HEADNOTES

The principle, "he who appoints, may remove", cannot be applied to relations in the context of court administration and that neither is it possible to construe the duality of the legal status of a court chief judge as an official of state administration, on the one hand, and as a judge, on the other. Accordingly, the manner in which court chief judges, including the Chief Justice of the Supreme Court, are removed must be gauged by means of the maxim expressed in Art. 82 par. 2 of the Constitution; not only must the rules governing the removal of judges respect the constitutional principles of the separation of powers and the independence of the judiciary, so too must the rules for the removal of chief judges and deputy chief judges.

The office of chief judge or deputy chief judge, as well as that of chairperson of court collegia, should be considered as a career step for a judge (similarly as is the case for the appointment of the chairperson of a court panel), so that neither the chief judge and deputy chief judge of a court should be subject to removal otherwise then on the grounds foreseen in the law and on the basis of a decision of a court.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court Plenum, composed of the Chief Justice, Pavel Rychetský and Justices Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, on the petition of JUDr. Iva Brožová, residing in Brno, at Marie Steyskalové 60, represented by JUDr. Alexandr Nett, attorney, with his office in Brno at Gorkého 42, proposing the annulment of § 106 par. 1 of Act No. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts, and on the amendment of certain other acts (the Act on Courts and Judges), as amended by Act No. 192/2003 Coll., with the Assembly of Deputies and the Senate of the Czech Parliament as parties, decided as follows:

§ 106 par. 1 of Act No. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts, and on the amendment of certain other acts (the Act on Courts and Judges), as amended by Act No. 192/2003 Coll., is annulled as of the day this judgment is published in the Collection of Laws.

REASONING

I.

On 8 February 2006 the Constitutional Court received a complaint submitted by complainant, JUDr. Iva Brožová, against the decision of the President of the Republic, act no. KPR 966/2006, contrasigned by the Prime Minister, by which she was removed from the office of

Chief Justice of the Supreme Court, in conjunction with a petition proposing the annulment of § 106 par. 1 of Act No. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts, and on the amendment of certain other acts (hereinafter "the Act on Courts and Judges") and with a petition proposing the delay of the entry into effect of this decision. The complainant reasoned her petition primarily in terms of the violation of the principle of the separation of powers in the state and the threat to the independence of the judiciary; in consequence of the application of an unconstitutional provision, § 106 par. 1 of the Act on Courts and Judges, she was denied her right to judicial protection and was thereby affected in her constitutionally protected right in the sense of Art. 36 of the Charter of Fundamental Rights and Basic Freedoms.

The Second Panel of the Constitutional Court found no preliminary grounds for rejecting the constitutional complaint, in the sense of § 43 of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended (hereinafter "Act on the Constitutional Court"), as the application of the contested provision resulted in the situation which is the subject of the constitutional complaint. Accordingly, the formal prerequisites under § 43 par. 1 for hearing the matter were met, and the constitutional complaint was not found to be manifestly unfounded under § 43 par. 2, lit. a). Accordingly, the Second Panel suspended the proceeding on the constitutional complaint, in the sense of § 78 par. 1 of this Act, and referred to the Constitutional Court Plenum for its decision pursuant to Art. 87 par. 1 of the Constitution of the Czech Republic (hereinafter "Constitution") the petition proposing the annulment of a legal enactment, that is § 106 par. 1 of the Act on Courts and Judges.

The Constitutional Court Plenum decided in a proceeding on concrete norm control, and in its jurisprudence relating to the outcome of a derogational judgment in such a proceeding, based on the fulfillment of the conditions of § 74 of the Act on the Constitutional Court (see, in particular, Judgments Nos. I. US 102/2000, I. US 738/2000) the Constitutional Court has repeatedly emphasized: "Although the constitutional complaint and the petition proposing the annulment of statutory provisions represent relatively separate petitions, upon which the Constitutional Court decides separately, their substantive interconnection cannot be disregarded. That is to say, this type of proceeding before the Constitutional Court falls within the field of 'concrete norm control', where a specific adjudicated matter, in which the contested legal enactment was applied, serves as the instigation for the Constitutional Court's decision-making as to that enactment's constitutionality. It is true that one cannot, alone from the fact that the petition proposing the annulment of the legal enactment is granted, automatically draw conclusions as to whether the constitutional complaint itself will also be granted. One cannot rule out the possibility of the situation (albeit exceptional) where even following the annulment of the contested legal enactment the Constitutional Court would reject the constitutional complaint on the merits as not well-founded, where it finds in the specific case that the annulled provision did not interfere with the complainant's constitutionally protected fundamental rights; it is equally clear, however, that in deciding on the constitutional complaint the Constitutional Court must take into consideration the judgment of annulment in the norm control proceeding. Were it otherwise, the submitted constitutional complaint would not fulfill its individual function, the function of protecting the complainant's constitutionally guaranteed fundamental rights or freedoms." The Constitutional Court would add to this that a properly submitted and admissible constitutional complaint is a prerequisite to the institution of a proceeding on this type of concrete norm control.

II.

In harmony with § 69 of the Act on the Constitutional Court, the Constitutional Court requested that the parties to the proceeding, both chambers of Parliament, give their views on the matter.

In its statement of views of 5 April 2006, the Assembly of Deputies explained the reasons leading to the adoption of the amendment to the Act on Courts and Judges in conjunction with the Constitutional Court's judgment No. Pl. US 7/2002, with reference to a passage from the Explanatory Report on the amending act, which stated that the proposed provision is not in conflict with international treaties, nor with legal acts of the European Union. According to the Explanatory Report, neither is the submitted bill in conflict with the Europe Agreement on the Association of the Czech Republic with the European Community, nor with general principles of law of the European Community. The proposed provision respects the Recommendation of the Committee of Ministers of the Council of Europe R (No. 94) 12 on the independence, efficiency and role of judges and does not conflict either with international acts relating to the independence of courts, judges, or the performance of the judiciary.

The Assembly of Deputies further stated that the Act on Courts and Judges was adopted on 10 June 2003 through the regular legislative procedure, and the legislative body acted in the conviction that the adopted act was in conformity with the Constitution and our legal order. It is thus up to the Constitutional Court to adjudge the constitutionality of the contested provision and to issue the appropriate decision.

In its statement of views of 10 April 2006, the Senate also summarized the reasons which led to the Act on Courts and Judges, specifically § 106 odst. 1 thereof, being amended.

The Senate debated the bill in the sixth session of its fourth electoral term, held on 29 May 2003 and, on the basis of the Constitutional Law Committee's recommendation, decided to return the bill to the Assembly of Deputies in the version established by the adoption of amendments.

As to the merits of the matter under adjudication, the Senate described the most significant factors in the development of the model of court administration from 1991 up to the adoption of the amendment to the Act on Courts and Judges. Further, it summarized the powers of the President of the Republic and the Minister of Justice relating to the appointment of court chief judges, as well as the status of chief judges in their performance of the state administration of courts. In connection therewith, it declared that in her submission the complainant did not call into question that the office of judge and chief judge of a court are of a dualistic nature; the Senate accordingly confined its statement of views solely to the issue of the termination of a chief judge's function through removal from office.

The Senate observed that, in debating the amendment to the Act on Courts and Judges, it adopted, in connection with Constitutional Court judgment No. Pl. US 7/02, the position that, in the situation where court functionaries – judges should perform state administration, it is necessary to fortify their independence from the executive, at least as concerns their removal from office. In the Senate's view, chief judges and deputy chief judges of courts should be removed from office solely through the imposition of disciplinary measures, and only after holding a disciplinary proceeding. Only the violation of a statutorily prescribed duty

(moreover in a serious manner) in the performance of the state administration of courts should constitute grounds for the imposition of disciplinary measures. A statutorily prescribed disciplinary panel should decide as to whether, in a specific case, the prerequisite grounds were satisfied. The proposed amendment, which the Senate incorporated into the proposed act it returned to the Assembly of Deputies, accorded with this aim.

III.

The Constitutional Court then proceeded to review, as its primary criteria for review under § 68 par. 2 of the Act on the Constitutional Court, whether the amendment to the Act on Courts and Judges at issue in this case was adopted and issued within the confines of Parliament's competence, as laid down in the Constitution, and in the constitutionally prescribed manner.

The Constitutional Court has verified that the amendment to Act No. 6/2002 Coll., effected by Act No. 192/2003 Coll., was adopted by the Assembly of Deputies on 13 May 2003 and that 175 of the Deputies voted in favor of the bill and one against. On 14 May 2003 the bill was transmitted to the Senate, which debated it on 29 May 2003 and by its resolution decided to return the bill to the Assembly of Deputies in the version including the proposed amendments it adopted. Sixty of the present Senators voted in favor of the bill and none against. In the context of the completion of the legislative process, on 10 June 2003 the Assembly of Deputies approved the version of the bill that had been transmitted to the Senate. On 18 June 2003 the President of the Republic signed the Act, which entered into effect on the day it was promulgated in the Collection of Laws as No. 192/2003 Coll., that is on 1 July 2003.

The Constitutional Court accordingly affirmed that the Act was duly adopted and issued, in the sense of § 68 par. 2 of the Act on the Constitutional Court.

