

# 2002/03/21 - III. ÚS 256/01: PHOTO IDENTIFICATION

## HEADNOTES

There can be no doubt that the institute of photo-identification is an effective evidentiary means, thus is an institute enabling the attainment of a public estate (good), consisting in the proper discovery of criminal offenses and the just punishment of the perpetrators. Apart from that, photo-identification fulfills another purpose as well. In view of the fact that identification is one of the means of verifying that direct testimony is credible, it also fulfills the purpose of excluding innocent persons from suspicion, thus the purpose of protecting individual rights from being affected by unwarranted prosecution and conviction.

The statutory authorization in the sense of § 12 para. 2 of the Civil Code can be considered as constitutionally conforming only in the case that the pursued official purpose cannot be attained while obtaining the consent of the affected person before using their pictures, that is, the acceptance of § 12 para. 2 of the Civil Code in relation to § 12 para. 1 of the Civil Code under the condition of subsidiarity.

In a democratic constitutional order, the attainment of the purpose of discovering criminal offenses and punishing their perpetrators in a criminal proceeding is generally tied up with a whole host of indispensable intrusions into the rights of personhood of persons other than the suspect, or the accused. An example is the entitlement to order an examination or an autopsy of a corpse or its exhumation (§ 115 of the Criminal Procedure Code) in relation to the rights of personhood under § 15 of the Civil Code, or the duty to testify (§ 97 of the Criminal procedure Code) and, in this connection, even suffer questions relating to credibility, which, from the nature of the thing, oversteps the bounds protecting personhood under § 11 of the Civil Code. The institute of photo identification, under consideration in this matter, does not diverge from the framework of these generally accepted examples of conflict with the right of personhood.

It is a statutory condition for holding a photo identification that all comparison photographs must be of persons who are not involved in the criminal proceeding at issue. Thus, the use in a criminal proceeding of photographs of persons not involved therein for identification purposes does not result in their rights of personhood stemming from § 11 of the Civil Code (for example, the right to the protection of their honor and good name in connection with an unauthorized origination of suspicion of committing a criminal offense and its dissemination in public) being affected. Moreover, a photo identification is included in the court record, but this is not a public document and the opportunity to peruse it is restricted to a class of persons precisely defined by law (§ 65 of the Criminal Procedure Code).

**CZECH REPUBLIC**  
**CONSTITUTIONAL COURT**  
**JUDGMENT**

**IN THE NAME OF THE CZECH REPUBLIC**

Following an oral hearing, held on 21 March 2002 by a Panel, the Constitutional Court decided in the matter of the constitutional complaint of JUDr. L. K. and I. M., with the Czech Republic - Ministry of Interior of the Czech Republic taking part as a secondary party, against the 6 February 2001 judgment of the High Court in Prague, file no. 1 Co 291/2000 and 1 Co 293/2000, on the protection of personhood, and on the declaration of a duty under § 82 para. 3 let. b) Act No. 182/1993 Coll., as subsequently amended, and in the matter of a petition for the issuance of provisional measures, as follows:

**The petition is rejected on the merits.**

**REASONING**

I.

The Definition of the Matter according to the Constitutional Complaint

In their petition, submitted for delivery to the Constitutional Court on 25 April 2001, that is, within the term prescribed in § 72 para. 2 of Act No. 182/1993 Coll., as subsequently amended, the complainants requested the annulment of the 6 February 2001 judgment of the High Court in Prague, file no. 1 Co 291/2000 and 1 Co 293/2000, on the protection of personhood, further the declaration directed to the Chair of Panel 2 T of the District Court in Cheb of the duty to remove from file no. 2 T 171/2000 all photographs of the complainants and their names and titles, whether in pictorial or written form, and to destroy them within 15 days of the delivery of the Constitutional Court judgment. In addition, they requested the Court to issue provisional measures which impose upon the District Court in Cheb the duty to „restrict access to photographs of the complainants, as well as their names, found in the photo-album, kept in the file originally opened by the Czech Police - Cheb District Office of Investigation as file no. OVCH 410/2000, now held by the District Court in Cheb as file no. 2 T 171/2000 and all copies thereof, at their own expense within three days of the announcement of this judgment“. As a result of the mentioned decision of the High Court in Prague, as well as the steps taken by the Czech Police - Cheb District Office of Investigation and the District Court in Cheb, they feel themselves to be affected in their basic rights arising from Art. 2 para. 2, Art. 7, and Art. 10 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „Charter“).

