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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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The Constitutional Court of the Czech Republic

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?

Art. 83 of the Constitution of the Czech Republic states that the Constitutional Court is the judicial body responsible for the protection of constitutionality. In a general sense, this protection of constitutionality consists of state-organized activity aimed at preserving the constitution (and constitutional laws) and review of observance thereof. This distinguishes the Constitutional Court from the general courts, not only in terms of the subject matter of its proceedings, but also in terms of personnel. The role of a Constitutional Court judge is a public and constitutional office, especially in terms of protecting the judge from interference by other state authorities.

Under Art. 84 par. 1 of the Constitution, the Constitutional Court consists of 15 judges; however, the Constitutional Court itself concluded[1], that in order for it to fully exercise its competence, it is necessary that at least 12 judges take the oath of office (and thereby form the court), only with that number is it capable of performing all the competences entrusted to it by the Constitution. A Constitutional Court judge is named by the president of the republic, under Art. 62 let. e) of the Constitution, with the consent of the Senate; the prime minister's countersignature is not necessary.

Neither the Constitution nor the Act on the Constitutional Court regulate the manner in which candidates for appointment to the Constitutional Court are chosen; therefore, there is also no statutory commission or other body to propose candidates to the president – the president is fully independent in making his choice. However, the president has discretion to establish such an advisory body himself.

The Senate's review of the president's request for consent with the appointment of a Constitutional Court judge is governed by the Rules of Order of the Senate (Act no. 107/1999 Coll.). After the president delivers to the Senate his request for consent to the appointment of a Constitutional Court judge, the chairman of the Senate delivers the request to the organization committee and sends it to all the Senate political party clubs (groups). The organization committee assigns the request to a particular committee or committees, and recommends to the chairman of the Senate that the request be included on the Senate's agenda and discussed so that the Senate can take a vote on consent to the appointment of the Constitutional Court judge no later than 60

[1] Judgment no. 5/2005 Coll. of Decisions of the Constitutional Court, vol. 36

days after the president requested the consent. A simple majority of senators present is required to give consent to the appointment of a Constitutional Court judge.

Under § 6 par. 2 of the Act on the Constitutional Court, if the Senate does not give its consent within 60 days after the president requests it, only because the Senate did not vote on the matter by that deadline, the Senate is deemed to have given its consent.

A Constitutional Court judge cannot be recalled, either by the president, the Senate or the Chamber of Deputies (the lower house of the Parliament). The termination of a judge's office is governed by § 7 of the Act on the Constitutional Court:

- A judge may resign from office, by delivering his resignation to the president. The president is merely informed of this decision, but does not take further action. The judge's office terminates the day after the president was informed of the judge's resignation.
- upon expiration of the term for which the judge was appointed (10 years)
- on the day when the judge ceased to be eligible for election to the Senate (i.e., if he ceases to hold citizenship of the Czech Republic or the active right to vote)
- on the day that a judgment convicting the judge of an intentional crime enters into effect,
- upon the announcement of a Constitutional Court resolution on the termination of a judge's office. Only the plenum of the Constitutional Court may decide to terminate the mandate of a judge, and only after conducting a disciplinary proceeding. The disciplinary proceeding is to review whether a judge committed such conduct that it would be inconsistent with the mission of the Constitutional Court and the status of its judges for him to continue in office. The consent of at least nine judges (out of at least 12 judges present) is required to terminate a judge's office.

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

The Constitutional Court was established directly by the Constitution (Art. 83) and as the supreme body of the judicial branch, which is authorized to intervene in the legislative and executive branches, it is not subordinate to any other body, and exercises its authority independently; the Chamber of Deputies and the Senate have the same independent status as the Constitutional Court. The head of court administration is the chairman of the Constitutional Court who may, however, transfer part of the authority related to the routine exercise of court administration (operational, technical, administrative and financial matters) to the director of court administration.

The Constitutional Court's budget is not connected to the budget of the Ministry of Justice, which administers the finances of the general courts, but is an independent

component of the state budget. Therefore, the Constitutional Court prepares its own budget proposals, and then reviews them with the constitutional law committee of the Chamber of Deputies and the Ministry of Finance, so that the Constitutional Court budget is approved as part of the approval process of the state budget in the Chamber of Deputies. The Constitutional Court then manages its own budget according to budgetary regulations.

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

The organization and activities of the Constitutional Court of the Czech Republic are governed by Act no. 182/1993 Coll., on the Constitutional Court. This statute is unusual in two aspects. The first is the fact that the Constitutional of the Czech Republic expressly anticipates its existence; the second is the fact that it is the only sub-constitutional legal regulation that the Constitutional Court judges must observe in their decision making (see Art. 88 par. 2 of the Constitution). From a formal point of view, however, the Act on the Constitutional Court has the same qualities as other statutes. It must be adopted in a proper legislative process, and must be promulgated in the Collection of Laws. There are no specific provisions governing amendments to it. The Act on the Constitutional Court has been amended fourteen times, but most amendments concerned technical matters related to the amendment of other statutes.

Subjects that are endowed with the authority to initiate legislation[2], may propose amendments to the Act on the Constitutional Court; most often it is the government that proposes such amendments. In preparing draft statutes the government and state administration bodies (in particular, ministries) are guided by the Legislative Rules of the Government, a document adopted in the form of a government resolution that sets forth the procedures followed by ministries and other central state administration bodies in the drafting and discussion of legal regulations. Article 5 par. 1 let. c) of the Rules provides that a draft statute or substantive outline thereof shall be given to the Constitutional Court, the Supreme Court, and the Supreme Administrative Court, if it concerns them as organizational components of the state, or their competence, or the procedural rules that govern them. Thus, the Constitutional Court is always a commenting party for a potential amendment to the Act on the Constitutional Court. However, its comments are of the nature of recommendations and consultations, and the Constitutional Court does not have a veto in the process. In the event of a draft statute (or amendment) submitted by a subject other than the government, the Constitutional Court is not legally entitled to make comments, though the proponent of the statute or amendment may ask for its opinion (as may Parliament during discussions).

