to some other acts (the Act on Courts and Judges), as amended, may participate in the exercise of the judicial power; the latter’s status is regulated with necessary modifications by the provisions governing the status of senior judicial officers.

29. A senior judicial officer is a person carrying out the acts of court delegated to him or her by law; depending on the specific regulation, it can include not only acts in the exercise of the judicial power but also acts within the court administration. Pursuant to the current Czech legislation, the duties of senior judicial officers may be performed by a citizen of the Czech Republic who has no criminal

record and has completed the studies of senior judicial officers (Section 22 et seq. of the Act on Senior Judicial Officers); the requirement for completing the studies is deemed fulfilled by completing a master's or a bachelor's study programme (Section 2 (1) of the Act on Senior Judicial Officers). The duties of senior judicial officers consist in carrying out the acts of the court in civil court proceedings, criminal court proceedings or administrative court proceedings. Such acts may be carried out by senior judicial officers based on authorisation by the presiding judge or even without such authorisation; which of the two alternatives applies is decided under the current regulation only by a work schedule (see Section 4 (2) of the cited Act). Should a senior judicial officer carry out any act of the court directly based on a work schedule, i.e. without being authorised by the presiding judge, he or she is only bound by law and other legislation, not by the instructions of the presiding judge. If such acts are carried out on behalf of the presiding judge, the presiding judge may instruct the senior judicial officer in writing as to how to carry out such act, but only if such act is not a decision. As for a decision, there is not such possibility to influence the discretion of a senior judicial officer; however, the presiding judge does not have to authorise a senior judicial officer to carry out such act. An appeal may be lodged against any decision of a senior judicial officer under the same conditions as against any decision of the presiding judge. If the case to be dealt with by a senior judicial officer is legally complicated or complicated in terms of the facts of the case, he or she is obliged to submit it to the presiding judge who may take it away from the senior judicial officer and deal with it on his or her own. As to this, see especially Sections 1 to 9 of the Act on Senior Judicial Officers.

30. The comparison of the guarantees of the independence and professional and personal qualifications of judges on the one hand and those required from senior judicial officers on the other hand is obvious.

31. As to the independence, only the subject-matter independence is comparable. Judges are bound by law and international treaties being part of the legal order. Pursuant to Section 3 (1) of the Act on Senior Judicial Officers, senior judicial officers are bound by "law and other legislation". The wording is different compared to that concerning judges as judges are not bound by other legislation (i.e. secondary legislation) if such legislation is contrary to law. Should such situation occur in the activities of a senior judicial officer, he or she should refer the case to the presiding judge as assessing the compliance of secondary legislation with law can be considered legally complicated within the meaning of Section 7 (a) of the Act on Senior Judicial Officers. In relation to the parties to the proceedings, the ultimate result should therefore be the same whether the act is carried out by a judge or a senior judicial officer.

32. In this context, however, it should be pointed out that the rule under Section 5 of the Act on Senior Judicial Officers under which the presiding judge may bind a senior judicial officer in writing only in the case of an act that is not a decision and is carried out under the authority of a judge lacks sense. A senior judicial officer cannot undoubtedly be bound by instructions, orders or wishes of third parties, be they persons outside the court or judicial persons, having nothing to do with the consideration of the case under the work schedule. However, such regulation is not justified in any manner as for the judge who is to deal with the case according to the work schedule. A senior judicial officer should be an aid for a judge, not someone who is independent of the judge.

33. At the level of personal independence, the statuses of judges and senior judicial officers are incomparable. Virtually none of the above-mentioned attributes applies to a senior judicial officer, whether it is a guarantee of long-term nature office, the impossibility to dismiss and transfer, material welfare, the incompatibility of offices, etc.

34. Similarly significant is the difference in personal qualifications and in requirements for the professional qualifications of judges and senior judicial officers. Only the requirements for nationality and having no criminal record are common for both categories of persons. But while a judge must guarantee through his or her personality the proper discharge of his or her duties, must be at least thirty years of age, must have completed a five-year master's programme at a faculty of law, and must have completed a training of trainee judges and passed a judicial exam, to perform the duties

of a senior judicial officer it is only necessary to complete a three-year departmental training organised by the Ministry of Justice or a three-year bachelor's study programme at a university.

35. A senior judicial officer is in fact only an officer lacking personal independence, from whom the personal qualifications as required from judges are not required, and whose professional qualifications are sufficient at a significantly lower level. The above-mentioned implies the limits of the activities of a senior judicial officer. A senior judicial officer must not carry out such acts the performance of which requires the qualities senior judicial officers do not have (personal independence, personal qualifications, and professional qualifications). From this point of view, it is unacceptable that a senior judicial officer could decide on the merits, regardless of the form of such decision. The same applies to other procedural acts, especially procedural decisions. A senior judicial officer should act as an aid for a judge, who provides his or her assistance in achieving a reasonable length of judicial proceedings by carrying out simple or routine acts. Complicated cases requiring legal knowledge or situations in which the court cannot be by definition represented by other person than a judge (decisions on the merits, final decisions or major decisions in the preparation of hearings) do not allow any participation of senior judicial officers. Otherwise, judging would become a paper work.