## II.

### Recapitulation of the Matter in the Proceedings before the Ordinary Courts

The following was ascertained from the files of the Regional Court in Plzen, nos. 19 C 43/2000 and 19 C 44/2000, which the Constitutional Court requested, and from the enclosure to the constitutional complaint:

In their action before the ordinary court the complainants demanded from the defendants (the secondary parties in the proceeding before the Constitutional Court) an apology and compensation of non-property damage in the amount of 500 000 CZK, as they felt affected in their right to the protection of personhood arising from § 11 and following of the Civil Code, due to the manner in which state bodies acting in the criminal proceeding, in the matter conducted by the Czech Police - the Cheb District Office for Investigation, made use, for the purposes of identification, of their photographs with their names and dates of birth given.

...

## V.

### Evidentiary Hearing

Pursuant to § 48 para. 1 of Act No. 182/1993 Coll., as subsequently amended, the Constitutional Court shall admit all evidence which is necessary to establish the facts of the case, shall decide which of the proffered evidence should be admitted, and may also admit evidence other than that which has been proposed.

This statutory provision must be interpreted in light of Art. 83 of the Constitution, according to which the Constitutional Court is the judicial body responsible for the protection of constitutionalism, as well as from the perspective of current case law, in which is accentuated that the Constitutional Court and ordinary courts have differing functions. The Constitutional Court adjudges decisions of ordinary courts contested by means of a constitutional complaint solely from the perspective of whether fundamental rights and basic freedoms guaranteed by constitutional acts and treaties under Art. 10 of the Constitution have been affected, and not by reviewing the merits of the matter from the perspective of ordinary law. From this can be deduced, in the area of evidence taking, the maxim that evidence is taken in relation to facts verifying the complainant's assertion that he has been affected in his fundamental rights and basic freedoms, but not evidence in relation to the merits of the case, that is evidence concerning matters on the plane of ordinary law, leading to a decision on the merits of the case. This differentiation is one of the features distinguishing the constitutional judiciary from the ordinary judiciary.

In view of the indicated safeguard, for the purpose of verifying the assertions contained in a constitutional complaint, the evidence taken by the Constitutional Court in the instant

case took the form of confirming the precise wording of the article authored by Jaroslav Fikar, published in the newspaper, Blesk, on 2 June 2000 on page 4 with the title, “Prominent Persons Are on the List”:

“CHEB - A large police scandal threatens to erupt in Cheb due to the inclusion of 61 photographs and personal data of judges, civil servants, and persons who are local prominent into a classified file OVCH 410/2000. It concerns the investigation of trafficking in drugs and women. The case took on large proportions on 17th and 18th of March, when 18 of the accused were taken into custody. . . . Among the 61 photographs in the file appeared the personal data of one of the District Court judges, high civil servants, several attorneys, a number of well-known entrepreneurs and prominent persons. At the instigation of advocates Ladislav Kubíček and Petr Bayer, the judge issued provisional measures ... One of the suspects, No. 56, is entrepreneur Ivo Mlátílik, the former owner of FC Union Cheb ...“

In the oral hearing, the Constitutional Court further questioned the secondary party on practical issues involved in the Czech Police holding of a photo identification. According to the secondary party’s testimony, the Czech Police hold identifications in accordance both with the relevant provisions of the Criminal Procedure Code, and the regulation of the Interior Minister No. 82/1995 (Ar. 74), which govern the criminal procedure and criminalistic aspects of identification. Comparison photographs of uninvolved persons are taken either from police photo albums or from records kept by the police, among which included, at the time in question, records of civil identity cards. Since a central database has not yet been created, use is made of photographs which are available to the police in district records.

## VI.

### Admissibility of the Constitutional Complaint

Prior to adjudging the constitutional complaint on the merits, the Constitutional Court stated, in regard to the objection made by the secondary party, that it did not find in the present matter the condition had been met for rejecting the constitutional complaint as inadmissible pursuant to § 43 para. 1, let. e) and § 75 para. 1 of Act No. 182/1993 Coll., as subsequently amended. It based this finding on its constant jurisprudence, according to which

as remedial procedures for the protection of rights may be considered only those procedures leading to the review of a decision of a public authority, which is within the procedural control of the party to the proceeding and not dependant on the decision of the relevant authority. For the given reason, to submit a complaint of the violation of the law in a criminal proceeding does not qualify, nor does a petition, in civil law proceeding, for leave to submit an extraordinary appeal on the grounds that a legal issue of basic significance is involved. It must, in addition, be emphasized that the purpose of extraordinary appeals in matters which are of basic significance in terms of law, is the necessity of unifying the case law of the ordinary courts, that is, the unification of the interpretation and application of ordinary law, which falls entirely within the jurisdiction of the Czech Supreme Court. (see, for example, the judgments in matters Nos. III. US 224/98, I. US 539/98, II. US 21/97.)