In the context of this statutory requirement, the Constitutional Court first of all delimited the relevant state of facts in terms of the ambit of provisions which form the subject of review and in terms of the relevant provisions of constitutional acts with which this provision might conflict.

The subject of review is § 106 par. 1 of Act No. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts, and on the amendment of certain other acts (the Act on Courts and Judges), as subsequently amended and supplemented, the text of which reads: "The chief judge or deputy chief judge of a court may be removed from office by the official who appointed her to that office if she violates, in a serious manner or repeatedly, her statutorily prescribed duties in the course of performing the state administration of courts. The chairperson of a collegium of the Supreme Court or of a collegium of the Supreme Administrative Court may be removed from office by the person who appointed her to that office, if she fails properly to carry out her duties."

The complainant contested § 106 par. 1 of the Act on Courts and Judges due to its conflict with fundamental constitutional principles, specifically the principle of the separation of powers in the state and the principle of the independence of the judiciary.

As a preface to constitutional review in the given matter, that Constitutional Court states that the fundamental constitutional guarantees of the separation of powers in a democratic, law-based state are governed by the provisions of Art. 2 par. 1 of the Constitution: "All state

authority emanates from the people; they exercise it through the legislative, executive, and judicial bodies". The principle of the independence of the judiciary is laid down in particular in Art. 81 of the Constitution, according to which: "[t]he judicial power shall be exercised in the name of the Republic by independent courts", and Art. 82 of the Constitution, par. 1 of which provides that "[j]udges shall be independent in the performance of their duties [and n]obody may threaten their impartiality", and par. 2 that "[j]udges may not be removed or transferred to another court against their will; exceptions resulting especially from disciplinary responsibility shall be laid down in a statute". A further guarantee, which should also ensure the elimination of external influence on the exercise of judicial power, is Art. 82 par. 3 of the Constitution, according to which "[t]he office of a judge is incompatible with that of the President of the Republic, a Member of Parliament, as well as with any other function in public administration; a statute shall specify which further activities are incompatible with the discharge of judicial duties."

In this context, the Constitutional Court makes reference to the general views it expressed in its judgment in matter No. Pl. US 7/02 on the the principles of the separation of powers and its historical context. Above all, it emphasized the following: "however little even a democratic state strives in relation to the court system for maximalist programs and therefore remains far removed from the conception of the 'judicial state' - as was already mentioned, the legislative and executive powers are also state authorities and thus, in a democratic system, the state power can be functionally realized only by the fulfillment of the condition that all of its bodies are functioning - on the other hand, it is obliged to create the institutional preconditions for that which, as far as the judiciary is concerned, applies specifically and unconditionally, the constitution and establishment of the genuine independence of courts, not only for the stabilization of their position, but also that of the entire democratic system in relation to the legislative and the executive - as a significant state-building, equally however, a polemical component. The mentioned genuine independence of courts is an attribute of judicial power which is specific to it and indispensible, both justified and required by Article 4 of the Constitution, according to which 'the fundamental rights and basic freedoms shall enjoy the protection of judicial bodies', as well as by Articles 81 and 82, which provide that 'the judicial power shall be exercised in the name of the Republic by independent courts', that 'judges shall be independent in the performance of their duties', and that 'nobody may threaten their impartiality'. The above-asserted specific character and content of the judicial power thus cannot be called into doubt and therefore not even its basic function is compatible with infiltration of any sort by other state authorities. This premise was expressed in § 96 par. 1 of the Constitutional Charter of the Czechoslovak Republic (introduced by Act No. 121/1920 Coll.), according to which the judiciary in all instances shall be separate from the administration, then in the present Constitution, in Article 82 par. 3, which provides that 'the office of judge is incompatible with that of the President of the Republic, a Member of Parliament, as well as with any other function in public administration'. As was already stated, the principle of the independence of courts has in this respect an unconditional character excluding the possibility of encroachment by the executive."

It can thus be said that one of the basic preconditions to the rule of law is a strong and independent judiciary. In a state which should be considered a law-based state, the judiciary must be regarded as one of three powers, which has the same weight as the executive and legislative powers, from which the judiciary must be independent to the greatest degree possible, whereas the judiciary is the only one of the three powers for which especial emphasis is placed on the constitutional protection of its independence. This principle has been broadly embodied in the majority of the world's constitutions; sometimes even in those

states where the judiciary was (or is) not actually independent. The danger remains that this principle will remain a mere theoretical edifice, unless it is supplemented in special provisions of the Constitution, or at least in the legal enactments governing the judiciary, by further principles which can be deduced from the constitutions of the majority of West European states, just as from the most important international documents relating to the issue of the independence of the judiciary. In this connection reference can be made, for example, to the Council of Europe European Charter on the status of judges, which was adopted at its session in Strasbourg held on 8-10 July 1998, and to the explanatory memorandum accompanying it. In the sense of Art. 1.3 of the mentioned Council of Europe European Charter on the status of judges, it is an indispensable requirement for safeguarding the independence of the judiciary that the conditions influencing the selection, recruitment, appointment, career advancement or removal from office of judges allow for independence from the executive and legislative powers.

IV.

From a comparative perspective, it must be said that there does not exist a single model for the administration of courts in democratic countries; on the contrary, one can speak of a plurality of such models. The majority of the contemporary European systems have been influenced by their constitutional traditions and are the result of a slow and gradual development. With the exception of Article 6 of the European Convention on Human Rights and Fundamental Freedoms and certain recommendations of the Council of Europe and the UN, there are no common standards that are elaborated in more detail for the organization and the administration of courts. Nor is this field affected by Community law, as the European Community has not competence in this area.

In spite of the plurality of institutional models for court administration, one can discover common characteristics in all European state (or in groups thereof). In every EU state and in the majority of newly acceding Member States, the principle of judicial independence is respected, whether on the level of the constitution or statutory law, or follows from practice (it is, however, variously interpreted). The individual independence of each judge is respected; increased attention is devoted to the independence of the judiciary as a whole, that is, as the third power in the state, in only certain countries. It is guaranteed either by transferring significant powers to the supreme council of the judiciary (Italy, France, Spain), or by distinguishing judicial administration from state administration within the context of the classic model (Germany, Austria).

Among models of judicial administration, of which the supreme council of the judiciary (hereinafter “council”) forms a part, one can distinguish the following systems:
- the southern model, in which the council took over from the government significant competence in the area of appointing judges and judicial officials, as well as disciplinary proceedings concerning them; however, most of them lack significant powers in the area of administrative courts (budget, the management of property);
- the northern model (Sweden, Denmark, Ireland, the Netherlands) in which the council has primarily economic and administrative competence, but for the most part lacks competence in personnel matters;
- a combination of both systems for the organization of the judiciary (for example, Hungary), where the council took over extensive powers in both fields and in principle is responsible for

the judiciary as a whole.

In the majority of Western European countries, however, the ministry of justice, or the government, gave up significant competence and supervisory mechanisms in relation to the judiciary, even following the creation of a council. This applies for the northern model, where the council often shares certain competencies with the ministry of justice and the system functions on the basis of a reciprocal agreement. Non-judges are also represented in all supreme self-governing bodies of the judiciary.

On the level of proceedings of individual courts, the traditional system prevails, that is, where the chief judge – a judge – is responsible for the entire agenda of all courts. One can also discern the tendency, in relation to administrative courts, to transfer certain powers to the main court secretary, chancellor, director, etc. Even in the case of such judicial officials, in many states their judicial and administrative functions are intermingled.

In the majority of European countries a functional solution is preferred, the judicial systems are gradually being reformed, and the independence of judges in their decision-making is always guaranteed (see The Ministry of Justice Study – On the Solution of the Situation following Judgment Pl. US 7/2002).

V.

In terms of legal developments in the Czech Republic, the Constitutional Court observes that after 1948 a court's administration was always carried out by the chief judge (alternatively the deputy chief judge) of individual courts who, in the performance of that task, were subject to the supervision of the Ministry, or the Minister, of Justice, to whom she also bore responsibility for her performance in office.

New judicial statutes comprehensively covering issues concerning the judiciary were adopted at the start of the 1990's: Act No. 335/1991 Coll., on Courts and Judges, Act No. 436/1991 Coll., on Certain Measures in the Judiciary, on the Election of Lay Judges, Relieving them from Duty or Removing them from Office, and on the State Administration of Courts, and Act No. 412/1991 Coll., on the Disciplinary Responsibility of Judges.

These statutes retained the terminology introduced by Act No. 62/1961 Coll., on the Organization of Courts, which consisted in replacing the term, "the administration of courts", with the term, "the state administration of courts" (see also § 38 par. 1 of Act No. 66/1952 Coll., on the Organization of Courts, which made use of the previous nomenclature). At the same time, in principle they adopted, as the model for a court's chief judge to enter into and be removed from office, one involving intervention by the executive (in the person of the Minister of Justice). In the case of the Chief Justice of the Supreme Court, the election and removal of that official by the legislative body was gradually replaced with her appointment and removal by the President of the Republic, which in a certain sense resulted in weakening her personal independence.