36. Prof. Winterová drew attention to the unacceptable development of the legal regulation of the activities of senior judicial officers in the preparation of the Act on Senior Judicial Officers (Winterová, A., *Nad perspektivami českého civilního procesu [About Prospects of Czech Civil Court Proceedings]*, *Právní rozhledy [Legal Perspectives]*, 2008, No. 19, page 706 et seq.):

“The new Senior Judicial Officers Bill goes even further in this direction. The bill submission report expresses a clear intention when pointing out to the possibility of delegating from judges ... to senior judicial officers to a far greater extent also their own decision-making competence. The bill does so by enumerating various acts which may be carried out by senior judicial officers, namely in Section 10 and in new Section 11, which already reverses the logic of this legislation, saying that a senior judicial officer may, in civil court proceedings and in administrative court proceedings, carry out all the acts of the court of first instance, except for the hearing on the merits and deciding on the merits by means of a judgment. (Sic!)

In my opinion, it is necessary to say clear NO to this trend towards to the bureaucratic decision-making (should the mentioned formulation be passed, it would only be sufficient to amend the Civil Procedure Code by extending the list of cases which may be decided on the merits by means of a resolution, not a judgment, and to extend the list of cases which may be decided without a hearing, and senior judicial officers may commence their work).

A number of the acts enumerated in Sections 9 and 10 of the current Act on Senior Judicial Officers (also in Section 10 of the bill) may surely be delegated to judicial officers, if properly qualified. However, in my opinion, a judicial officer should not make decisions on behalf of the court and with external impacts: he or she should not decide to issue a payment order or to reject a protest filed late; further, I doubt whether a judicial officer should approve an agreement on inheritance settlement or confirm the acquisition of inheritance according to portions thereof or to decide on the redemption of instruments, etc. I consider it inadmissible that a judicial officer could decide to reject an appeal lodged late, decide on subrogation, admit an alteration of an action, decide on the replacement of parties (according to the new bill) or decide on a call under Section 114b of the Civil Procedure Code (according to the draft amendment to the Act on Senior Judicial Officers as contained in a summary amendment to the Civil Procedure Code).

I do not know what in the organisation of teamwork in the courts could prevent such and similar decision from being prepared by an assistant or officer but made and presented externally (signed) by a judge, and thus guaranteed by that judge. I would consider it more appropriate.”

37. It is clear that the legal regulation of acts which may be carried out by a senior judicial officer in the first instance of civil court and administrative court proceedings as contained in Section 11 of the Act on Senior Judicial Officers cannot stand because of both reasons indicated by the petition of the High Court in Prague. Specifically, it must be emphasised that Section 10 of the Act on Senior Judicial Officers (or other provisions) is omitted from further considerations only because it is not sought to be annulled by the petition. What has been generally described above obviously applies to its contents as well.

38. First of all, Sections 10 and 11 of the Act on Senior Judicial Officers are apparently contradictory. Section 10 (1) of the Act on Senior Judicial Officers Senior enumerates the cases in which senior judicial officers are entitled to carry out the acts of the court of first instance in civil court proceedings. Paragraph 2 of the above-mentioned section deals with registration and paragraph 3 should not apply to cases but individual acts in civil court proceedings and – compared to the first and second paragraphs – in administrative court proceedings, irrespective of what kind of case it is [the third paragraph is, however, inconsistent; see letter (p)]. With a standard form of legislation, it could be inferred using the *a contrario* argument, that cases or acts not provided for in this provision cannot be included in the scope of activities of senior judicial officers. However, this is opposed by Section 11 of the Act on Senior Judicial Officers pursuant to which a senior judicial officer is entitled to carry out all the acts of the court of first instance in civil court proceedings and administrative court proceedings, with the exceptions explicitly enumerated in that provision.