VII.  
Ratio Decidendi

VII./a  
The Scope of Constitutional Review

The assessment of whether an encroachment by a public authority upon fundamental rights and basic freedoms is unconstitutional consists of several components (III. US 102/94, III. US 114/94, III. US 84/94, III. US 142/98, III. US 224/98). The first is the adjudication of the constitutionality of the legal provisions that have been applied in the case (which follows from § 68 para. 2 of Act No. 182/1993 Coll., as subsequently amended). Further components are the evaluation of whether constitutional procedural rights have been observed, and finally the adjudication of whether the substantive legal provision was interpreted and applied in a constitutionally conforming manner.

VII./b  
Assessment of the Matter on the Ordinary Law Plane

The Constitutional Court adjudicated the matter on the basis of the factual findings made by the ordinary courts, which were contested by the complainants and the secondary party. These findings indicate that during the month of March, 2000 the investigator of the Cheb District Office of Investigation, in a criminal prosecution against a group of persons accused of the criminal offense of trafficking in women under § 246 para. 1, para. 2 let. a), c) of the Penal Code and of procurement under § 204 para. 1, 2, 3 let. b) of the Penal Code, carried out several identification proceedings with the aim of identifying and designating the accused from among uninvolved persons. For this purpose he compiled a collection of photographs, drawing upon the registry of photographs for civil identity cards, into which, in addition to the photographs of the accused, were inserted photographs of extras, including the complainants, who were not involved in the criminal proceeding in any way. The matter is before the District Court in Cheb, under file no. 2 T 171/2000, and has not as yet resulted in a final judgment.

From the perspective of ordinary law, the following provisions are applicable for the adjudication of the instant case: § 12 para. 2 of the Civil Code, § 93 para. 2 and § 103 of the Criminal Procedure Code (which in the matter of photo identification was, by virtue of an amendment to the Criminal procedure Code, Act No. 265/2001 Coll., which entered into effect on 1 January 2002, supplemented by a new provision, § 104b para. 4 of the Criminal Procedure Code, § 4 of Act No. 75/1957 Coll., on Civil Identity Cards (which was repealed and superseded by Act No. 328/1999 Coll., on Civil Identity Cards, as of 1 July 2000 pursuant to § 29 of Act No. 133/2000 Coll., on Records concerning the Inhabitants, and pursuant to § 28 of Act No. 328/1999 Coll.), § 2 para. 1 let. l), § 45a Act No. 283/1991 Coll., on the Czech Police, as subsequently amended.

Pursuant to § 12 para. 2 of the Civil Code, the use of a person's picture does not require consent, if it is used for official purposes on the basis of a statute. In the matter under consideration, the official purpose is defined by the provisions of § 93 para. 2 and § 103 of the Criminal Procedure Code. It governs the proceeding in a criminal proceeding, in particular that component of the witness testimony which is the identification of the suspect (the accused). The relevant provisions of Act No. 75/1957 Coll., on Civil Identity Cards, and Act No. 283/1991 Coll., on the Czech Police, as amended as of 30 April 2000, were the statutory basis upon which, in the crucial period (March, 2000), rested the possibility to attain the given official goal by the use of a picture (photograph) without the affected person's consent.

Provision of § 4 of Act No. 75/1957 Coll., vests in the Czech Police the task of issuing civil identity cards. The Police are entrusted, by § 2 para. 1, let. l) of Act No. 283/1991 Coll., as subsequently amended, with maintaining the records necessary for it to fulfill this task. Pursuant to § 45a of Act No. 283/1991 Coll., as amended as of 30 April 2000, information from the records kept by the police pursuant to § 2 para. 1, let. l), may be made available to the services which operate within the police, the Ministry of Interior, the Security Information Services of the Czech Republic, the Military Defense Intelligence and Military Police; other state bodies and organizations, solely if such is necessary for them to fulfill the tasks given them by statute. As was already stated, Act No. 75/1957 Coll., on Civil Identity Cards, was repealed and superseded by Act No. 328/1999 Coll., on Civil Identity Cards, as of 1 July 2000 (pursuant to § 29 of Act No. 133/2000 Coll., on Records concerning the Inhabitants, and pursuant to § 28 of Act No. 328/1999 Coll.).