The state administration of courts in the Czech Republic was entrusted, at the central level, to the Ministry of Justice, and it was performed by the chief judge and deputy chief judge of courts either indirectly or through the direct administration of the Ministry of Justice. It was an explicitly expressed principle, however, that the performance of state administration of

courts was not permitted to intrude upon the independence of courts. As one aspect of judicial reform, in mid-2000 two bills were submitted that, among other things, contemplated a fundamental change in the system of the administration of courts. The administration of the judiciary was meant to be differentiated from the state administration of courts. The administration of the judiciary was to be responsible for courts' personnel matters under the auspices of the Supreme Council of the Judiciary, and state administration was to arrange for the material requirements of courts by means of administrative units subordinate to the Ministry of Justice. The Assembly of Deputies rejected this approach. Efforts at further reform in the year 2001 petrified in the conditions of the Czech Republic due to the historical conception that the state administration of courts is managed under the direction of the Ministry of Justice – chief judges (deputy chief Judges) of a court; this conception was subsequently incorporated into the statutory scheme, which is implemented de lege lata by Act No. 6/2002 Coll. The President of the Republic did not veto the Act, rather he instituted review of it by the Constitutional Court in the context of a proceeding on abstract norm control.

The outcome of this review was the Constitutional Court's judgment No. Pl. US 7/02, which annulled (among others) all provisions relating to the regulation of the manner in which the state administration of courts is carried out (§ 74 par. 3 and foll.). In relation to its annulment of § 106 par. 1, the Constitutional Court advanced a further reason, namely the entirely general and vague (hence not corresponding to the principle of legal certainty) expression of the grounds leading to the removal from office of a court chief judge. The Constitutional Court also stated that entry into the office of a court chief judge should be considered as a career step for a judge, so that such official should not be subject to removal otherwise then on grounds foreseen in the law and by means of a disciplinary proceeding, i.e., by decision of a court.

The Government reacted to the Constitutional Court's judgment by submitting its bill to amend the Act on Courts and Judges, which affected also § 106 par. 1 and envisaged the possibility to adjudge the violation of statutorily prescribed duties in the performance of the state administration of courts as a disciplinary infraction in a disciplinary proceeding before an independent court; further, the sanctions for the violation thereof were not to be limited to the removal of the judge in question, but it was to be possible to select other measures as well, corresponding to the seriousness of the violation of duty. The proposed amending act was not adopted by the Assembly of Deputies in this form. The Government submitted a new bill which reaffirmed the existing model of the state administration of courts. During debate in the Assembly of Deputies the principle "he who appoints, may remove" was once again introduced, and § 106 par. 1 of the Act on Courts and Judges was adopted in the wording which was contested by the petitioner.

In contrast with the original text, this amendment to the Act on Courts and Judges narrowed the possibility to remove court chief judges (deputy chief judges) for the failure properly to carry out duties (particularly substantively) to the possibility of removal for serious or repeated violations of statutorily prescribed duties in the course of performing state administration.

VI.

In connection with the removal of the Chief Justice of the Supreme Court from office pursuant to § 106 par. 1 of the Act on Courts and Judges, the Constitutional Court first of all assessed the possible applicability of this provision

The Chief Justice of the Supreme Court is appointed by the President of the Republic on the basis of Art. 62 lit. f) of the Constitution, that is, on the basis of his sole authority and without the need for the Government's contrasignature. In this separation of the appointment of the chief justice of a high organ of the judicial system from the politically constituted Government, must be seen an element of detachment (thereby also independence) of the judiciary. It must be remarked, however, that there is found in other systems an absolute separation of the judiciary from the executive, where none of the executive organs appoints the chief justice of the supreme court and the executive fulfills primarily a consultative role, possibly proposing candidates.

As follows from what has been stated, the Constitution safeguards the personal independence of the Chief Justice of the Supreme Court vis-à-vis the Government at the moment that official is appointed; the necessity of maintaining such personal independence even in the course of performance the office and its termination is not affected thereby, especially then when it is terminated by removal from office. If the President of the Republic is entrusted with the power to appoint the Chief Justice of the Supreme Court, without concurrent action by any other state body, an entirely unlimited power to remove the Chief Justice of the Supreme Court cannot be found in the Constitution's silence. In the situation where the authority to remove the Chief Justice of the Supreme Court is not explicitly mentioned in the Constitution, to adopt an interpretation whereby the President's authority to appoint implicates also the possibility to remove the Chief Justice from office, was in conflict with the constitutionally protected value of the independence of the judiciary and its separation from the executive power. In this system, where the judiciary is not absolutely separated from the executive, the President of the Republic is thus entrusted solely with the authority to install the Chief Justice of the Supreme Court into office, whereas in terms of influencing his performance in office or the termination of that office, no power of the President is envisaged.

A rule which provides that "he who appoints, may recall" is entirely logical in cases where a direct relationship of superiority and subordination is involved. However, no such relationship exists between the President of the Republic and the Chief Justice of the Supreme Court (who, according to Art. 92 of the Constitution, stands at the head of the highest judicial organ). It can thus be concluded that, by regulating removal in § 106 par. 1 of the Act on Courts and Judges, the legislature acted pursuant to Art. 63 par. 2 of the Constitution also in the case of the Supreme Court, similarly as in the case of the Supreme Auditing Office and the Czech National Bank or of the other highest judicial body, the Supreme Administrative Court.

VII.

In a number of its judgments (Pl. US 34/04, Pl. US 43/04) the Constitutional Court has authoritatively interpreted the principle of judicial independence: "The principle of judicial independence is one of the essential attributes of a democratic, law-based state (Art. 9 par. 2 of the Constitution). The requirement that justice be independent springs from two sources: from the neutrality of judges, as a guarantee of just, impartial, and objective court proceedings and as a safeguard of individual rights and freedoms by judges set apart from political power.

The independence of judges is ensured by guarantees of a special legal status (among which must rank non-transferability, irremovability, and inviolability), further by guarantees of organizational and functional independence from bodies representing the legislative and above all the executive powers, as well as by the separation of the judiciary from the legislative and executive powers (in particular by assertion of the principle of incompatibility). In substantive terms, judicial independence thus ensures that judges are bound solely by the law, that is, by excluding any sort of component of subordination in judicial decision-making. The Constitutional Court addressed itself to the fundamental components of the principle of judicial independence in its judgment No. Pl. US 7/02."

In the context of the matter before it, the Constitutional Court observes, with regard to the conclusions which it has expressed in the past, that the necessity for the judiciary to have an autonomous position flows from the Constitution. This "ideal" state of affairs, as envisaged in the Constitution, does not, however, actually exist in the conditions of the Czech Republic, as the judiciary does not constitute an independent and autonomous representative entity, it cannot express its views externally as an independent power, and is in fact represented by the Ministry of Justice, which is demonstrated even by the entire legal framework for the model of the administration of courts de lege lata.

In this connection it must be emphasized that, in the matter under adjudication, the Constitutional Court is not entitled to adjudge the constitutionality of the overall conception of the state administration of the judiciary, for in the matter at hand it is entitled to adjudge solely the constitutionality of the contested provision, § 106 par. 1 of the Act on Courts and Judges. That does not mean, however, that it is impermissible for the Court, when considering the constitutionality of the contested provision, to take into account the content of other provisions; on certain levels it is necessary to look into the legal framework chosen by the legislature for the administration of courts, as it has a certain relevance in relation to the constitutional review of § 106 par. 1 of the Act on Courts and Judges.

In relation to the contested provision, the significance increases of the maxim according to which personal independence, which furnishes representatives of the judiciary with the necessary degree of autonomy from external influences, is a perfectly natural consequence of, and a precondition for, institutional independence. Personal independence, in the sense of Art. 82 of the Constitution, consists of several attributes; whereas the essential one, in connection with the case under consideration, is irremovability from office, which is breached only in the case of removal carried out, in particular, in consequence of statutorily disciplinary responsibility. Thus, the Constitutional Court adjudged the contested provision also in reference to this above-mentioned attribute of independence.

In relation to the judiciary and to individual court functionaries (§ 102 of the Act on Courts and Judges), the position of the Ministry of Justice is demarcated in § 119 par. 1 of the Act on Courts and Judges, namely he is the central organ for the state administration of courts, the further organs being the chief judges (and deputy chief judges) of courts; and the state administration is performed either directly by the Ministry or by means of the chief judge (or deputy chief judge). The Minister's power to appoint the chief judge and deputy chief judge of courts and his power to remove them from office pursuant to § 106 par. 1 of the Act on Courts and Judges then follows from the position of the Ministry as the central organ of the state administration of courts.

The Constitutional Court would emphasize that the principle "he who appoints, may remove" is inherent in a system of state administration. Solely in the case of state administration is the exercise of public authority characteristic, that is, the carrying out of executive power in relations of hierarchy, in other words, relations of superiority and subordination. The content thereof consists in prescriptive activity expressing the predominance in power of the organs of state administration in relation to those towards whom it is exercised, which applies both for its operation externally and for the internal organizational system. An administrative body has at its disposal authoritative powers (cf. Průcha, Administrative Law – The General Par, Masaryk University, Brno 2004)

Thus, to the extent that § 106 par. 1 of the Act on Courts and Judges contain a component of a special system of state administration, the Constitutional Court must address the issue of whether the administration of courts can also be considered as state administration.