39. Pursuant to Section 10 of the Act on Senior Judicial Officers, a senior judicial officer is only entitled to carry out what is explicitly stated therein, but under Section 11 of the Act on Senior Judicial Officers he or she is entitled to do everything except what he or she is explicitly forbidden to do. Such legislation raises a number of interpretation issues difficult to solve: e.g. pursuant to Section 10 (1) (a) of the Act on Senior Judicial Officers, a senior judicial officer may call upon the defendant to comment in the form of a qualified call under Section 114b (1) of the Civil Procedure Code only if the case has been decided through a payment order. Does it really mean that except for in connection with a payment order a senior judicial officer may not issue a qualified call (which would also be indicated by Section 114b (1) of the Civil Procedure Code) or can it be inferred that when Section 11 of the Act on Senior Judicial Officers does not include a qualified call among the acts the senior judicial officers must not carry out it may be made by a senior judicial officer at any time, even without relation to the compulsory payment order procedure (see the recent decision of the Supreme Court with file No. 21 Cdo 4259/2011)? The petitioner draws attention to another absurd matter – and more serious – in relation to judicial bill of exchange payment orders: Section 10 (1) (a) or other provision of the Act on Senior Judicial Officers does not mention them, and therefore does not delegate them to the competence of senior judicial officers, but Section 11 of the Act on Senior Judicial Officers does include them among the acts the senior judicial officers are not entitled to carry out; with regard to that, a senior judicial officer could then make a decision in the form of a judicial bill of exchange payment order. Some other similar examples of the relation between Sections 10 and 11 of the Act on Senior Judicial Officers could be mentioned, but it is not necessary as it is now evident that there is no reasonable relation between both provisions because both are the expression of two different legislative approaches that cannot stand side by side.

40. Also the exceptions enumerated in Section 11 of the Act on Senior Judicial Officers under individual letters leads to hardly acceptable conclusions. It has been mentioned above that deciding on the merits should not be within the competence of a senior judicial officer. However, Section 11 (b) of the Act on Senior Judicial Officers, as pointed out in the above-cited article by prof. Winterová, forbids senior judicial officers to decide on the merits only if such decision has the form of a judgment. By means of evidence to the contrary, it is then possible to conclude that if a decision on the merits has “only” the form of a resolution, it may be made also by a senior judicial officer. With regard to the introductory sentence of Section 11 of the Act on Senior Judicial Officers, this applies both to the first-instance decision-making in civil court proceedings and to administrative court proceedings. The unsustainability of this concept becomes evident by mere looking into the Civil Procedure Code and the Administrative Procedure Code. However, the problematic nature of the issue

may still increase if it is not necessary to order the hearing in the proceedings in which a decision on the merits is made in the form of a resolution [Section 11 (a) of the Act on Senior Judicial Officers]: such proceedings may be conducted by a senior judicial officer only, without any participation of a judge. In this respect, we can mention Section 200e (3) and (4) of the Civil Procedure Code or Section 46 (1) of the Administrative Procedure Code.

41. In general, the concept of Section 11 of the Act on Senior Judicial Officers is problematic as such. The constitutional bases outlined above determine that the judicial power is exercised by judges in the courts; the reasons for that are the guarantees of personal and subject-matter independence, as well as the personal qualifications and professional qualifications of judges. The participation of other persons in the exercise of the judicial power is an exception to this rule and, therefore, need to be dealt with narrowly (in relation to senior judicial officers, see the resolution, file No. III. ÚS 1531/09, cited above). The constitutional bases cannot be turned upside down by any legal regulation based on the principle which essentially implies that the judicial power may generally be exercised by officers, except for a few cases which are explicitly reserved for judges. Therefore, the ideological bases referred to in the statement of the Ministry of Justice and mentioned in the preamble to the bill, namely that the objective is to achieve the “improvement and speeding up of proceedings in particular by transferring the exercise of the broadest possible range of acts carried out so far by judges or public prosecutors to senior judicial officers and senior officers of public prosecutor’s offices”, while the competence of both of them should be limited “in fact only by the exclusive competence of judges and public prosecutors. ... The competence of senior judicial officers is defined to the maximum extent possible and ends where the exclusive statutory competence of judges starts. ... Thus, there are created conditions for lightening the burden of judges to the maximum extent...”.

42. However, the efforts to speed up proceedings and to “lighten the burden” of judges have their limits and must not result in that the judiciary becomes only a formal tool. The mission of the judiciary is to provide the protection to existing (i.e. real) rights and, therefore, fulfils its social function only if it is capable of achieving this objective. In order to hear and decide any case, it is always necessary to spend some appropriate time and efforts. It is possible to speed up proceedings especially where it comes to procedures which are not necessary or are too formalised and complicated (both apply to e.g. the division of judicial competence between the civil and administrative courts in reviewing the decisions of administrative bodies and the excessively complicated and confusing regulation of the subject-matter jurisdiction in civil court proceedings and the related procedure); by analogy, the participation of other persons in the exercise of the judicial power is permissible if this relieves judges of their responsibility for simple and routine tasks. Speeding up and “lightening the burden” cannot endanger the possibility of the proper – and objectively necessary – ascertainment and legal assessment of the facts of the case, at the necessary level of expertise with sufficient guarantees of personal and subject-matter independence.