[2] Art. 41 par. 2 of the Constitution: Bills may be introduced by Deputies, groups of Deputies, the Senate, the government, or representative bodies of higher self-governing regions.

4. **Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?**

Under the Constitution [Art. 87 par. 1 let. a) and b)] the Constitutional Court is authorized to review the constitutionality only of specifically defined normative acts. They are:

- statutes or individual provisions thereof
- other legal regulations:
  - government orders
  - legal regulations issued by ministries and other central administrative offices and legal regulations of other administrative offices and legal entities if, based on a special statute, they issue legal regulations that are in effect nationwide ("decrees")
  - generally binding decrees and orders of the regions and the capital city of Prague,
  - generally binding municipal decrees and orders

However, the Constitutional Court concluded in its case law[3], that classifying the sources of law that are subject to its review may not be done mechanically; on the contrary, it is necessary to derive classification based on the content of the contested legal norm, not from its form or external label on the act.

Other acts of Parliament or the government, generally described as resolutions, are not subject matter for the abstract review of norms. However, one can theoretically imagine that they could constitute interference by a state authority in the constitutionally guaranteed fundamental rights and freedoms, and thus be subject to individual review of norms. Such a process is the actual decision making on a constitutional complaint, when the court rules, in individual cases, on the violation of fundamental rights and freedoms arising from the constitutional order.

5. **Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.**

Review of the constitutionality of normative legal acts (abstract review of norms) is the core activity of constitutional courts, and the purpose of a modern concentrated and specialized constitutional judiciary. However, the authority of the Constitutional Court applies only to reviewing whether a contested statute or part thereof is consistent with a constitutional law, or an international treaty on human rights and fundamental freedoms, and whether another legal regulation is consistent with a statute or a constitutional statute. Therefore, the Constitutional Court is not authorized to review the consistency of sub-statutory legal norms, even if they are of varying

[3] Judgment file no. Pl. ÚS 24/99

legal force and conflict with each other. The Constitutional Court has noted in this regard: *"The Constitution does not give the Constitutional Court the power to annul sub-statutory legal regulations of lesser legal force due to inconsistency with sub-statutory regulations of higher legal force, or even due to inconsistency with a sub-statutory regulation of the same legal force. Thus, at the level of abstract review of norms, the Constitutional Court is not a universal guardian for the consistency of a hierarchically structure legal order at all its levels. In our constitutional system, conflict between sub-statutory regulations of varying or the same legal force can be addressed at the level of specific review of norms and their application under Art. 95 par. 1 of the Constitution*."[4]

Now, more detail on the individual kinds of reviewed legal regulations:

- Statutes. A statute means a legal act of a normative nature, which must meet three criteria: it must be adopted by Parliament in a process prescribed by the Constitution, it must be signed by the president and the chairmen of both chambers, and it must be duly published (in the Czech Republic by publishing a statute in the Collection of Laws). A statute can be contested as a whole or in part. A petition seeking annulment of a statute or part thereof may be submitted by:
    1. the president,
    2. a group of at least 41 deputies or a group of at least 17 senators,
    3. a panel of the Constitutional Court, in connection with ruling on a constitutional complaint,
    4. the government
    5. a person who filed a constitutional complaint or a petition to renew proceedings.

- Other legal regulations (see Art. 4 of the Questionnaire). These are legal documents that were adopted and exist in the required form. The basic requirements for these legal regulations fall into two groups: general requirements (the regulation is of a regulatory nature and is binding on a wide – indefinite – group of subjects) and specific requirements (the regulation was duly adopted and published, is valid and in effect). A petition seeking the annulment of "other" regulations or part thereof may be submitted by:
    1. the government,
    2. a group of at least 25 deputies or a group of at least 10 senators,
    3. a panel of the Constitutional Court, in connection with ruling on a constitutional complaint,
    4. a person who filed a constitutional complaint or a petition to renew proceedings
    5. a representative body of a region,
    6. the ombudsman,

[4] Judgment file no. Pl. ÚS 35/04

7. the Ministry of the Interior, in the case of a generally binding decree of a municipality, region, or the capital city of Prague,
8. the appropriate ministry or another central administrative office, in the case of a petition to annul an order from a region or from the capital city of Prague,
9. the director of a regional office, in the case of a petition to annul a municipal order,
10. a municipal representative body, in the case of a petition to annul a legal regulation of the region to which the municipality belongs.

If a petition is filed seeking the annulment of "other" legal regulations, the grounds may be only conflict with constitutional statutes or with statutes.

- International treaties. The purpose of a proceeding on preventive review of the constitutionality of international treaties is to verify, no later than the time when a treaty is ratified, whether it is consistent with constitutional laws. This is the only proceeding in which constitutionality is reviewed a priori. A petition to review the consistency of an international treaty with a constitutional statute under Art. 87 par. 2 of the Constitution may be filed by:

A. one of the chambers of Parliament, from the time when an international treaty is presented to it for its consent with ratification, until the time when it votes to give consent,
B. a group of at least 41 deputies or a group of at least 17 senators, from the time when Parliament gave consent to ratification of an international treaty, until the time when the president ratifies the treaty,
C. a group of at least 41 deputies or a group of at least 17 senators, from the time when the result of a referendum giving consent to ratification of an international treaty is announced, until the time when the president ratifies the treaty,
D. the president, from the time when an international treaty is presented to him for ratification.

Parties to the proceeding always include, in addition to the petitioner, the Parliament, the president, and the government. If a party so requests, the Constitutional Court shall discuss a petition out of the order in which it received it, and without unnecessary delay.