The performance of the state administration of courts is generally characterized as the creation of conditions for the proper performance by the judiciary (§ 118 par. 1 of the Act on Courts and Judges), that is, in respect of organization, personnel, management, finance, and instruction, and also of supervision of the due performance of the tasks entrusted to courts. Certain of the powers entrusted to court chief judges within the framework of "the state administration of courts" are not tasks of a solely administrative character. As an example can be cited the power to set the work schedule, to carry out vetting of court files, to oversee the quality of court hearings, to resolve complaints, or to propose to the Minister of Justice that he lodge a complaint on the violation of the law. Although the legislature made use of the term, "state administration of courts", which, due to its formal designation, gives the impression that it concerns state administration, it is necessary to take into account the formal definition of the content of the term "state administration of courts" (that is according to the Act on Courts and Judges) and the substantive demarcation of the subject of court functionaries' activities. The mere formal designation cannot carry more weight than the content, thus not more than the actual character of court administration either. All actions taken by the chief judges and deputy chief judges of a court are at the same time actions which can indirectly influence the exercise of judicial power, and can, in consequence, represent a certain encroachment by the executive power upon the judiciary.

It follows from what has been said above that, in character, the performance of state administration of courts does not correspond to the general definition of the performance of state administration. In this instance it is a special activity performed only within the judicial system and more or less conditioned upon the type of decision-making characteristic of courts. It is then necessary to adjudge in this context as well the principle, "he who appoints, may remove", as laid down in § 106 par. 1, which principle is characteristic of a hierarchical system of relations of direct superiority and subordination (as has already been stated above). The presence of an essential attribute characteristic of the system of state administration cannot be tolerated in relations within the confines of the administration of courts, which is not state administration.

In assessing the position of the chief judges of courts as court functionaries appointed by the Minister of Justice or the President of the Republic, it must be borne in mind that court functionaries continue to take part as judges in the actual decision-making.

It is then necessary to proceed from the premise that the office of chief judge of a court, just as the Chief Justice of the Supreme Court, is inseparable from the office of judge, for one

cannot construe the dual nature of the legal status of a court chief judge as an official of state administration on the one hand and as a judge on the other. It is, thus, necessary to relate, in the above-indicated respect, the attribute of the independence of the judiciary, alternatively the independence of judges, also to the chief judges of courts. It is then not possible to accept, while at the same time preserving the above-stated requirements, that they could be removed by executive organs precisely in the manner contemplated by the contested provision.

The Constitutional Court refers to Art. 82 par. 2 of the Constitution, which lays down that judges may not be removed against their will and that exceptions to the irremovability from the office of judge, as a result especially of disciplinary responsibility, may be laid down in a statute. It is necessary also to assess, with reference to the maxim declared in this Article, the manner in which the chief judges of courts (thus even the Chief Justice of the Supreme Court) are removed from office. Therefore, not only the legal rules governing the removal of judges, but also those governing the removal of chief judges and deputy chief judges of courts must respect the constitutional principles of the separation of powers, judicial independence, etc. It is not possible thus to lay down any sort of model for the removal of judicial functionaries without consideration of constitutional values.

In accordance with the contemporary constitutional arrangement and in harmony with the standards which spring from the European and international milieu, it follows from the principle of the separation of the judiciary and the executive power that a judicial functionary can be removed from office solely by a procedure which is carried out within the judiciary itself.

In other respects the above-mentioned manner of removal chosen by the legislature does not take into account the distinctive character of the "system of functionaries" as a career track, by which must be understood the objective possibility for judges to attain, under prescribed conditions, such a position as satisfies them professionally. In principle this means either to undertake a greater responsibility in the performance of their judicial role deciding on ordinary and extraordinary remedies, or participation in the state administration of courts in the office of chief judge or deputy chief judge of a court (Král, V., On the Stabilization of Justice, Criminal Law Review [Trestněprávní revue], No 5/2004, p. 108 and foll.).

VIII.

Dató Paramo Cumaranswamy drew attention to the negative aspects connected with the imperfect separation of the judiciary from the executive, in the Report of the Special Rapporteur on the Issue of the Independence of Judges and Lawyers, which he submitted in conformity with the resolution of the Commission for Human Rights of the UN Economic and Social Committee, No. 2000/42 (hereinafter "Report"), and which assessed the situation that arose in the Slovak Republic as a result of the removal of Dr. Harabin, the Chief Justice of the Supreme Court of the Slovak Republic.

In terms of comparative law, as far as concerns the evaluation of the relationship of the office of Chief Justice of the Supreme Court to the executive, that situation is similar to the one in the case before the Court. Art. 141 par. 1 of the Constitution of the Slovak Republic provides that the judicial power is exercised by independent and impartial courts, and in par. 2 that it is carried out at all levels separately from other state bodies. Art. 144 par. 1 of the Constitution of the Slovak Republic provides that in their decision-making judges are independent and are

bound solely by the law.

The Report primarily draws attention to the fact that, in Slovakia, the procedure for the appointment of judges, as well as those for their promotion and removal from office, place far too much power into the hands of the executive and legislative components of state power, and especially so into the hands of the Minister of Justice. The Report designated these procedures as being in conflict with the conception of judicial independence, as it is enshrined in the Constitution and as it is regulated in regional and international standards of judicial independence. Otherwise, according to the Report, the assertion of the Slovak Government does not pass muster in that it is untenable to assert that the office of Chief Judge is distinct from the office of judge and that the constitutional prerequisites for the removal of a judge do not apply to it as such. The assertion that a judge in the office of Chief Justice of the Supreme Court comes under the executive branch of state power is in conflict with the very essence of an independent judiciary, as it is regulated in Art. 141 of the Constitution and would mean that the Chief Justice of the Supreme Court is de facto an executive official. According to the Report's assessment, as soon as a chief judge or deputy chief judge is appointed, no distinction should be drawn between this office and the office of judge. Thus, despite the fact that the asserted grounds, by which the proposal to Parliament to remove the Chief Justice was reasoned, might have been fundamental, the attempt at removal by the Slovak Government was viewed as being in conflict with international and regional standards for safeguarding and protecting an independent judiciary, as the Government did not demonstrate its assertions before the competent tribunal.

According to the Report's conclusion, it is unjustifiable for laws, whether derived from legislation, custom, or tradition, to be in conflict with the basic values and standards that protect an independent judiciary, especially if such legal arrangements for the judiciary are enshrined in the Constitution. That applies doubly if the state in question has ratified some of the important international and regional instruments on human rights. These basic values and standards enjoy universal application.

IX.

After assessing whether the approach called for in the Act on Courts and Judges for the removal of the chief judge of a court results in an intrusion into the guarantees of institutional and personal independence of the judiciary, the Constitutional Court came to the conclusion primarily to the effect that the principle, "he who appoints, may remove", cannot be applied to relations in the context of court administration and that neither is it possible to construe the duality of the legal status of a court chief judge as an official of state administration, on the one hand, and as a judge, on the other. Accordingly, the manner in which court chief judges, including the Chief Justice of the Supreme Court, are removed must be gauged by means of the maxim expressed in Art. 82 par. 2 of the Constitution; not only must the rules governing the removal of judges respect the constitutional principles of the separation of powers and the independence of the judiciary, so too must the rules for the removal of chief judges and deputy chief judges. Thus, it cannot be accepted that, while observing the above-analyzed requirements, their removal could be effected by an executive organ in the manner foreseen in the contested provision. What follows therefrom is the conclusion that the contested provisions are unconstitutional, as they result in an encroachment upon the guarantee of the institutional and personal independence of the judiciary.

In keeping with the proposition of law expressed in its judgment in the matter No. Pl. US 7/02, the Constitutional Court emphasized that the entry into the office of chief judge or deputy chief judge, as well as that of chairperson of court collegia, should be considered as a career step for a judge (similarly as is the case for the appointment of the chairperson of a court panel), so that neither the chief judge and deputy chief judge of a court should be subject to removal otherwise then on the grounds foreseen in the law and on the basis of a decision of a court.

The statutory arrangement whereby court chief judges and deputy chief judges can perform activities which are administrative in nature without also, as a consequence, losing the quality of their status as independent judges and, for this reason alone, finding themselves in the position of a state employee, the distinct definitional characteristic of which is the relationship of subordination and respect for orders of superiors, is considered in a whole host of developed European countries (for example, Austria, Germany, Sweden, Norway, the Netherlands, Great Britain, Ireland, Italy, and Portugal) as an integral part of the separation of powers principle, arising from the requirements of the law-based state, as well as from the principle of the institutional independence of the judiciary and the principle of the undisturbed exercise of a personally independent judicial mandate. The Constitutional Court would also add that the current situation, where the central organ for the state administration of courts is the Ministry of Justice and the judicial branch itself does not have its own representative body on the ministerial level (which body could be called upon to take over the role of the Minister in personnel matters, including the monitoring the level of competence of the judicial corps, as well as in other areas of the direction and performance of administration of the judiciary), does not, in the view of the Constitutional Court, sufficiently exclude the possibility of the executive branch exercising indirect influence over the judicial branch [(for example, by means of the allocation of budgetary funds and the supervision of their use)] (Pl. US 7/02).