43. The legislature must have this in mind when regulating the participation of other persons in the exercise of the judicial power. Currently, the activity of judges cannot go without the assistance of others, namely senior judicial officers, judicial assistants, and others. The persons may only carry out the acts which do not exceed their aiding role. They can, of course, participate in the acts of other persons if instructed by a judge; however, those acts are merely prepared by them and must be made afterwards by the judge in his or her own name and at his or her own responsibility.

44. Finally, it should be noted that even against those acts which may be delegated to senior judicial officers there must be maintained an effective possibility of defence. However, the legal regulation pursuant to Section 9 of the Act on Senior Judicial Officers does not conform to this requirement. An appeal or a complaint under the conditions laid down in the Civil Procedure Code or the Criminal Procedure Code may be lodged against any decision of a senior judicial officer in civil court proceedings or criminal court proceedings. This means that where e.g. an appeal against any decision of the court of first instance is not permissible, even any decision of a senior judicial officer may not be appealed against. As a consequence, not a judge but a senior judicial officer has the last word, and

it is despite the fact that the judicial power should, based on its nature, be exercised by judges and not by judicial officers.

45. It must also be taken into account that senior judicial officers may also participate in the acts of courts within administrative court proceedings (Section 10 (3) and Section 11 of the Act on Senior Judicial Officers). In that event, however, the Act on Senior Judicial Officers openly ignores any possibility of defence of the parties to the proceedings; within administrative court proceedings, there is simply no defence at all against the decisions of senior judicial officers. Section 9 (1) of the Act on Senior Judicial Officers enables the presiding judge to decide on an appeal against any decision made by a senior judicial officer in civil and commercial cases, Section 9 (2) of the Act on Senior Judicial Officers by analogy enables the presiding judge to decide on a complaint against any decision made by a senior judicial officer in criminal court proceedings.

46. It can therefore be concluded that Sections 10 and 11 of the Act on Senior Judicial Officers are in conflict, since the former is based on the concept according to which a senior judicial officer may carry out only acts delegated by that provision, the latter is, on the contrary, based on the concept according to which a senior judicial officer may carry out everything except for a few specifically forbidden acts. This discrepancy cannot be overcome even by an interpretation, as shown above in the examples of a qualified call or a judicial bill of exchange payment order (see Item 39 of the Reasoning). Further, it is reminded that not only the relationship between the two provisions but also Section 11 of the Act on Senior Judicial Officers itself is problematic. The constitutional bases described in detail imply that the judicial power is exercised by courts and judges whose personal and subject-matter independence, professional qualifications, and personal qualifications are principal functional attributes of the judiciary within the rule of law. Any act may not turn, as Section 11 of the Act on Senior Judicial Officers, this constitutional rule upside down by making the judging only a paper work and defining only a small range of acts which senior judicial officers may not carry out and which are reserved for judges. Therefore, an introductory sentence of Section 11 of the Act on Senior Judicial Officers that instead of fulfilling the exception implied by the Constitution makes this exception in fact a vague rule is not acceptable. Equally, the content of certain exceptions enumerated in this provision or consequences resulting therefrom are not constitutionally acceptable [as for that, see Item 41 above pointing out to the fact that Section 11 (a) and (b) of the Act on Senior Judicial Officers may bring about a situation where the proceedings in which deciding on the merits is made by a resolution and it is not necessary to order a hearing are fully under control of a senior judicial officer (e.g. the mentioned examples of the proceedings concerning some issues of business companies, cooperatives, and other legal persons)]. On these grounds, the Constitutional Court has granted the petition and has annulled Section 11 of the Act on Senior Judicial Officers under Section 70 (1) of Act No. 182/1993 Coll., on the Constitutional Court, as amended by Act No. 48/2002 Coll. In order to provide the legislature with sufficient time to prepare a constitutionally conforming regulation of the activities of senior judicial officers, the Constitutional Court set the end of this calendar year, i.e. 31 December 2013, as the date of annulment of Section 11 of the Act on Senior Judicial Officers.

47. *Obiter dictum*, the Constitutional Court points out that, with regard to the principle of being bound by the prayer for relief, only Section 11 of the Act on Senior Judicial Officers could be annulled in the proceedings. However, it is evident from the argumentation outlined above that not only that provision but also part of the content of Section 10 of the Act on Senior Judicial Officers is constitutionally problematic. The legislature will also have to carefully consider the concept of Section 12 of the Act on Senior Judicial Officers that applies to criminal court proceedings, which at first glance can cause similar problems, and finally also address the lack of protection resulting from Section 9 which is discussed above. Finally, it should be noted that this judgment does not intend to exclude senior judicial officers from the participation in the exercise of the judicial power. A senior judicial officer may prepare a number of procedural acts of the court for a judge and at the judge's responsibility; but a senior judicial officer may only carry out such acts in his or her own name in the cases and under the conditions as set out above (see e.g. Item 35 of the Reasoning of this judgment).