This proceeding may have one of two results:

1. After conducting the proceeding, the Constitutional Court concludes that an international treaty is inconsistent with the constitutional order – it then announces this inconsistency in a judgment. The judgment shall state the provision of the constitutional order with which the international treaty is in conflict. This kind of "negative" judgment prevents ratification of the international treaty until such time as the conflict is removed.

2. In contrast, if the Constitutional Court concludes, after conducting a proceeding, that an international treaty is not inconsistent with the constitutional order, it shall rule in a judgment that ratification of the international treaty is not in conflict with the constitutional order.

6. **a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

In the legal environment of the Czech Republic the Constitutional Court has an important but not unrestricted role. When the Constitutional Court reviews a contested legal regulation, the law gives it only two alternatives for its decision. The first is to annul the legal regulation or part thereof, and the second is to deny the petition. The Constitutional Court's authority to derogate a legal regulation is limited to the scope in which the petitioner contested the regulation; however, a unique feature of the Constitutional Court of the Czech Republic is that it is not limited only to pronouncing legal norms invalid, but it actually annuls the norms, i.e. removes them from the legal order. However, it cannot replace these norms with other norms or rules[5]; therefore it is described as a "negative" legislature. Thus, after the Constitutional Court acts, there are gaps in the legal order, which must be filled in again by the legislature.

The Act on the Constitutional Court states, in § 58 par. 1, that judgments (which annul a legal regulation or part thereof) are enforceable on the day they are published in the Collection of Laws, unless the Constitutional Court decides otherwise. However, in order for the Constitutional Court to limit the creation of gaps mentioned above, it often defers the enforceability of its judgments, in order to provide the legislature sufficient time to adopt a new legal regulation that will reflect the Constitutional Court's decision and remove the unconstitutional state of affairs. However, the legal framework does not specify any deadlines, or other procedural steps, that would require the Constitutional Court to set precise deadlines for the legislature, which is

[5] Although the Act on the Constitutional Court does not say anything about this, the Constitutional Court has concluded about its authority that, in addition to simple annulment of a regulation or denying a petition, it may adopt "interpretative" verdicts, whereby, in a proceeding on review of a norm it covers the gap arising from the inadequacy or annulment of the previous legal regulation. Intepretative verdicts thus assist in achieving a constituitonal interpretation, although the actual substantive rule for conduct is lacking in the legal order. A second type of verdict, not specified by the law, is an additive verdict, whereby the Constitutional Court denies the original petition, but, above the framework of that petition, states that it found the reviewed regulation to be inconsistent with the legal order in a different aspect. The most familiar example of an additive verdict is Constitutional Court judgment file no. Pl. ÚS 20/05 (finding the long-term inaction of the legislature to be unconstitutional).

not possible anyway, in view of the separation of powers in a democratic state governed by the rule of law. Therefore, if the Constitutional Court decides to defer the enforceability of a judgment in which it annuls a legal regulation or part thereof, its decision on the length of the deferment is influenced primarily by considerations of the complexity of the legal framework to be replaced and the complexity of the legislative process. If large groups of legal norms or important statutes are annulled, the enforceability can be deferred for up to 18 months. In most cases, however, the enforceability of derogatory judgments takes place at the same time as publication in the Collection of Laws. However, there are also Constitutional Court judgments whose enforceability was tied to the moment when they were announced. For example, the Constitutional Court decided thus in a proceeding to review the constitutionality of certain provisions of the Act on Ownership of Land and Other Agricultural Property[6], in the interest of protecting constitutionality in the adjudicated matter. The reason to transfer enforceability to the moment when a decision is announced may also be the grounds that led to a petition being handled on a priority basis[7].

After annulling an unconstitutional legal regulation, the Constitutional Court does not have legal means to force the legislature to adopt a new legal regulation. The basic features of legislative process, the main activity of the legislative branches, is governed by the Constitution, in Articles 39-52, and in greater detail by the rules of procedure of both chambers of Parliament[8]. Because both chambers of Parliament are parties to a proceeding on annulment of a legal regulation, they are among the first to be informed of any annulment of a legal regulation (regardless of publication of the decision in the official collection of legal regulations). Therefore, Parliament is aware that it is necessary to adopt a new legal regulation, and, if the enforceability of a judgment is deferred, it is also aware of the deferment period. Of course, it is up to its independent decision when, if at all, to adopt a new legal regulation. Replacing a legal regulation with a new one – after derogation performed by the Constitutional Court – is done according to the same procedural rules as the standard legislative process for adopting a new legal regulation; more precise, the rules of order do not contain any special regulations governing the legislative process for replacing an annulled legal regulation. Moreover, the annulled legal regulation (or part thereof) need not be replaced by a similar regulation within the affected regulation; the legal relationships in question may be regulated by other regulations, or a completely new regulatory structure may be created. The Constitutional Court cannot evaluate the suitability of such steps, and the legislature has no obligation to inform the Constitutional Court that it has adopted a new legal regulation in response to the Court's judgment. Therefore, the Constitutional Court cannot renew a new legal framework unless it too is contested by an authorized petitioner on grounds of unconstitutionality.

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[6] e.g. Constitutional Court judgment file no. Pl. ÚS 6/05 of 13 December 2005

[7] e.g. Constitutional Court judgment file no. Pl. ÚS 13/05 of 22 June 2005

[8] Act no. 90/1995 Coll., on the Rules of Order of the Chamber of Deputies, and Act no. 107/1999 Coll., on the Rules of Order of the Senate.

The foregoing naturally applies not only to the adoption of new law, but also applies to other legal regulations that are issued by subjects other than Parliament.

6. **b) Parliament can invalidate the constitutional court's decision: specify conditions.**

Parliament cannot annul, invalidate, or otherwise limit a derogatory judgment by the Constitutional Court.