In assessing § 106 par. 1 of the Act on Courts and Judges, the Constitutional Court did not find any grounds for departing from the conclusions expressed in its judgment no. Pl. US 7/02 and declares the unconstitutionality of § 106 par. 1 of the Act on Courts and Judges in its current wording.

The Constitutional Court also declares that the legislature failed, in the legislative process, to respect the conclusions expressed in judgment no. Pl. US 7/02, in consequence of which it violated Art. 89 par. 2 of the Constitution. The Constitutional Court therefore annulled § 106 par. 1 of the Act on Courts and Judges as of the day it is published in the Collection of Laws, without postponing its coming into effect, and it will now be up to the legislative body fully to respect, in its law-making, the proposition of law on this issue expressed by the Constitutional Court already for the second time.

The Constitutional Court has annulled § 106 par. 1 of Act No. 6/2002 Coll., on Courts, Judges, Lay Judges, and the State Administration of Courts, and on the amendment of certain other acts (the Act on Courts and Judges) as amended by Act No. 192/2003 Coll.; it has annulled both the first and second sentences, as they form a unit, and the decisional grounds of this derogational judgment apply to all “judicial officials” mentioned in the contested provision of the Act.

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

Dissenting opinions as to the judgment and reasoning were filed by Justices Vladimír Kůrka and Pavel Rychetský. Justice Ivana Janů filed a concurring opinion as to part of the reasoning of the judgment.

Brno, 11 July 2006

Dissenting Opinion
of justice Pavel Rychetský

Pursuant to § 14 of Act No. 182/1993 Coll., on the Constitutional Court, as subsequently amended, I have filed this dissenting opinion to the judgment, which is directed both against the actual decision to derogate, as well as against certain of the constitutional arguments contained in the reasoning of the judgment.

1). My cardinal objection rests on the conclusion that, in the given case, the basic condition are lacking for this Court to act on the accessory petition proposing the annulment of § 106 par. 1 of Act No. 6/2002 Coll., on Courts, Judges, and the State Administration of Courts, as subsequently amended (hereinafter "Act on the Judiciary"). The petition was submitted under § 74 of the Act on the Constitutional Court; however, the constitutional complaint itself, with which was connected the accessorial petition proposing concrete control of constitutionality, should have been, in conformity with the principle of subsidiarity (a fundamental principle establishing the powers of the Constitutional Court according to the principle ratione temporis), rejected as inadmissible for being untimely under § 75 par. 1 of the Act on the Constitutional Court. In the given case then the complainant failed to respect the requirement of the cited statutory provision, as she did not exhaust "all procedural remedies afforded her by law for the protection of her rights (§ 72 par. 3)", which moreover she herself acknowledged by indicating that she had also submitted an administrative complaint pursuant to the Code of Administrative Justice and that she had concurrently submitted a constitutional complaint solely "as a precaution". The relevant panel – just as the Plenum itself in its judgment – did not even attempt to overcome this deficiency in the basic prerequisites for a proceeding by applying § 75 par.2, lit.a) of the Act on the Constitutional Court. The Constitutional Court has already several times in its jurisprudence emphasized that it does not form a part of the system of ordinary courts, nor some other public authority; accordingly the requirement of admissibility for submitting a constitutional complaint to it is that the principle of subsidiarity be met, such that the possibility is not ruled out that a complainant's rights and freedoms are accorded protection in antecedent proceedings by means of the exhaustion of all available remedies for the protection of rights. A proceeding on a constitutional complaint itself is, thus, devoted exclusively to the protection of constitutionally guaranteed fundamental rights and basic freedoms (including the right to fair process), to the extent such protection was not afforded in previous proceedings. By the way in which Panel II of the Constitutional Court proceeded, that is by suspending the proceeding on the constitutional complaint and referring to the Plenum the accessory petition, it thus implicitly expressed the proposition of law that a decision of the President of the Republic, issued pursuant to § 106 par. 1 of the Act on the Judiciary, is not an administrative act subject to a review proceeding under the Code of Administrative Justice; the Constitutional Court thus appropriated the power of some sort of

special and singular "appellate organ in relation to the acts of the President of the Republic". As a footnote to this consideration, it must be observed that, already on 3 February 2005, the Minister of Justice issued, pursuant to the contested provision, a decision whereby he removed from office some other court official and, in an administrative court proceeding, the Municipal Court in Prague adjudged it to be an administrative act and quashed it. However, if, in the estimation of Panel II of the Constitutional Court, the decision of the President of the Republic issued pursuant to the contested provision is not an administrative act, there is no other option than to adjudge it as an act pursuant to the President's constitutional authority, with all the resulting consequences in terms of the application of Art. 54 par. 3 of the Constitution on the "the President's lack of accountability" in conjunction with the sole sanction contemplated in the Constitution (Art. 65). Throughout the period the Constitutional Charter of 1920 was in effect, it was clear, according both to legal theory and statutory rules, that, as a practical matter, the Supreme Administrative Court was competent to decide in all cases in which a person asserts that he was affected in his rights as the result of an unlawful decision or measure of an administrative authority. The conclusion that the President of the Republic is also an administrative authority was subsequently reflected in Act No. 164/1937 Coll., on the Supreme Administrative Court, which regulated proceedings against acts or measures of the President of the Republic (§ 2 par. 2); on this point see V. Mikule: Judicial Protection against Decisions Removing the Chief Justice of a Court from Office, Legal Reporter, 3/2006 or F. Weyr: Czechoslovak Constitutional Law, Prague, 1937.

2) In relation to the constitutional arguments contained in the reasoning of the judgment, I would like to emphasize that I agree with many of its supporting grounds concerning the significance of an independent judiciary as a fundamental prerequisite for the existence of a democratic law-based state. The arguments advanced on the separation of powers principle, however, spill over into an absolute position leading to the total separation of the judiciary and disregarding the complementarity of this theory, as proceeds from the critical axiom formulated, for ex., by Dworkin (the separation of powers instigates the tendency towards their concentration, towards maximum autonomy, to division and self-regulation, which in consequence leads to their absolutization). It is therefore appropriate in the context of constitutional argumentation on the theory of the separation of powers, as a constitutional principle and a constitutive value of democratic society, to take heed of its overall content, including the generally recognized dimension that the individual powers in the state balance and supervise each other ("checks and balances"). The Constitutional Court majority, to which I object in this dissenting opinion, came to the conclusion in its reasoning that, in the case of judicial officials performing the state administration of courts, the performance of their judicial function is inseparable from the performance of their administrative work in ensuring the operation of their court, and the constitutionally legitimate requirement of a judge's independence to decide also extends to separate administrative activities, including the management of state budgetary funds. I, on the contrary, am of the opinion that the dominant and irreplaceable principle for the performance of administrative activity is the principle of hierarchy and subordination. The majority, which I dispute, then crowned its conclusion on the indivisibility of judicial work from administrative function, with the requirement, formulated de lege ferenda, of the removability of judicial officials solely by the route of a disciplinary proceeding, although the grounds for the removal of such an official may frequently reside not only in the disciplinary field, rather due to reproofs exclusively of a managerial and organizational character. Someone who is a poor "court administrator" might still, even though she proves to be inadequate in the performance of the state administration of courts, be an excellent legal expert and judge. These considerations in the judgment's reasoning rests to a considerable extent on the plenary judgment preceding it, judgment of the

Constitutional Court Pl. US 7/02, which also annulled the previous version of § 106. However, precisely in this respect the judgment lacked sufficient arguments. In my judgment, it is doubtless an appropriate and constitutionally legitimate model in which the performance of court administration is entrusted to judges, and I entirely concur with the requirement that, in the performance of this task, he be accorded substantive and procedural protections against arbitrary action on the part of state administrative bodies. In my view, however, the new version, adopted by Parliament, of § 106 of the Act on the Judiciary meets both of these requirements, albeit not in an optimum matter. The new wording contains both a sufficiently clear formulation of the substantive grounds for removal from office ("if, in performing the state administration of the court, he violates statutorily defined duties in a serious manner or repeatedly"), as well as the procedural protections before an independent tribunal in the form of the administrative judiciary, which for proceedings in employment matters appear to me without any doubt to be far more suitable than the inappropriate rules on judges' disciplinary responsibility. Moreover, the annulment of the contested provision takes effect on the day it is published in the Collection of Laws, thus bringing about the entirely undesirable state of affairs in which for a longer period judicial officials will, for all intents and purposes, be almost entirely unaccountable and irremovable due to organizational, managerial, or similar deficiencies in the performance of the administration of courts.

3) Solely in passing I would recall that I have long espoused the view that, as the Constitutional Court is a "negative legislature", it does not possess the power to make broad considerations de lege ferenda; in no case do I consider that they qualify as part of the "supporting grounds" of the decision to which can be attached generally binding effects, in the sense of Art. 89 par. 2 of the Constitution. Until such time as is established a quasi self-governing body for the judiciary, I consider the current legal arrangement in relation to the state administration of courts to be satisfactory on the whole. No doubt its application to the office of both chief justices of the supreme courts represents an exception – in relation to it I would consider it at suitable, in terms of future legislative programs, to retain the power of the President of the Republic, although the system of ex post review of his decision to remove those officials should be replaced by a suitable a priori proceeding (as exists, for example, in the case of university rectors).