The Regional Court in Plzeň, as well as the High Court in Prague, decided the complainant's suit pursuant to § 11 and following of the Civil Code and not pursuant to § 13 of Act No. 82/1998 Coll., Responsibility for Damage Caused in the Exercise of Public Authority by Decision or by Incorrect Official Conduct, as subsequently amended. Implicitly and in harmony with the nature of the decided matter, it evaluated the relations between the plaintiffs and defendant (complainants and secondary party in the proceeding before the Constitutional Court) as relations in which the subjects are on equal terms, that is, private law relations, and not as responsible relations arising from a violation of the State's duties, connected with its governing status. Thus, the complainants are not participants in the criminal proceeding at issue, for which reason no effective procedural means for the protection of their rights existed within the confines of this proceeding. The Constitutional Court also agrees with the legal view espoused by the fact finding court, according to which, in view of the divided regulation of jurisdiction and venue in the Civil Procedure Code, the petition put forward by the complainants could not be decided after joining the matter together with a petition put forward under Act No. 256/1992 Coll., on the Protection of Personal Data in Informational Systems ...

#### VII./c

The Application of the Schumann Formula following a Change in the Ordinary Law Relevant in the Matter in View of the Legal Effect ex nunc of Constitutional Court Judgements

In view of the fact that at the time the Constitutional Court is deciding on a constitutional complaint the ordinary law which forms, or should form, the normative basis for the



ordinary court to adjudge the matter has already lost force and effect, or was amended or supplemented, and this in connection with § 67 para. 1 of Act No. 182/1993 Coll., as subsequently amended, as well as in view of the legal effects of a decision in a norm control proceeding (§ 70 para. 1 of the Act on the Constitutional Court - see Judgment No. Pl. US 31/96), it is no longer pen to the Constitutional Court to adjudge the constitutionality of ordinary law enactments in the sense of § 78 para. 2 of Act No. 182/1993 Coll., as subsequently amended.

For these reasons, it is no longer competent to concern itself with the constitutionality of the given statutory structure and respect that function which falls to it by virtue of § 78 para. 2 of Act No. 182/1993 Sb, in conjunction with Art. 87 para. 1, let. a), b) of the Constitution, for even from doctrinal safeguards, as they are expressed in the Schumann formula (E. Schumann, *Verfassungs- und Menschenrechtsbeschwerde gegen richterliche Entscheidungen*. Berlin 1963, p. 206 and following; V. Šimíček, *The Imperative of the Constitutionally Conforming Interpretation and Application of Legal Enactments*, *The Lawyer*, No. 12, 1999, pp. 1083-1084)

#### VII./d

#### Adjudication of the Constitutionality of the Interpretation, the Application, and the Nature of the Ordinary Law Relevant in the Matter

In view of its assertion that the ordinary courts did not, in their decisions contested in the constitutional complaint, overstep the bounds defined by ordinary law, the Constitutional Court considered whether the complainants have been affected in their fundamental rights or basic freedoms arising from the Charter or from treaties under Art. 10 of the Constitution due to an interpretation or application that is in conflict with the Constitution, or by the nature of the ordinary law.

#### The Constitutional Aspect of the Purpose of Identification

The first question which must be answered in this regard is whether the purpose contained in § 93 para. 2 and § 103 of the Criminal Procedure Code stands in competition with the protection of the basic right arising from Art. 10 para. 1 of the Charter.

In a number of its decisions, the Constitutional Court expressed the view according to which a conflict occurs at the constitutional level not only between basic rights and freedoms, but also between basic rights and freedoms and other constitutionally protected values. In this regard, it declared, in its judgment in the matter Pl. US 15/96, the following: “The constitutional principles concerning the status of the individual in society contain the protection of individual rights and freedoms, as well as the protection of public goods. The difference between them consists in their distributability. It is typical for public goods that their benefits are not divisible, so that people may not be excluded from the enjoyment of them. Public goods include, for example, national security, public order, and a healthy living environment. Certain aspects of human existence become public goods under the condition that it is not possible, conceptually, materially, or legally, to separate them into parts and allocate these parts as shares to individuals.” [For the concept of public goods in economic literature, see, e.g., P. A. Samuelson, W.