48. As regards the impact of this annulling judgment on the acts carried out by senior judicial officer until the date on which the judgment becomes enforceable, it is noted that on the ground of legal certainty the provision under the sentence after the semicolon of Section 71 (2) of the Act on the Constitutional Court shall not be applied and the claims arising from such decisions may be subject to the enforcement of a decision.

A dissenting opinion disagreeing with the plenary decision is written by Judge Vladimír Kůrka and dissenting opinions disagreeing with the reasoning are written by Stanislav Balík and Jan Filip pursuant to Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended.

1. A dissenting opinion of Judge Stanislav Balík

I voted for the verdict and my dissenting opinion is directed only to the Reasoning of the judgment, namely Item 17.

Although it may be inferred from its content, I believe it will make it even clearer if the following text is attached:

“In this case and as part of the specific review of regulations, the Constitutional Court has decided by preferring, in contrast to the case under file No. Pl. ÚS 36/09 (the resolution, file No. Pl. ÚS 36/09, of 23 April 2013, is available at nalus.usoud.cz), decisions on the merits. In doing so, it proceeded from the fact that the meaning and purpose of the petition is, at the moment of decision-making by the Constitutional Court, in particular to obtain a comprehensive assessment of the constitutionality of the legal regulation altered. The Constitutional Court did not call upon the petitioner, in a formalistic manner, to respond by changing the prayer for relief to the new situation given by the amendment to the contested provision in the period from filing the petition until the decision of the Constitutional Court. Even if the petitioner changed the prayer for relief in any way, the petitioner could have hardly achieved by its mere reformulation the annulment of the unconstitutional provision in force, without applying at the same time the *prima vista* unconstitutional provision in its form in force prior to the amendment. Moreover, the logic of this particular case implies that should Section 11 of the Act on Senior Judicial Officers be annulled after the amendment, also Section 11 of the Act on Senior Judicial Officers before the amendment would be unconstitutional.”

2. A dissenting opinion of Judge Jan Filip

Pursuant to Section 14 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, (hereinafter referred to as the “Act on the Constitutional Court”), I am giving my dissenting opinion to the Reasoning of the judgment with file No. Pl. ÚS 31/10.

The subject of proceedings in the case was a major issue of defining the place of the judicial power and the forms of the exercise of the judicial power in terms of the cornerstones of our constitutional order. I agree with the initial proposition according to which the form of the general clause for defining the competence in Section 11 of Act No. 121/2008 Coll., on senior judicial officers and senior officers of public prosecutor’s offices and on amendments to related acts (hereinafter referred to as the “Act on Senior Judicial Officers”), is contrary to the definition of the exercise of the judicial power in the Constitution. From this perspective, the only acceptable is an exhaustive list of acts of the court which may be carried out by a senior judicial officer outside the exercise of the judicial power, and not his or her decision-making as a rule. For the mutual connection of the acts of the court leading in any acts of the judicial power, only the regulation to the contrary may be constitutionally conforming (the same applies to Section 12 of the Act). The problem is even more evident based on the formulation of Section 38a of the Civil Procedure Code and Section 27a of the Criminal Procedure

Code. It is for these reasons I consider it necessary to adopt a dissenting opinion. The reasons are elaborated upon below:

1. The Constitutional Court without any further review adopted the conclusion of the petitioner (Item 5 of the Reasoning), according to which the competence delegated to senior judicial officers and judicial assistants to make decisions as allowed by Article 94 (2) of the Constitution is an exception to the general rule and cannot therefore become the rule, while the contested provision of the Act on Senior Judicial Officers enables such becoming the rule. Items 22, 23, 27, and 28 and the summary in Item 46 of the Reasoning of the judgment of the Constitutional Court are based on this proposition. In view of the fact that an independent judge is a key figure in the constitutional construction of the rule of law, this provision must, in connection with the exercise of the judicial power by someone other than a judge, be interpreted strictly or narrowly, not in a broad manner that may ultimately undermine this construction.

2. First of all, it is necessary to observe the difference in the establishment of jurisdiction as it is defined in the terms of the exercise of the judicial power by the Constitution in Articles 81 and 90 (the judiciary in the narrow sense), as it is established in other constitutional provisions [Articles 20, 58, 83, and 87 of the Constitution, and Article 36 (2) of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the “Charter”)], and as it is possibly extended by ordinary laws based on authority under Article 91 (2) of the Constitution. There is also a difference between the right to judicial protection under Article 36 (1) of the Charter and the reservation of judicial decision-making (or decision-making by a judge), where it does not have to be the exercise of the judicial power in the substantive sense.