Brno, 11 July 2006

Dissenting Opinion
of justice Vladimír Kůrka

I.

There is not doubt that the "right" to continue to be (forever, for life) the holder of a public office is not protected by the sources of the constitutional order (the Charter, the Convention); the divestiture of such an office (the removal from it) receives protection only in those situations (in relation to such persons), where the act of removal encroaches upon some other right, namely one of the fundamental rights which, in contrast, are protected.

Since such a situation is not present (nor can the right to remain in a public office be subsumed under the right of equal access to it under Art. 21 par. 4 of the Charter), on conceptual grounds alone it cannot be objected that the process leading to the removal from office is "unconstitutional". The sole exception is where it was carried out in conflict with the fundamental constitutional principles of the democratic law-based state (Art. 1 par. 1 of the Constitution), that is, if the process was carried out without transparent and comprehensible (statutory) grounds, alternatively if it had been a wanton or arbitrary process. Only to this extent is it conceivable to submit a constitutional complaint against a constitutional act of the President of the Republic, such as the removal from the office of Chief Justice of the Supreme Court. If the right to remain in public office is not protected, then a specific instance of the process of removal cannot be subject to constitutional review (except in the above-mentioned circumstance), also because to hold otherwise could signify nothing else than the granting to the holder of a public office precisely this (constitutional) protection, when there is none in such a case.

In the instant case, the complainant does not object that this was an arbitrary recall, in conflict with the fundamental principles of the democratic law-based state (in the above-mentioned sense); on the contrary, she proceeds on the basis that the President of the Republic acted within the confines of the statute (§ 106 par. 1 of the Act No. 6/2002 Coll., on Courts and Judges, as amended by subsequent acts, hereinafter "the Act on Courts and Judges") and she criticized him (only), for the fact that this statute (a provision thereof) is unconstitutional (due to the fact that it violates the principle of the separation of powers and the right of access to a court and that the removal from office was not made subject to a disciplinary proceeding). If action in accordance with a statute quite evidently does not constitute arbitrary action, even if the complainant called that statute into doubt in terms of its constitutionality, then it is appropriate to conclude that the complainant has not substantiated, nor has she (in actual fact) even asserted, the existence of circumstances leading to the conclusion that "a fundamental right or basic freedom guaranteed by the constitutional order has been infringed as a result of some other action by a public authority" (§ 72 par. 1 lit. a/ of Act No. 182/1993 Coll., on the Constitutional Court, as amended by subsequent acts, hereinafter "Act on the Constitutional Court").

If a relevant interference with a fundamental right is not asserted, the constitutional complaint constitutes a manifestly unfounded petition, which must be rejected as a preliminary matter (§ 43 par. 2 lit. a/ of the Act on the Constitutional Court).

The same conclusion then logically attaches even to the evaluation of the petition pursuant to § 74 of the Act on the Constitutional Court, which this case concerns and by which the complainant seeks the annulment of § 106 par. 1 of the Act on Courts and Judges, as the "manifestly unfounded" character of the constitutional complaint stands apart from any sort of substantive tie to the contested provision. For this reason alone it would, therefore, have also been proper to reject on preliminary grounds the petition proposing its annulment. Since the Constitutional Court panel did not proceed in this manner (§ 43 par. 2 lit. b/ of the Act on the Constitutional Court), then the Plenum should have done so; there is no doubt that the Plenum is not bound by the divergent assessment of the conditions for a constitutional complaint, on the basis of which the competent panel suspended the proceeding in the sense meant by § 78 par. 1 of the Act on the Constitutional Court.

The Constitutional Court Plenum opened the door to consideration of the petition on the merits without giving closer attention to the very nature of the contested act of the President

of the Republic, which is a patent deficiency, particularly in relation to the contested interpretation of this act as an administrative act (an act in the field of public administration issued by an organ of the executive power); after all, the complainant is also working from that assumption, if she declares in her constitutional complaint that she has also filed an administrative action against the President's decision to remove her (file no. 9 Ca 22/2006 of the Municipal Court in Prague). If such an interpretation of the President's act were possible, then the consideration on the merits of this constitutional complaint should not even be entertained (nor along with it the petition proposing the annulment of the particular statutory provision) before the matter has been heard by the administrative judiciary, as the principle of the subsidarity of constitutional review prevents it (§ 75 par. 1 of the Act on the Constitutional Court).

II.

Nor is it possible to concur with the judgment adopted by the Constitutional Court Plenum in respect of substance either.

The judgment correctly emphasizes that this is a case of concrete norm control, which arises from § 74 of the Act on the Constitutional Court, specifically the review of a single provision of the Act on Courts and Judges (§ 106 par. 1), and it also correctly states that it is necessary to proceed on the basis of (must "take into account") the overall legal arrangement for court administration, embodied in that same Act, and that the Constitutional Court is not entitled to adjudge the constitutionality of the "overall conception of the state administration of the judiciary". Naturally, it is possible to concur with the proffered content of the constitutional principle of the independence of the judiciary (with the references to Pl. US 34/04 and Pl. US 43/04), which emphasizes the phenomenon of personal independence, that is, the independence of a judge when performing his duties in the sense of Art. 82 of the Constitution,

However, it is not possible to concur with the remainder.

A. The crux of the construction selected in the judgment is the following: in the Constitutional Court's view, although § 106 par. 1 of the Act on Courts and Judges embodies the principle "he who appoints, may remove" (moreover, in a sufficient manner), nonetheless, that principle is characteristic of a system of state administration, as it is only therein that power is exercised "in hierarchical relations, that is, in relations of superiority and subordination"; despite the formal (statutory) designation, however, court administration is not such state administration, as it is a special type of activity carried out solely within the judicial system, and therefore the principle, "he who appoints, may remove", cannot be tolerated in this context.
This conclusion is incorrect due to the fact that its primises are incorrect.

The Constitutional Court proclaims that it respects the statutory definition of the "state administration of courts" (although, in its view, it is not "state" administration), as it is laid down in § 118 and following of the Act on Courts and Judges. Hence, it accepts the fact that the task of administration is to create for courts the conditions for the proper performance of the judiciary in respect, in particular, of personnel, organization, management, finance, and instruction, and to supervise, in the manner and within the bounds laid down in that Act, the due performance of the tasks entrusted to courts (§ 118 par. 1); that, in accordance with

current statutory scheme, the central organ of this administration is the Ministry (§ 119 par. 1), and its other organs are the Chief Justice and Deputy Chief Justiceof the Supreme Court, the Chief Justice and Deputy Chief Justice of the Supreme Administrative Court, and the chief judges and deputy chief judges of the high, regional and district courts (§ 119 par. 2); that the Minstry performs, within the scope laid down in that Act, the administration of high, regional, and district courts, either directly or through the chief judges of those courts (the administration of district courts can also be performed through the chief judges of regional courts); and that also the administration of the Supreme Court is performed by the Ministry through that Court's Chief Justice (§ 120 par. 1, 2). According to § 121 par. 1, the Chief Justice of the Supreme Court and the chief judges of high, regional, and district courts perform the administration of courts within the scope laid down in that Act.

The definition of administration put forward by the law is not arbitrary, rather physically inevitable, as it is inconceivable for judicial work to be performed by solitary and isolated judges in individually-selected tangible milieus. Their activities (above all procedural and decisional) must be institutionalized, be materially and financially provided for in a unified manner, and have a systematic personnel foundation and perspective; consequently, they must be organized and managed as a unit, in other words administered. It is another matter who should perform this administration, and what part thereof; although a case has already been decided on this point (see judgment of the Constitutional Court No. Pl. US 7/02), the Constitutional Court did not call into doubt that administration, to the extent laid down in § 118 par. 1 of the Act on Courts and Judges, is also performed by court chief judges, including the Chief Justice of the Supreme Court, and that these chief judges of courts are judges.

Legally defined in this way, court administration is conceptually always administration, whether it is designated as "state" administration or merely as "administration of courts" (as the Constitutional Court believes), and the Chief Justice of the Supreme Court is its organ; albeit even in this case it is not decisive how the type of administration is designated. It makes no difference if it is stated in the judgment that "[c]ertain of the powers entrusted to court chief judges . . . are not tasks of a solely administrative character" (setting the work schedule, the vetting of court files, overseeing the quality of court hearings, the resolution of complaints . . . etc.), for even these can without difficulty be subsumed under the task "to create . . . the conditions for the proper performance by the judiciary" in respect of "organizational matters", alternatively "to supervise . . . the due performance of the tasks entrusted to courts" (§ 118 par. 1).