Nordhaus, Economics, Prague 1991, pp. 770-771, 982; in the legal literature, see, e.g., J. Raz, Right-Based Moralities, in: Theories of Rights, (Ed. J. Waldron), Oxford 1984, p. 187; R. Alexy, Recht, Vernunft, Diskurs, Studien zur Rechtsphilosophie, Frankfurt a. M. 1995, p. 239 and following] In contrast to public goods, it is a typical characteristic of basic rights and freedoms that they are capable of being distributed. Aspects of human existence, such as personal liberty, the freedom of expression, participation in political events and the right to vote connected therewith, the right to serve in public office, and the right to associate in political parties, can conceptually, substantively and legally be divided into parts and allocated to individuals. It is necessary, for the event of a conflict, to lay down the conditions under which, if fulfilled, one basic right or freedom takes priority, certain public estates on the fulfillment of other conditions. What is fundamental in this connection is the maxim according to which a fundamental right or freedom may be restricted only for the benefit of another fundamental right or basic freedom or of a public good.”

Proceeding from the above-given definitional perspectives for the constitutional law demarcation of protected public goods, among them belongs as well the endeavor to ensure internal peace in society, consisting in the proper discovery of criminal offenses and the just punishment of the perpetrators in a fair trial, which enters/is projected onto the constitutional plane in Art. 80 para. 1 and Art. 90 of the Constitution, Art. 39 and Art. 40 of the Charter. Evidentiary means, provided for in the Criminal Procedure Code, are also one of the partial instruments for attaining this public estate/patrimony (good), and among them are included recognition (or the identification of persons or things), which is laid down in § 93 para. 2 and § 103 of the Criminal Procedure Code (as amended as of 30 April 2000).

The Weighing of the Conflict between the Right to the Protection of Personhood and the Public Good in the Discovery of Criminal Acts and the Just Punishment of their Perpetrators The Constitutional Court considers that, from the constitutional law perspective, the key issue is whether, in the instant case, the relevant provisions of ordinary law satisfy the condition of statutory authorization for the restriction of the right to the protection of personhood pursuant to § 12 para. 2 of the Civil Code, in particular from the perspective of the collision of basic rights arising from Art. 10 of the Charter and the public purpose, which is the proper discovery of criminal offenses and the just punishment of the perpetrators within the framework of due process, which projects onto the constitutional plane through Art. 80 para. 1 and Art 90 of the Constitution and Art. 39 and Art. 40 of the Charter, onto the level of ordinary law through § 93 para. 2 and § 103 of the Criminal Procedure Code (as amended as of 30 April 2000).

The standard method by which the Constitutional Court adjudges a conflict of basic rights or freedoms, or their conflict with some other constitutionally protected value, is the method of proportionality. It has, in a number of its judgments (see in particular judgment in the matter Pl. US 4/94, Pl. US 15/96, Pl. US 16/98), adumbrated the structure of this method and its component parts.

In the matter under consideration, there can be no doubt that the condition of appropriateness (or the satisfaction of the connection between the means and the end) has been met, in other words that the institute of photo-identification is an effective



evidentiary means, thus is an institute enabling the attainment of a public estate (good), consisting in the proper discovery of criminal offenses and the just punishment of the perpetrators. Apart from that, photo-identification fulfills another purpose as well. In view of the fact that identification is one of the means of verifying that direct testimony is credible, it also fulfills the purpose of excluding innocent persons from suspicion, thus the purpose of protecting individual rights from being affected by unwarranted prosecution and conviction.

The second perspective of weighing is a comparison of the institute of identification in which, apart from the use of photographs of the suspect, use is also made of photographs of persons not involved in the proceeding, without their consent, with other possible ways of proceeding which would also enable the goals of identification to be achieved but without affecting the rights of personhood under Art. 10 para. 1 of the Charter in conjunction with § 12 para. 1 of the Civil Code.

In other words, from the given requirements flows, on a general plane, the maxim according to which the statutory authorization in the sense of § 12 para. 2 of the Civil Code can be considered as constitutionally conforming only in the case that the pursued official purpose cannot be attained while obtaining the consent of the affected person before using their pictures, that is, the acceptance of § 12 para. 2 of the Civil Code in relation to § 12 para. 1 of the Civil Code under the condition of subsidiarity.