7. **Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?**

The Constitution of the Czech Republic, in response to a long period of lack of freedom, separated the judicial branch fairly thoroughly from the other two branches. This applies twice as much for the constitutional judiciary. Therefore, institutionally speaking, there are three situations where the Constitutional Court interacts with other state authorities:

State bodies are parties to a proceeding before the Constitutional Court. State bodies become parties to a proceeding if they submit a petition to open a proceeding and are competent to take such a step (if a petition is filed by a body that is not competent to do so, it cannot become a party to the proceeding). Under the Act on the Constitutional Court (§ 69 par. 1) the body that issued the contested statute or other legal regulation, and sometimes the president, are parties to the proceeding.

The president and the Senate work together in appointing judges to the Constitutional Court. The president appoints judges after the Senate has given consent to their appointment. The president then appoints a chairman and two deputy chairmen from the Constitutional Court judges. From that moment, however, all judges are in principle independent, and the legislative and executive branches can not longer affect their positions[9]. Holding the position of a Constitutional Court judge is incompatible with any other paid office or other income-earning ability, with the exception of management of one's own property, or academic, pedagogic, literary or economic activity, provided that such activity is not to the detriment of the judicial office, its importance and dignity, and does not endanger confidence in the Constitutional Court's independent and impartial decision making. A judge also may not be a member of a political party or political movement.

[9] This principle is partly breached by the fact that, under Art. 86 of the Constitution, the Senate gives consent to initiating the prosecution of a judge of the Constitutional Court. A judge may not be prosecuted for administrative offences (see § 4 par. 2 of the Act on the Constitutional Court)

Cooperation with the government commissioner representing the Czech Republic before the European Court of Human Rights.

The government commissioner defends the Czech Republic's interests in proceedings pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") before the European Court of Human Rights (the "ECHR"), as well as before the Committee of Ministers of the Council of European in matters that are related to proceedings before the ECHR in which the Czech Republic was a party. State bodies, including the Constitutional Court, are required to provide the commissioner information and cooperate with him, which can take place in the following ways:

a) sending or providing information on the circumstances of a case, submitting or sending documents and other written evidence, as well as preparing briefs to answer factual and legal questions related to alleged violation of the Convention,

b) sending a file related to a case, or a complete copy, or a copy of the relevant part, including court files and evidentiary aids maintained by courts, or giving the commissioner access to view a file an make copies or extracts from it,

c) arranging direct consultation with persons who were or are involved with a case as part of their job.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?

The constitutional order governs the position of the main constitutional bodies, such as the Chamber of Deputies and the Senate, the government, the president, the Constitutional Court, or the Supreme Audit Office, and defines the basic limits and space for their activities. Their authority – established by a constitutional norm – can be further developed by statutes, both general statutes (which govern the competence of several bodies[10]) or special statutes (which govern the competence of a single body[11]).

However, a situation can arise where two (or more) state authorities cannot agree which one of them has jurisdiction to act in a particular matter, or whether it has jurisdiction in that area at all. Thus, a jurisdictional conflict (dispute) arises. Such a dispute is a conflict where one party claims the authority to issue a decision in the same case, involving individually determined participants, in which the other party issued a decision (a positive jurisdictional dispute). A jurisdictional dispute can also mean a dispute in which both parties deny their authority to issue a decision in the same case, involving individually determined participants (a negative jurisdictional conflict). The Constitutional Court has expanded this concept beyond a positive and negative jurisdictional conflict, particularly in its judgments file no. Pl ÚS 14/01, Pl. ÚS 17/06 and Pl. ÚS 87/06[12].

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[10] e.g. Act no. 2/1969 Coll., on Establishing Ministries and Other Central Bodies of the State Administration of the Czech Republic (called the "Jurisdiction Act" because it sets the jurisdiction of individual ministries and offices)

[11] e.g. Act no. 166/1993 Coll., on the Supreme Audit Office

[12] In particular in judgment Pl.ÚS 17/06 of 12 December 2006 the Constitutional Court primarily considered the question of whether the matter involved a jurisdictional dispute. It acknowledged that there was a jurisdictional dispute, the essence of which ws reviewing the jurisdiciton of the body that made the final decision in the matter, where its jurisdiction was subject to the act of another body (joint jurisdiction). Thus, the act of another body is a prerequisitve for the final decision to be perfected. The substance of the jurisdictional dispute was the question of whether the minister of justice could decide to appoint a judge to the Supreme Court without the consent of the chairman of the Supreme Court. The Constitutional Court recognized in this context that the chariman of the Supreme Court is a state body, which has exclusive authority to give consent to the appointment of a judge to the Supreme Court. it also found the petition admissible because no other body has authority to decide the matter; it stated that as the judicial body for protection of constitutionality (Art. 83 of the Constitution) it cannot permit a situation where a serious jurisdictional dispute between two important state bodies, representing the judicial branch on one side and the executive branch on the other, to remain unresolved only because it seems that noone is authorized to resolve it. In a democratic state governed by the rule of law it is not possible for some arbitrary act not to be subject to review, and thus, despite its obvious illegality or unconstitutionality, to be impossible to annul.

However, settling jurisdictional disputes between individual bodies in proceedings before the Constitutional Court is not a frequent occurrence, and it is limited by Art. 87 par. 1 let. k) of the Constitution, which states that the Constitutional Court decides jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body. This constitutionally enshrined authority is described in more detail in § 120 par. 1 of the Act on the Constitutional Court, under which, in proceedings in jurisdictional disputes, the Constitutional Court decides disputes between state bodies and self-governing regions on the jurisdiction to issue a decision or take measures or other actions in the matter referred to in the petition instituting the proceedings. Under § 120 par. 2 let. a) a state body is authorized to submit a petition to institute proceedings in a jurisdictional dispute between two state bodies. Under § 122 par. 1 of the Act a petition is inadmissible if, according to a special statute, some other authority has jurisdiction to decide the jurisdictional dispute, or if a body superior to both the bodies between which the jurisdictional dispute arose has jurisdiction to decide the jurisdictional dispute.