3. Therefore, key constitutional bases under which the judicial power is exercised by courts (Article 81), namely through its holder, i.e. judges (Article 82 of the Constitution) deciding as a panel of judges or as a single judge (Article 94 (1)), should not go without further discussion. What is in the competence of the courts under this concept is subsequently determined by an ordinary law under Article 91 (2) of the Constitution. The constitutional provisions leave no place for the exercise of the judicial power by senior judicial officers, which of course does not mean that such positions in the judicial organisation (not in judging itself) cannot be established by law (within the meaning of Article 91 (2) of the Constitution). In this respect, the Reasoning aptly describes the status of judges and expresses its peculiarities and differences compared to the position of senior judicial officers – here, I am only emphasising some aspects such as a relation to judges, a special employment relationship, the lack of professional immunity, being bound not only by law, decision-making bound by an instruction, an inability to refer to the Constitutional Court under Article 95 (2) of the Constitution, a position defined by an ordinary law, which in turn may be cancelled or changed by any ordinary law, etc.

4. Therefore, I assume that the basic problem lies in the interpretation of Article 94 (2) of the Constitution. The purpose of such provision is authorising the legislature to define further the areas of jurisdiction (criminal, employment, and family issues) and the manner in which other citizens will be able to participate in the decision-making by courts. It should thus be a democratic element in an otherwise professionally conceived judiciary in the form of a co-decision by “other” persons in a panel as “lay-judges” or in the form of trial juries. As it is known, in 1992 some authors of the text of the Constitution were under the strong influence of Anglo-Saxon law, while the idea of judicial officers was only emerging at the time. Someone “other” may, under the constitutional order, decide only when if he or she co-decides with a judge.

5. Further, it should also be noted that to participate “alongside someone” is something different than just to participate. To “participate alongside” judges (within the meaning of Article 82 of the Constitution) in the decision-making by courts within the meaning of Article 81 of the Constitution means not “before” judges and certainly not “after them” or “on behalf of them” but along with them (while I do not exclude also “for them” as in the case of assistants). This follows from the fact that a court decision may only be rendered by the court (judges and alongside them by other citizens)

provided that the constitutional rules of decision-making by courts under Articles 36 to 40 of the Charter and Articles 81 to 82 and 95 to 96 of the Constitution are complied with. Within the meaning of procedural rules, the acts of the court other than decisions on the merits must be assessed according to how they relate to the very decision as a form of the exercise of the judicial power.

6. If, therefore, the participation of judicial officers and other persons in the decision-making by courts is to be ensured in a constitutionally conforming manner within the meaning of Articles 4, 20, 81, 83, and 87, Article 91 (2) of the Constitution or Article 36 (1), (2) and (4), Article 38 (1), and Article 40 (1) of the Charter (generally not in the acts of the court), such exception (still an exception) must explicitly be established within the constitutional order. Otherwise, there is in fact a danger to judging and the judiciary posed not only by the two contradictory provisions of Sections 10 and 11 of the Act on Senior Judicial Officers, but also by a number of other provisions of the Act (e.g. Sections 4 and 13). It is sufficient to say that according to Article 4 of the Constitution deciding on fundamental rights and freedoms cannot be removed from the competence of the courts by an ordinary law (also Article 36 (2) of the Charter). Moreover, under Article 1 (1) of the Constitution, it is *in fine* the only explicitly defined essential element of a democratic rule of law. However, there is a provision under Section 10 (1) (d) of the Act on Senior Judicial Officers according to which a senior judicial officer decides in the proceedings concerning the granting of a permit to detain a person in a medical institution, although Article 8 (6) of the Charter explicitly states that the court must decide on such placement in a medical institution. If we understand the decision-making by a senior judicial officer as an exception (of which no one could even think of in 1992), it would mean that in this manner also other persons could exercise the judicial power independently (not alongside judges). There would be no justification for indicating such possibility, even by referring to an exception only, in the case of an entirely essential judgment. Moreover, the Reasoning itself gives a number of other examples where the Act in question gets into conflict with the constitutionally established right to a lawful judge, not to mention that only a constitutional complaint is available in some cases against the thus conceived and not contestable decision of senior judicial officers (Section 9 of the Act on Senior Judicial Officers)!