Thus, the court administration which (in contrast to state administration of courts) the Constitutional Court has been considering, is not, in content and regime, distinguished from state administration nor from administration as such; thus, it is unjustifiable to assert that the principle of superiority and subordination, which is otherwise characteristic of administration, does not apply within its framework. It is an untenable notion that where the Ministry performs the administration of courts through its chief judge, the court's chief judge is not in a relation of subordination towards the Ministry, just as it is self-evident that the chief judge of a regional court is, on the contrary, superior to the chief judges of relevant district courts, if the Ministry performs through him the administration of district courts (§ 120 odst. 1). If the Constitutional Court does not call into question § 120 par. 2 of the Act on Courts and Judges, that the (state) administration of the Supreme Court is performed through the Chief Justice of that Court, then the same – the existence of the relation of superiority and subordination – is evident in this case as well.

The view that, within the framework of court administration as it is understood by the Constitutional Court (in contrast to state administration), there is no place for "a hierarchical system of relations of direct superiority and subordination", does not hold water. One cannot then agree with the conclusion which the Constitutional Court derived therefrom, that there is no place in this context for the principle, "he who appoints, may remove".

The first of two arguments against the constitutionality of § 106 par. 1 of the Act on Courts and Judges thereby falls out, since the Constitutional Court identified the contested provision precisely with this – allegedly "intolerable" assertion of – the principle.

It is appropriate to add that within (any sort of) public administration the attribute of superiority and subordination is an organic attribute, not an unnatural one. The logical and substantive correlate thereof is that it is inconceivable to connect with the status of the administrative organs of courts (their chief judges) the attribute of independence, which appertains to the position of a judge (Art. 82 of the Constitution); that which is characteristic of a judge (independence), does not apply for the chief judge of a court.

Otherwise, the Plenum's opinion inappropriately absolutizes the view that the principle, "he who appoints, may remove", is inherent in systems of state administration, or systems formed on the basis of relations of superiority and subordination; in and of itself, it is certainly correct, nonetheless, it is not true that it is not possible (is out of the question) to apply it even in some other context. It is, on the contrary, quite possible, which is shown, for example, by § 6 par. 2 of Act No. 6/1993 Coll., on the Czech National Bank, as subsequently amended, according to which the President of the Republic appoints and removes the Governor, Vice-Governor and other members of the Bank Council, although § 9 of this Act provides that "[i]n carrying out its main objective and in the performance of its other duties, the Czech National Bank and the Bank Council shall neither accept nor request instructions from the President of the Republic, the Parliament, the Government, administrative bodies, or any other subject." If it truly could be conceptually ruled out for the principle "he who appoints, may remove" to be applied apart from relations of superiority and subordination, not even a statute could so provide. Moreover, not only is the Czech National Bank (the Bank Council) not subordinate to the President, rather it is a constitutional body ("a legal person, which has the status of a public law subject") endowed with evident independence from other constitutionally enshrined bodies (powers). A similar provision can be seen in § 13 par. 2 (§§ 26 and 27) of Act No. 150/2002 Coll., the Code of Administrative Justice, as subsequently amended.

B.

In terms of the second argument against the constitutionality of § 106 par. 2 of the Act on Courts and Judges, the Constitutional Court proceeds from the notion that "court functionaries continue to take part as judges in the actual decision-making" and is of the view that "[i]t is then necessary to proceed from the premise" that the office of chief judge of a court is indivisible from the office of judge, "for one cannot construe the dual nature" of a court chief judge as "an official of state administration" on the one hand and as a judge on the other. Then, according to the Constitutional Court, the attributes of independence of judges must be extended "also to the chief judges of courts, including the Chief Justice of the Supreme Court". The Constitutional Court refers to Art. 82 par. 2 of the Constitution, and the exceptions to the irremovability of judges intimated there (arising from disciplinary responsibility), and is of the opinion that it is also necessary to gauge, by means of the

maxims expressed in that Article, the manner in which court chief judges are removed from office, that is, by a procedure which is carried out within the judiciary (by a disciplinary, or some analogous, proceeding), or in such a way that the judiciary would have significant influence on the outcome of the removal procedure. Moreover, the currently existing procedure does not, in the Constitutional Court's view, take into account the "the distinctive character of the system of functionaries as a career track," by which is understood the objective possibility for a judge to attain a position which "satisfies him professionally".

It is not possible to assent to this argument either.

The Constitutional Court is working on the basis of assumptions for which, above all, it provides no arguments at all. Furthermore, logical and substantive considerations point in the opposite direction; not only is it possible "to construe" the above-mentioned "duality", but – so long as the administration of courts is to be performed by judges - it is inevitable, and in practical life that is the way it is (and without any problem). The chief judge of a court, who is a judge, acts in both capacities; as a judge he is independent, and as the chief judge of a court (administrative functionary) he is naturally subordinate. Both offices are separable and, in actual fact, they are also performed separately. It is unthinkable, merely due to the fact the an administrative functionary is (by coincidence) a judge, to make of him something else and attach to him a status, which conceptually does not appertain to an administrative functionary; in the performance of an administrative function, administrative functionaries (even if they are, in addition, judges) cannot be independent. The attribute of independence is the sovereign attribute of the status of a judge, and of no other official; otherwise it is self-evident that the removal from the (unprotected) office of court chief judge in no was affects the (protected) office of judge. Therefore, it is entirely inappropriate to extend the "maxim" of Art. 82 par. 2 of the Constitution in any sense to the office of a court chief judge; in consequence (and for that reason alone), nor can there be a reliable foundation for the consideration that the sole constitutionally appropriate procedure for the recall of a court chief judge from office is a process based on a disciplinary (or analogous judicial) proceeding as, in accordance with Art. 82 par. 2 of the Constitution, is the case for judges. The indicated parallel with the removal from office of chairperson of a panel is inapposite due to the fact that this is not an administrative, rather a judicial, office.

Naturally, it is possible to reject some external influence, proceeding from "another" power (or to demand for the judiciary "substantial influence" on the removal therefrom) in the removal of a chief judge from office, especially in a situation where the judiciary (judges) also has (at least some form) of influence in the process of appointment to such office (if, for example, the chief judge of a court were appointed by an executive body on the proposal of a certain segment of the judiciary). One could then understand the objection that for some other power authoritatively to deprive the chief judge of his office does not correspond to "civilized standards", if the installation of (specific) persons into the office of chief judge were "substantially influenced" by a process within (the appropriate) judicial organ; if it is accepted, however, that the judiciary has de lege lata no influence on this process of "installation", then in both instances, that is, both the appointment and the removal, it takes place (as an expression of a phenomenon of administration) separate from of the judiciary – in essence - adequately, in harmony with the specifically asserted form of the principle of the separation of powers, alternatively with the specific form of the independence and the mutuality of influence of the executive and judicial powers.

Corresponding thereto, no reproaches are made of the "encroachments" by the executive when appointing court functionaries, even though this generally constitutes a highly significant intrusion into the judicial power. Nor did the complainant raise, against her own appointment to the office of Chief Justice of the Supreme Court, the objection that it occurred to an absolutely independent judiciary, without any sort of influence of this power, much less "substantial" (including "influence" of the Supreme Court itself, alternatively its judges at that time).

The argument "functionary position as a career step" for judges is naturally cannot be effectively applied in order to bring the status of court chief judge court closer to, or even identify it with, that of a judge: first, the concept of such "career step" lacks any sort of legal basis and evidently is not even actually shared within the ordinary judiciary; also, even if the chief judges of courts in their (administrative) positions had in mind the goal of "satisfying themselves professionally", it does not follow therefrom that they should for that reason obtain a greater level of protection. If they elect this professional (career) direction, they have to bear the risk traditionally connected to it.

Neither does the circumstance that judges are independent in the performance of their duties (Art. 82 par. 1 of the Constitution) give grounds for declaring unconstitutional the contested provision, § 106 par. 1 of the Act on Courts and Judges.

C.

The Constitutional Court thus evaluated the constitutionality of the contested § 106 par. 1 of the Act on Courts and Judges, not within the contextual framework of the statutory definition of the content of the court administration and the status of chief judges of courts therein, rather – and inadmissibly – in relation to the form of some other administration, which cannot however be deduced from the law currently in force (§ 118 and following of this enactment). Thus, it is only on the basis of (incorrect) presuppositions of some other administration that the Constitutional Court deduced the unconstitutionality of the provision empowering the person who appointed the chief judge of a court to remove him from office.

If the Constitutional Court reproves the legislature that, by adopting the rules contained in § 106 par. 1 of the Act on Courts and Judges, it failed to respect the conclusions expressed in the Court's previous judgment, No. Pl. US 7/02, such criticism is not entirely apposite. Although § 106 par. 1 was annulled by that judgment, it was not due to the fact that it was constitutionally impermissible for the chief judge of a court to be removed "by the person who appointed him", rather primarily "on formal grounds", as a consequence of the annulment of the version of § 74 par. 3 of the Act then in force, due to its conflict with Art. 82 par. 3 of the Constitution (on the incompatibility of the office of judge with public administrative functions), and due to "the entirely general and vague - hence not corresponding to the principle of legal certainty - expression of the grounds leading to the recall of the chief judge or deputy chief judge of a court" Insofar as this judgment further refers to "a career step for a judge" and to the process of removal from the office of chief judge or deputy chief judge on the basis of a disciplinary proceeding, the annulment of § 106 par. 1 was not based upon these considerations (manifestly these are not "supporting grounds"), hence no obligation arose for the legislature the "respect" them (for greater detail, reference can be made to the reservations expressed by the dissenting Justices).