2. **Specify whether the Constitutional Court is competent to resolve such litigation.**

The Constitutional Court's competence for the proceeding is based on the subsidiarity principle; it is called upon to decide a dispute only if no other body has authority to decide the conflict (whether positive or negative) under a special statute or if a body that is superior to both the bodies between which the dispute exists does not have authority to decide the dispute.

In this case the subsidiarity principle guarantees that a situation cannot arise in which all the bodies involved would refuse to fulfill their role, citing their own lack of jurisdiction. Since one cannot casuistically list all such potential conflict situations, or appoint a body to decide a dispute in all cases, the legislature defined an open area for the Constitutional Court to act.

The special statute discussed in § 122 par. 1 of the Act on the Constitutional Court is Act no. 131/2002 Coll., on Deciding Certain Jurisdictional Disputes. This Act governs jurisdictional disputes concerning authority to issue a decision where the parties are

a) courts and self-governing executive, territorial, interest-based or professional bodies,
b) courts in civil proceedings and administrative courts.

These disputes shall be reviewed and decided by a special panel composed of three judges from the Supreme Court and three judges from the Supreme Administrative Court. The purpose of a proceeding under this special Act is to decide who has authority to issue a decision in the disputed matter. Jurisdictional disputes between

courts are then decided by the closest court superior to both of them. An analogous rule applies to jurisdictional conflicts arising in administrative proceedings.

3. Which public authorities may be involved in such disputes?

It is appropriate to point out here that the Constitutional Court's authority is residual, i.e. that it decides those cases where no other body has jurisdiction. Each year the Constitutional Court publishes in the Collection of Laws an announcement of which cases the plenum has reserved to itself under § 11 par. 2 let. k) of Act no. 182/1993 Coll., on the Constitutional Court. According to the current announcement, no. 200/2010 Coll., these cases include deciding disputes on the scope of jurisdiction of state bodies and regional self-governing bodies under Art. 87 par. 1 let. k) of the Constitution. Supreme bodies are traditionally understood to be:

- the Chamber of Deputies and the Senate of the Parliament of the Czech Republic,
- the president,
- the government
- the Constitutional Court.

Case law also indicates[13] that these supreme bodies include both the highest courts.

4. Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples.

Jurisdictional disputes, under § 120 par. 1 of the Act on the Constitutional Court, means disputes between state bodies on the jurisdiction to issue decisions, implement measures, or take other action in a matter referred to in the petition to institute a proceeding. Thus, in the Czech legal order it is not possible for the Constitutional Court to decide disputes other than those involving actual application of rules in practice. In these proceedings the Constitutional Court cannot review the constitutionality of normative legal acts issued by state authorities, and so cannot decide disputes on legislative authority. Review of norms is part of a second kind of proceeding.[14] Therefore, the key to answering this question is conflicts about which body is to issue a decision in a particular matter (or handle it, in the widest sense of the word).

[13] Jurisdictional dispute between the chairman of the Supreme Court and the minister of justice on the authority to appoint a judge to the Supreme Court (judgment file no. Pl. ÚS 87/06)
[14] See Art. 87 par. 1 let. a) and let. b) of the Constitution

Since it was established in 1993 the Constitutional Court has decided fifteen jurisdictional disputes; it issued resolutions denying five of them, and issued judgments deciding the rest. The most important judgments were:

- Judgment of 28 July 2009, file no. Pl ÚS 9/09, on jurisdiction to exclude a judge on the disciplinary panel of the Supreme Court from reviewing and deciding a disciplinary matter involving the vice chairman of the Supreme Court
- Judgment of 9 October 2007, file no. Pl 5/04, on a dispute about the scope of jurisdiction to provide emergency medical services, submitted by the South Bohemian Region (a self-governing region)
- Judgment of 12 September 2007, file no. Pl ÚS 87/06, on the authority of the president to name the vice chairman of the Supreme Court
- Judgment of 12 December 2006, file no. Pl ÚS 17/06, on the requirement of consent from the chairman of the Supreme Court to the appointment of a judge to that court.
- Judgment of 20 June 2001, file no. Pl ÚS 14/01, on a dispute about the countersignature of a decision by the president, appointing the governor and vice governor of the Czech National Bank, initiated by the government.
- Judgment of 29 January 2008, file no. III. ÚS 299/97, on a dispute between the Ministry of the Interior and the Ministry of Education on deciding on an appeal in the matter of an offence committed by unauthorized use of an academic title.

5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?

A petition to open proceedings in a jurisdictional dispute may be submitted by[15]:

- A state body, in a jurisdictional dispute between the state and a self-governing region, or in a jurisdictional dispute between state bodies. A state body is represented by its statutory governing body (head, director, minister, etc.)
- The representative body of a self-governing region, in a jurisdictional dispute between the self-governing region and the state, or in a jurisdictional dispute between self-governing regions.

As stated above, submitting a petition or being a party requires a direct relationship to the subject matter of the dispute. Therefore, one cannot seek a decision on a merely abstract or theoretically possible jurisdictional dispute.