7. It is possible to have an understanding of the prudence of the legislature that perhaps sees a danger in the inclusion of such exception in the Constitution (cf. Article 142 (2) of the Constitution of the Slovak Republic, as amended), as well as in its subsequent testing in accordance with Article 9 (2) of the Constitution. Its inclusion in the Constitution might undermine the role of a judge, as it conceived by the rule of law, and bring about a situation when the majority of decisions would be made by someone other than a judge and when the number of such judicial officers would exceed the number of judges. As an idiom says, the devil is in the detail. It should not matter whether the judicial power is defined formally by law or materially according to the content of the concept of judging and the judiciary. By means of defining the powers and role of senior judicial officers in the contested provisions of the Act, we would however arrive at a significantly distorted concept of the judiciary, as compared to how it was originally conceived by our constitutional order. As it is up to the legislature to define, clearly for everyone, who will decide on any respective case and how and at which stage of proceedings (which did not happen), as it follows from the right to judicial protection, it is up to the Constitutional Court to prevent any incomprehensible and contradictory regulation but also to ensure that the right to judicial protection is secured actually by means of judicial protection without exceptions.

8. Finally, I acknowledge that there may be a difference in the consequences of the annulment of a legal regulation due to the staff of the decision-making body (an individual decision may be entirely lawful procedurally, as well as in terms of subject-matter), but Item 48 of the Reasoning of the judgment may have instead of strengthening a legal certainty a rather opposite effect. Therefore, it should not be included in the Reasoning, not to mention that it gives the impression that in other cases Section 71 (2) of the Act on the Constitutional Court concerning the enforceability of decisions rendered under an annulled legal regulation or any of its provisions might not be binding on

the Constitutional Court and other bodies. This is in my opinion a different procedural situation than in the case of the judgment, file No. Pl. ÚS 1/12, of 27 November 2012 (437/2012 Coll.).

3. A dissenting opinion of Judge Vladimír Kůrka

I.

The judgment, I am opposed to, is based on two propositions; firstly, Section 11 of Act No. 121/2008 Coll., on senior judicial officers and senior officers of public prosecutor's offices and on amendments to related acts, as amended by Act No. 396/2012 Coll., is not interpretable in a constitutionally conforming manner, and secondly, Act No. 121/2008 Coll. delegates to senior judicial officer and judicial assistant (hereinafter referred to as the "senior judicial officers") the acts which should be from the perspective of constitutional principles reserved exclusively for judges.

I cannot agree with either of them.

II.

By way of introduction: the petition filed with the Constitutional Court is based on the proceedings in which the High Court in Prague decides on an appeal against a decision through which a judicial assistant rejected objections to a judicial bill of exchange payment order (probably for lateness – see Section 175 (3) of the CPC); for "deterrence" purposes, the majority judgment refers to the decision of the Supreme Court, file No. 21 Cdo 4259/2011, approving that also a resolution under Section 114b (1) of the Civil Procedure Code may be rendered by a senior judicial officer. The overall ideological concept of the judgment implies that in the opinion of the majority of the plenum it should not be that way, or that even those acts must not be performed by anyone other than a judge in order not to impair the constitutional principles of the exercise of the judicial power.

Is this really true or is such conclusion inevitable or should the Constitutional Court "want" to promote it? My answer is not – due to the apparently trivial nature of such acts (albeit "decision-making"), their specialist substrate, an importance in the proceedings, etc., especially when they are ultimately (Section 9 of Act No. 121/2008 Coll.) under the control of a judge and a standard appeal is admissible against them, which is (essentially) complied with (also Section 9 of Act No. 121/2008 Coll.).

III.

As an adequate response to the persistent excessive workload of the courts and the lengthening period of judicial proceedings, a concept has been developed since the beginning of nineties of the last century that the judicial proceedings do not urgently need a judge in each procedural situation (whether for the acts within an actual procedure or the formal acts within decision-making) and that, on the contrary, it is effective to relieve judges of the "burden" of simple tasks of a specifically procedural nature which constitute an unnecessary time and subject-matter workload and divert unreasonably their attention from the decision-making ("judiciary") activities. The legislative manifestation of those tendencies, which had their predecessors in foreign regulations (see the institution of *Rechtspfleger* in the Federal Republic of Germany), was the first Act on Senior Judicial Officers passed in 1994 (Act No. 189/1994 Coll., on senior judicial officers, as amended). It was then followed by important processes directed to the appropriate organisational structure both at the level of the regulations of the procedural rules of proceedings and the regulations of the organisation of the judiciary, and finally also the systems of the education and training of thus newly established judicial persons. Contested Act No. 121/2008 Coll., annulling Act No. 189/1994 Coll., is part of the process as well as its final manifestation.

However, the ideological bases of the judgment dealing with the differences between judges and senior judicial officers will take this gradual process of strengthening the efficiency of the judiciary about two decades back. Based on the majority judgment, anyone who should participate in judicial procedures alongside judges should not be more than an "aid" who shall have neither the power to

decide on the merits nor (and “especially”) the power to make “procedural” decisions, as “the same applies” to them as well (Item 35). The acts the senior judicial officers are allowed to carry out should not “exceed their aiding role”; if “they can, of course, participate in the acts of other persons if instructed by a judge”, then “those acts are merely prepared by them and must be made afterwards by the judge in his or her own name...” (Item 43). In other words, the majority judgment puts senior judicial officers (as well as judicial assistants) into a position the benefit of which for the judges is – somewhat euphemistically speaking – negligible, or puts them below position held until 1994 by judicial secretaries (for example – within the duties of a Ro department – judicial secretaries decided on the issue of payment orders and now senior judicial officers are denied this power by the majority of the plenum – see Item 36). The concepts established by Section 3 (1), Section 4 (2), and Section 5 of Act No. 121/2008 Coll. are being destroyed.