The previous version of § 106 par. 1 of the Act on Courts and Judges, which allowed for chief judges and deputy chief judges to be removed from office "if they fail duly to perform their duties", was replaced by the contested wording, which conditions such removal from office on the fact that they "in a serious manner or repeatedly violate their statutorily prescribed duties in the course of performing the state administration of courts". These "general and vague" grounds were not only put in precise form, but were also substantively narrowed – to the violation (serious or repeated) of statutorily prescribed duties, moreover in the course of performing the state administration of courts. The Act limited itself solely to the criterion of the lawfulness of the performance of administration, omitting possible consideration of the suitability, effectiveness, and thrift of the performance, etc., by which the protection of court functionaries' status was significantly strengthened. In effect, it can no longer relate to merely "poor management" of a court, and the holder of an administrative function evidently will be accorded judicial protection by means of an action against the decision of an administrative organ, pursuant to § 65 of the Code of Administrative Justice. In the absence of administrative review of the constitutional act of the President of the Republic, the lack of statutory prescribed grounds for the removal from office of the Chief Justice of the Supreme Court (that is, their utter non-existence, not the mere failure to state them in the instrument of removal) is conceivable as an argument in a constitutional complaint, admissible (precisely and solely) by the applicable objection of wilfullness, if not arbitrariness (see above, Part I).

Thus, one can defend the view that the requirements laid down in the Constitutional Court's previous judgment, No. Pl. US 7/02, were met.

The annulling judgment brought about the circumstance where court functionaries are simply not subject to removal and can assume that the office entrusted to them may be carried out without any sort of restriction whatsoever; the removals of chief judges that have occurred in the past were unconstitutional. Such an outcome can hardly pass muster in regard to the attributes of a democratic law-based state. The Constitutional Court has come to a conclusion on the constitutionality of the contested provision by means of arguments which in their implications, asserted in a wider, more-general context, are capable of paralyzing the entire administration of the ordinary judiciary by eliminating from it the characteric of superiority and subordination, and for administrative functionaries (the court chief judge) postulating the position of an independent subject, in contrast to the typical (as well as logically and substantively necessary) hierarchical order.

This is not meant to say that the current model of court administration is not subject to criticism: as such, however, it was not the subject of constitutional control in the matter before the court. The system with the Minister of Justice having the dominant position was already the subject of doubt in judgment No. Pl. US 7/02, that, in relation to the status of court chief judges, the standards of "developed European countries" (which is characteristic of it) was not attained, that, although they perform "activities which are administrative in nature", they do not lose "the quality of their status as independent judges", and that the absence of the judiciary's "own representative organ" "does not sufficiently exclude the possibility of the executive branch exercising indirect influence over the judicial branch" (and I am now citing from the Constitutional Court judgment). Nonetheless, it is decisive that neither in that case nor in this is it stated that this system for the administration of courts is unconstitutional. The principle of the separation of powers, oft-cited in the judgment, does not entail the separation and total division of the judiciary from the executive power; neither the joint performance of court administration by the Ministry of Justice and chief judges of individual courts, nor the circumstance that the executive power (administration) can influence who occupies positions

and the performance (again) of administration by another power - the judiciary, need come into conflict, at the constitutional level, with the requirement of mutual ties (exerting influence, checks) among the different powers. It is appropriate to concur with the view that the constitutionality of the existing rules cannot be gauged solely through the prism of the view "de constitutione ferenda" (see the dissenting opinion of Justices J. Malenovský, V. Ševčíka a P. Varvařovský to judgment No. Pl. US 7/02). From the perspective of the Constitution (Art. 1 par. 1) as currently in force, it is not important whether court (administrative) functionaries are or are not independent, rather that they are independent when performing their duties as judges (Art. 82 par. 1).
The Constitutional Court has not expressly addressed the issue of the implications which the annulment of § 106 par. 1 of the Act on Courts and Judges has (may have) for the proceeding on the constitutional complaint, from which the petition under adjudication arose. Although it mentioned (by citing) its earlier judgments, No. I. US 102/2000 and No. I. US 738/2000, and their conclusion that "in deciding on the constitutional complaint the Constitutional Court must take into consideration the judgment of annulment in the norm control proceeding", it is not sufficiently clear how it foresaw the implications of § 71 of the Act on Courts and Judges, in particular the principles expressed in § 71 par. 2 in relation to § 71 par. 4 of this Act. If the contested decision of the President of the Republic could not be subsumed under the first of these mentioned provisions, that is, the clause following the semi-colon (due to the fact that the constitutive nature of the decision excludes considerations of its enforcement), then the possibility anticipated by both provisions remains open, namely that "final decisions", alternatively "rights and duties flowing from legal relations created prior to the invalidation of the legal enactment", remain unaffected. Attention then once again turns (only) to the question whether the petitioner's constitutionally guaranteed rights were encroached upon (and which of them) as a result of proceeding in accordance with the provision which was later found to be unconstitutional (see Section I, above)

III.

In summary, the complainant's petition should have been rejected on preliminary grounds (Part I.); and even though it was not, should then have been rejected on the merits, either because the contested provision is not unconstitutional, or because the objections raised against it are not capable of calling its constitutional conformity into doubt (Part II.).

11 July 2006

Dissenting Opinion
of Justice Ivana Janů

I.

I agree with the conclusion that, by allowing for the removal of the chief justice of a court (the Chief Justice of the Supreme Court) without concurrent action on the part of the judicial power, § 106 of Act 6/2002 Coll., on Courts and Judges, as amended by subsequent acts, is in conflict with the constitutional principle of the separation of powers and the institutional

independence of the judicial power.

II.

I have formulated the following opinion supplemental to a portion of the Court's opinion:

My concurring opinion focuses on two areas which are used to support the reasoning of the judgment, namely, the possibility of limiting the term of office of court chief justices, above all the chief justices of supreme courts, and their selection as a career promotion.

Foreign experience supports the view that a number of countries have formulated rules (whether at the constitutional level or the level of ordinary law) which limits the term of office of the chief justices of supreme courts (hereinafter SC) to a precisely prescribed term (although they diverge as regards the possibility of re-appointment to that office). I consider this approach as inspirational for use even under the conditions for the functioning of justice that prevail here.

The principle that legitimacy must be reaffirmed is without any doubt a key constitutional principle of a democratic law-based state. Logically, due to its character, this principle applies to the judiciary only to a limited extent; nonetheless I see no impediment for its full application to the office of chief justice, alone due to the fact that, among the other judges, a court's chief justice is „primus inter partes".

I have long espoused the position that the judiciary should be an open system, which is accessible to persons from other parts of the legal profession, in particular advocacy, the state attorney's office, and the academic community. A country as small as the Czech Republic can ill afford to narrow illogically the background from which it can recruit judges. The same applies to the office of chief justice.

It can generally be postulated that for a judge to be suitable for the office of chief justice, he should manifest abilities which are demanded by court administration. He should be not only a recognized expert, but also a person who is able to act so as to gain respect and esteem through his human characteristics; merely formally to gird oneself in the chief justice's robe quite often does not suffice. The chief justice of a court should be a capable organizer and a person who, in a milieu which as individuality, is capable while maintaining respect for his colleagues' views of performing the basic tasks of the judiciary so as to fulfill his constitutional function and not lose the essential confidence of the public. The chief justice of the SC should be capable to having unifying positions adopted, so as to ensure that the results of ordinary courts' judicial decision-making is not only timely but also predictable, a task which is among the most important for the SC. The office of chief justice also requires a person with the decisiveness and energy to be, if necessary, an uncompromising accuser of his colleagues, such as in the case of a disciplinary proceeding. The absence of certain of these virtues certainly does not qualify as a "disciplinary transgression", as understood in the humorous sense, which would provide grounds to remove such a person from the office of chief justice; nonetheless, it is precisely in such situations that an unlimited term of office, which can go on even for decades, functions as an impediment to the selection of more suitable persons.

Within the bounds of objectivity, reference must also be made, in relation to the mentioned requirements placed upon the office of the Chief Justice of the SC, to the personal quality of the judicial corps of the SC in the conditions of the post-communist transformation of justice. In this connection, I have in mind the entirely unknown rule on the basis of which the selection of Justices of the SC has until now been practiced. A candidate's name is not made known in advance to the wider public, thus his integrity and expertise is not even discussed in the press, which is a quite common practice in the case of Constitutional Court Justices.

Even the most capable Chief Justice will manage to do little with a court on which sits also judges who have not developed a high level of restraint and sense of responsibility. I would recall the situation labeled by the media as the "war of the courts", when the Supreme Court refused to respect Constitutional Court judgments, thus also the direct instruction of the Constitution of the Czech Republic. A further well-known phenomenon is the attitude of the Supreme Court which a priori forces out all that can be considered as foreign to its organism; it did not welcome into its midst constitutional Justices who had finished their terms, and their Justices signed a petition against its Chief Justice, which I absolutely do not consider an acceptable form in which judges should express their views.

Brno, 17 July 2006