[15] § 120 par. 2 of the Act on the Constitutional Court

6. What procedure is applicable for the adjudication of such dispute?

The Act on the Constitutional Court does not set forth details of the process for reviewing jurisdictional disputes, although they are a special kind of proceedings. Therefore, the proceeding takes place in the following steps:

- Submission of a petition (the court cannot act unless a petition is filed to open proceedings)
- Assignment of the matter to a judge rapporteur. The agenda of the plenum is assigned to judges in alphabetical order (one case in each round of assignments), by the date of the petition. The assignment is done by computer, which eliminates the opportunity to interfere in the selection and interfere in the right to a lawful judge.
- Assembling documents needed for a decision. Preparation for the decision also includes obtaining briefs from the parties and secondary parties to the proceedings, and other evidence that is relevant to the matter. This is the job of the judge rapporteur.
- A hearing. If the petition was not denied, a hearing is held. As it was already stated that this is an additive jurisdiction of the plenum, the Constitutional Court sits en banc. All hearings are led by the chairman of the Constitutional Court; the judge rapporteur presents the content of the petition to open proceedings and the results of the prior proceedings before the Constitutional Court. The purpose of a hearing is to hear the parties and introduce evidence. If, in the plenum's opinion, a hearing cannot be expected to further clarify the matter, the Act on the Constitutional Court permits it in the particular proceeding, and the parties agree, a hearing can be waived.
- Deliberation and voting. Only the judges and a stenographer can be present during the plenum's deliberation and voting. During the deliberations, before voting begins, each judge may propose a draft decision. At the same time, each judge is required to vote for one of the draft decisions that were submitted before voting began. A decision of the plenum is adopted if a majority of the judges present voted in favor of it. A judge who disagrees with the plenum's decision or with its reasoning is entitled to have his dissenting opinion included in the protocol on the deliberations and to have it attached to the decisions, stating the judge's name.
- Announcement and publication of the judgment. A judgment is always announced publicly and in the name of the republic; the announcement is made by the chairman of the Constitutional Court. Under § 57 par. 1 of the Act on the Constitutional Court, a judgment in a proceeding on a jurisdictional dispute is not one of those that are required to be published in the Collection of Laws of the Czech Republic. However, the Constitutional Court may – under § 57 par. 3 of the Act on the Constitutional Court – decide that its decision in a particular matter is generally important and that the opinion will therefore be published in the Collection of Law. Thus, publication of such

judgments in the official Collection of Laws is in the discretion of the Constitutional Court.

7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.

Before the Constitutional Court makes a decision in a judgment the petitioner may – with the consent of the Constitutional Court – withdraw its petition. However, the Constitutional Court may decide that the interest in resolving the jurisdictional conflict in a particular case outweighs the will of the petitioner, and complete the proceeding. However, if it grants the withdrawal of the petition, it will stop the proceeding.

During a proceeding, the Constitutional Court may also deny a petition through a resolution if:

- Deciding the jurisdictional dispute is up to a different body, pursuant to a special law, or
- If deciding the jurisdictional dispute is up to the body superior to those between whom the jurisdictional dispute arose.

In other cases the Constitutional Court makes a decision on the merits which body has jurisdiction to issue the decision which the dispute concerns. In the event of jurisdictional dispute between a state body and a self-governing region, it decides whether the matter falls in the competence of the state or the self-governing region. The verdict of the judgment may read as follows:

"I. The president is the state body competent to issue a decision naming the vice chairman of the Supreme Court from the ranks of judges appointed to the Supreme Court by a valid decision of the minister of justice, after the prior consent of the chairman of the Supreme Court.

II. Decision of the President of 8 November 2006, which appointed JUDr. J.B. vice chairman of the Supreme Court, is annulled."[16]

8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.

If a body that is a party to the proceeding already issued a decision in the disputed matter and, in the Constitutional Court's opinion, did not have jurisdiction to issue that decision, the Constitutional Court, by its judgment, annuls that decision. If a body that is a party to the proceeding issued a decision denying its jurisdiction, and

[16] Judgment of 12 September 2007, file no. Pl ÚS 87/06, on the authority of the president to appoint the vice chairman of the Supreme Court.

according to the findings of the Constitutional Court it has subject matter jurisdiction in the matter, the Constitutional Court, by its judgment, annuls that decision as well. Such decisions, issued in conflict with the subsequent legal opinion of the Constitutional Court, are regarded as empty acts (null acts, which are not legal acts and cannot have legal effects), annulling them is only a formal step toward greater legal certainty. Moreover, the Constitutional Court may annul such decisions even if the petitioner did not expressly request it.[17]

The Constitutional Court makes cassation decisions; therefore, if a decision is annulled, the relevant body must make a new decision. If no decision was made, the relevant body must conduct the proceeding that was disputed before the Constitutional Court.

[17] That was the case in the judgment of 20 June 2001, file no. Pl ÚS 14/01, where the government proposed annulment of a disputed decision by the president appointing the governor and vice governor of the Czech National Bank

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. **The Constitutional Court's decisions are:**
   a) **final;**
   b) ~~**subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**~~
   c) **binding** ***erga omnes;***
   d) **binding** ***inter partes litigantes.***

Decisions of the Constitutional Court are final and no appeal can be filed against them at the domestic level.

However, the situation is more complicated as regards the degree to which individual decisions of the Constitutional Court are binding.

Art. 89 par. 2 of the Constitution states that enforceable decisions of the Constitutional Court are binding on all authorities and persons.

However, neither professional nor academic debate has agreed on the binding nature of the Constitutional Court's decisions. Arguably the most important Czech commentary on the Constitution[18] has noted two fundamental and approaches at opposite extremes:

- (all) decisions of the Constitutional Court are generally binding, including the "essential grounds" (*ratio decidendi*) set forth in the reasoning,
- decisions of the Constitutional Court – with the exception of judgments (or their verdicts) that annul legal regulations (or provisions thereof) – are not generally binding.