Then, “lightening the burden” of judges and making the judicial proceedings more effective are not achievable.

Not to mention what to do with the respective professional staff formed for twenty years, now with special education (achieved at a judicial academy) and, frequently, also with completed general tertiary education.

Through the adopted view of the constitutionally acceptable acts of senior judicial officers (and of judicial assistants) in judicial proceedings, the Constitutional Court has brought to the organisation and exercise of the judicial power the “principles” or “values” which are necessarily contrary to its pragmatic objectives (effective deciding in judicial cases within a reasonable time). The majority of the plenum put aside the sense of the practical dimension of matters.

I have no doubt that Article 94 (2) of the Constitution of the Czech Republic is sufficiently interpretable in favour of senior judicial officers and judicial assistants, though probably its original meaning lies somewhere else.

IV.

The practical judicial “life” even brought a finding – contradictory from the perspective of the majority of the plenum – that even the condition achieved by the contested Act is not effective enough in terms of the pursued objective to make proceedings more effective, which – among other things – has also led to the subsequent broad interpretation of Section 11 of Act No. 121/2008 Coll., which the majority of the plenum now oppose and which is expressed in the last commentary, published by Beck, on the Civil Procedure Code (Drápal, L., Bureš, J. a kol. Občanský soudní řád I., II. komentář [Civil Procedure Code, Vol. 1 and 2, Commentary], 1st issue, Prague: C. H. Beck, 2009, pages 230 to 231); according to that comment, the negative definition of the competence of senior judicial officers in Section 11 of Act No. 121/2008 Coll. “includes the entire competence... positively defined at the same time”, which depends on the specific authorisation by a judge (and this corresponds to the fact that in the cases mentioned above under Section 175 (3) or Section 114b (1) of the Civil Procedure Code a senior judicial officer or judicial assistant may act). This interpretation has been brought “into play” by the High Court in Prague, being the petitioner, and the majority of the plenum have adopted it in order to demonstrate the unconstitutionality of Section 11 of Act No. 121/2008 Coll.

However, there has been no reason for that.

It is not true that Section 11 of Act No. 121/2008 Coll. is not interpretable in a constitutionally conforming manner and even the opinion that it is not interpretable in competition with Section 10 of the Act does not stand; the interpretation of Section 11 opposed by the majority of the plenum is not the only possible.

There was also another available interpretation, namely the “historically” original one which was held in the long term and was based on grammatical and teleological bases: briefly, according to that

interpretation, Section 10 of Act No. 121/2008 Coll. defines positively the acts which a senior judicial officer (judicial assistant) may carry out and Section 11 makes an exclusion from that – laying down, on the contrary, what acts they may not carry out [for example, Section 10 (1) (g) lays down the manners of the enforcement of a decision by senior judicial officers, Section 11 excludes senior judicial officers from enforcing a decision if the enforcement order is constituted by a notarial deed]. “All the acts of the court of first instance” according to the introductory sentence of Section 11 can be understood as those that can otherwise be classified under Section 10.

Based on this interpretation of Section 11 of Act No. 121/2008 Coll. (in its relation to Section 10), obviously all the objections raised by the majority of the plenum are eliminated. If Section 11 provides only which acts cannot be carried out by senior judicial officers in proceedings, it cannot logically be blamed for extending the powers of senior judicial officers or for opening the space for “replacing” judges in decision-making (Item 41). On the contrary, the annulment of this provision paradoxically removes what has been the limit for the acts of senior judicial officers.

If such interpretation, undoubtedly constitutionally conforming, had been available, it should have prevailed. And that is why this interpretation of Section 11 should be preferred to its annulment, entirely in the spirit of the principle followed by the Constitutional Court as standard.

V.

The interpretation submitted above was also available to the High Court in Prague; it should have used it all the more so when it opposed the subsequent interpretation and there was nothing preventing that court from using it in its proceedings (probably resulting in an appeal). It would have achieved the same what is possible now after Section 11 has been annulled by the Constitutional Court, which implies that the removal of the contested provision was not necessary. This leads to an important conclusion: The High Court in Prague did not have the *locus standi* to file its petition.

VI.

Therefore, the petition of the High Court should have been dismissed (Section IV) or should have been rejected previously (Section V).