The Constitutional Court itself has not taken a consistent approach in its judgments:

Judgment I. ÚS 23/97:
"The provision of *§ 57 par. 2 of Act no. 182/1993 Coll. States that the verdict, and such part of the reasoning from which it is evident what the legal opinion of the Constitutional Court is shall be published in the Collection of Laws. Therefore, it is also evident that the legal opinion stated there is, in its fundamental meaning and scope of content, binding on the general courts."*
or
Judgment III. ÚS 200/2000:
"The interpretation of constitutional law questions presented by the Constitutional Court in the reasoning of a judgment, as a rule in the statement of law, if it is of a general nature, is generally binding, just like the verdict of the judgment itself, and as

[18] Sládeček V., Mikule V., Syllová J.: Ústava České republiky. Komentář. 1. vydání [The Constitution of the Czech Republic with Commentary. 1st ed.], Prague, C.H.BECK, p. 374

such this legal (constitutional law) opinion is binding on the Constitutional Court itself in matters of an analogous nature."

On the other hand, it notes:
Resolution II. ÚS 355/02:
"Thus, insofar as the Constitutional Court makes decisions in individual cases, its judgments are binding only in the cassation sense, but not in the sense of precedent. Therefore, in these cases, decisions of the Constitutional Court are not of a generally binding nature, even though the case law of the Constitutional Court should indirectly – because of its thoroughness and the nature of the reasoning guide the decision making of the general courts in the area of constitutional law."

The Constitutional Court spoke regarding the cassation and precedential nature of its judgments in judgment IV.ÚS 301/05, of 13 November 2007.

Regarding the binding nature of the cassation effect it stated:
"Legal disputes and court proceedings must end sometime, and may not continue like an eternal ping-pong between judicial bodies that insist on their own position. ... The rule that judgments of the Constitutional Court cannot be appeal has the consequence that a Constitutional Court judgment is a definitive resolution of constitutional law issues in a particular case, and therefore it must be faithfully implemented by the applicable general court, which must respect the constitutional law analysis presented in the Constitutional Court's judgment regardless of any doubts the general court may have as to whether it is correct or substantiated. ... The Constitutional Court does not claim that it is infallible, but it maintains that in individual cases the finiteness of the dispute is an essential element of a fair trial, and therefore, as the body with final word, its legal opinion in a particular matter must be respected unconditionally. A contrary opinion would conflict with the very principle of cassation decisions."

Regarding the precedential nature, the cited judgment stated the following:
"the Constitutional Court considers it useful to analyze the ratio decidendi in judgment III. ÚS 252/04 in more detail. In that judgment, the Constitutional Court stated the principles applicable to a situation in which the general courts must resolve questions that are similar to (or identical with) questions in matters that the Constitutional Court has already decided. The Constitutional Court stated that Art. 89 par. 2 of the Constitution, in connection with Art. 1 par. 1 of the Constitution, creates important requirements for the general courts regarding their decision making; accordingly, "an interpretation already made [by the Constitutional Court] should be ... a starting point for deciding subsequent cases of the same kind." In other words, the general courts must respect the constitutional law interpretations of the Constitutional Court, i.e. the "essential legal rule (decisive grounds) interpreted and applied by it, on which the verdict of the judgment in question was based"; in simple terms, to follow precedent. Failure to meet these requirements is a violation of Art. 89 par. 2 of the Constitution in connection with Art. 1 par. 1 of the Constitution,

and is also a violation of the subjective fundamental right of the affected person under Art. 36 par. 1 of the Charter, i.e. the right to "assert his rights before an independent and impartial court."

In summary, decisions of the Constitutional Court are always binding on the parties to a proceeding. The verdict sections and essential grounds of a decision to annul a legal regulation are also binding on all other persons. The legal opinions and essential grounds for the decision, as set forth in the reasoning, are binding primarily for the Constitutional Court, which can deviate from them only in a manner set forth by law. For other state authorities, as well as for natural person and legal entities, these legal opinions and ratia decidendi are not binding in the formal legal sense, but only through the strength of their ideas and the persuasiveness of their opinions. Thus, the essential grounds are not binding precedent de jure, but it is observed de facto.

2. **As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**
   a) **repealed;**
   b) ~~**suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**~~
   c) ~~**suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**~~
   d) ~~**other instances.**~~

The Constitutional Court has the authority to directly remove a legal regulation or part thereof from the legal order, if it finds them to be in conflict with a constitutional act. See § 70 par. 1 of the Act on the Constitutional Court, which reads:

"If, after holding a proceeding, the Constitutional Court concludes that a statute or individual provisions thereof conflict with a constitutional act or that some other legal regulation or individual provisions thereof conflict with a constitutional act or a statute, it shall declare in its judgment that the statute or other legal regulation or individual provisions thereof are annulled on of the day specified in the judgment."

3. **Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

As stated in part III. point 1. of the questionnaire, the question of a decision being binding is relatively complicated. With the general courts it can be divided into two categories:

- A proceeding on a constitutional complaint. If the Constitutional Court annuls a decision by a general court, the disputed matter is returned to that general court, which must conduct another proceeding and make another decision. If several decisions by a hierarchical series of courts were annulled, then the proceeding is returned to the stage before a decision was issued by the court

of the lowest level. However, this is only a widely accepted principle because neither the Act on the Constitutional Court nor other procedural regulations (except § 314 et seq. of the Criminal Procedure Code) contain this obvious process. The legal opinion of the Constitutional Court is then binding for the entire new proceeding, for the courts at all levels, and the Constitutional Court itself is bound by its legal opinion.

- A proceeding on the review of the constitutionality of legal regulations. § 58 par. 1 of the Act on the Constitutional Court provides that judgments in which the Constitutional Court ruled on a petition seeking the annulment of a statute or other legal regulation, or individual provisions there of, are enforceable on the day they are published in the Collection of Laws, unless the Constitutional Court decides otherwise. If the Constitutional Court uses its authority to set a different date of enforceability, most often it defers enforceability of the judgment. However, it can also decide that the judgment is executable as of the moment it is announced,[19] and constitutional law theory[20] does not rule out the possibility that the judgment can take effect ex tunc. The Constitutional Court has never yet used that alternative. Derogation is effective erga omnes, i.e. including the general courts, and the effects of the Constitutional Court's judgment are in force from the moment it is published in the Collection of Laws, unless the Constitutional Court decides to shift the enforceability of the judgment to a later time (if it wants to give the legislature time to create a new regulation, to avoid a gap in the legal order). However, deferring the enforceability of a judgment complicates the situation for the general courts, because until the derogatory judgment goes into effect they should apply a norm that has been declared unconstitutional, but for now remains part of the legal order. In this matter the Constitutional Court is of the opinion that the general courts must interpret such problematic norms in a constitutional manner, i.e. in accordance with the derogatory conclusions of the Constitutional Court, even though the norm in question formally remains part of the legal order.

4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found– as a result of *a posteriori* and/or *a priori* review?

The Constitutional Court performs a review of constitutionality a posteriori; an a priori review can be done only in one situation, that being review of whether an international treaty is consistent with the constitutional review.

As the Constitutional Court is a "negative legislature," it can only remove from the legal order those norms that are inconsistent with constitutional acts. The resulting

[19] Cf. Part I. point 6a

[20] Compare Wagnerová, E., Dostál, M., Langášek, T., Pospíšil, I.: Zákon o Ústavním soudu s komentářem [The Act on the Constitutional Court with Commentary], ASPI, Prague, 2007, p. 206

gap must be filled in by the legislative branch (or, in the case of norms other than statutes, another norm-creating authority); in really exceptional cases the Constitutional Court itself may fill in the gap through its interpretative verdict. However, under the principle of separation of powers, the Constitutional Court cannot force other bodies to exercise their authority, or sanction them (stricto sensu) for failure to do so. Therefore, it is up to the will and constitutional responsibility of these bodies to adopt a regulation that is consistent with the Constitution, as the Constitutional Court stated in its judgment.

Extending this situation to the relationship between the Constitutional Court and the legislative branch, it should be noted that in the overwhelming majority of cases the legislative branch responds to the Constitutional Court's derogatory judgment and adopts a new legal norm which is consistent with the Constitutional Court's legal opinion.

However, the Constitutional Court cannot set a deadline for adopting the new legal regulation. As stated above, the Constitutional Court can only defer the enforceability of its judgment, and thus give the norm-creator time to familiarize itself with the essential grounds of the decision and prepare appropriate new legal regulations. If the norm-creator does not make use of this time, then the contested provision or legal regulation ceases to be part of the legal order, but there is not direct responsibility relationship between the norm-creator and the Constitutional Court.

However, a derogatory decision by the Constitutional Court does not automatically revive a previous legal regulation, nor can the Constitutional Court authoritatively decide that another provision in the legal order should be used by analogy to replace what has been annulled.

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.

The legislative branch does not take any measures regarding the legal order in response to the Constitutional Court's finding of unconstitutionality, because the Constitutional Court has direct authority to eliminate a constitutionally defective norm. Thus, a situation cannot arise where Constitutional Court considers a legal regulation or part thereof inconsistent with the Constitution but must wait for the legislature to annul it. In this regard the Constitutional Court is completely independent of the activity of the norm-creator.

However, in certain circumstances the legislature's failure to act can give rise to an unconstitutional state of affairs. In judgment file no. Pl. ÚS 9/07, and particularly in judgment file no. Pl. ÚS 20/05, the Constitutional Court used an "additive" verdict, where it denied the original petition, but, beyond the framework of the original

petition, it stated that it had found something else to be unconstitutional. In this second proceeding – whose subject matter was a petition seeking the annulment of part of the Civil Code concerning apartment rental – the Constitutional Court found the regulation of rent to be constitutional, but concluded that Parliament's failure to act was unconstitutional, as the Constitutional Court had, in previous judgments, given it time to adopt a constitutional regulation. The Constitutional Court concluded that an unconstitutional gap in the law can also arise when: *"... the Parliament adopted the declared regulation, but it was annulled because it did not meet constitutional criteria, and the legislature did not adopt a constitutionally conforming replacement, although the Constitutional Court gave it sufficient time to do so (18 months). Moreover, the legislature failed to act even after that deadline passed, and today (more than 4 years later) still has not passed the necessary legal regulation."*

6. **Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

Review of the constitutionality of legal regulations is performed a posteriori and on a one-time basis. Therefore, the Constitutional Court does not have the opportunity to review whether the newly adopted legal regulation is consistent with the legal opinion presented in its derogatory judgment, unless that new legal regulation is also contested by an authorized petitioner and the Constitutional Court review it. The Constitutional Court cannot by itself, at will, review legal regulations, even in connection with the implementation of the legal opinions in its decisions, which probably led to the issuance of the legal regulations. However, if the norm-creator, in response to the annulment of a legal regulation, adopted materially the same legal regulation that the Constitutional Court already annulled, then the Constitutional Court may not review it until a new proceeding is opened at the instigation of one of the authorized subjects.

If it is therefore determined that the norm-creator only circumvented the essential grounds of the Constitutional Court's decision and replaced the annulled legal regulation with one that is formally different but has the same content, then grounds may exist for annulling that new legal regulation with reference to duplication of the previously annulled unconstitutional act.

7. **Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?**

The Constitutional Court makes cassation decisions; it can only annul a contested act, but cannot amend or supplement it, or replace a proceeding that is conducted before administrative bodies or the general courts. Likewise, it cannot assign tasks to other state authorities, or compel the fulfillment of such tasks, or penalize failure to fulfill

them. If, theoretically, a situation arose where another state authority did not respect the Constitutional Court's decision, then the Constitutional Court cannot take steps itself, but must wait to see whether one of the authorized subjects contests the act before the Constitutional Court, which could then – after conducting proceedings – declare it to be unconstitutional and annul it.