The requirement of the subsidiarity of the means of proceeding by statutory authorization in relation to assessing the possibility of achieving the pursued official purpose by proceeding pursuant to § 12 para. 1 of the Civil Code is tied up with the fulfillment of at least one of the following conditions: the first is an empirical condition, that is the actual impossibility of securing such consent (or consents); the second is the condition in which the requesting of consent would make impossible, thwart, or not facilitate the accomplishment of the official purpose pursued by law and flowing from the Constitution.

As follows from the criminalistic function that photo identification plays in criminal proceedings, in contrast to identification in natura, it is generally carried out at the start of an investigation, or in the form of an exigent and unrepeatable task. It is thus invariably necessary that it be carried out in a speedy and efficient fashion. Under such circumstances, to require that the consent of uninvolved persons be obtained before the creation of comparison albums which include their photographs would genuinely undermine the carrying out of the identification and render it impossible to make use of it as evidence in the criminal proceeding.

It is nonetheless necessary to weigh the possibility of obtaining in advance the consent of uninvolved persons before placing their photographs in comparison albums, for the purpose of identification.

To assess the feasibility of this alternative does not depend on its being well-founded in constitutional law (as was the case, for example, in the matter PL. US 15/96, in which the statutory provision was annulled due to its violation of the requirement of necessity), rather on an assessment of the empirical impracticability of carrying it out. From the nature of the thing, however, the empirical confirmation of a hypothetical alternative is not amendable to proof, the objects of which are solely past occurrences. In such a

situation, the Constitutional Court is limited, in confirming or rejecting weighed alternatives, to inductive methods, that is, consideration by analogy, or consideration of comparative law. In this connection, the Constitutional Court has not found, in the field of criminal law, any analogous examples where the consent of the affected persons is obtained before a database of personal data or objects of a personal nature is created for the purposes of criminal proceedings. From a comparative perspective, it did not find a similar approach even in comparable European countries (FRG, Austria). On the contrary, the possibility of obtaining the consent of third persons in advance of including their photographs in a database to be used for the purpose of identification is considered “as illusory” in the expert literature (H. Artkämper, *Gegenüberstellungen - Erkenntnisquelle mit Kauteln*. *Kriminalistik*, 10, 1995, p. 648).

In view of the above, it can be affirmed that, from the view of the conflict between the basic rights arising from Art. 10 para. 1 of the Charter and the public estate (good) arising from Art. 80 para. 1 and Art. 90 of the Constitution, as well as Arts. 39 and 40 of the Charter, the ordinary law model under consideration also met the requirements tied in with the postulate of necessity.

The third component of the proportionality methodology is the comparison of the basic rights and freedoms that come into conflict with each other, or with public estates (goods).

In a democratic constitutional order, the attainment of the purpose of discovering criminal offenses and punishing their perpetrators in a criminal proceeding is generally tied up with a whole host of indispensable intrusions into the rights of personhood of persons other than the suspect, or the accused. An example is the entitlement to order an examination or an autopsy of a corpse or its exhumation (§ 115 Criminal Procedure Code) in relation to the rights of personhood under § 15 of the Civil Code, or the duty to testify (§ 97 Criminal Procedure Code) and, in this connection, even suffer questions relating to credibility, which, from the nature of the thing, oversteps the bounds protecting personhood under § 11 of the Civil Code. The institute of photo identification, under consideration in this matter, does not diverge from the framework of these generally accepted examples of conflict with the right of personhood.

From a comparative perspective, reference can also be made in this connection to the relevant case-law of the Federal Constitutional Court of the FRG which, in its judgment concerning the constitutionality of the Census Act (BVerfGE, 65, 1), laid down the criteria for the constitutional acceptability of the collection, storage, and use of personal data, or of objects of a personal nature, on the part of state bodies. It declared that restrictions on the right to informational self-determination are only admissible if an overriding general interest exists and that it must be laid down in a law which satisfies the constitutional requirements of definiteness and clarity, as well as additional requirements stemming from the proportionality principle. Further, it must contain the procedural steps which act against the threat that the right to the protection of personhood will be infringed.

The Czech Constitutional Court has made an analogous declaration that one of the components of the proportionality method (arising from Art. 4 para. 4 of the Charter) is the careful consideration of the possibility to minimize the restriction of one fundamental

right or freedom standing in conflict with another, or with a public good. In connection with the matter under consideration, the mentioned crucial circumstance must be found in the restriction supplied by the content (found in) § 11 of the Civil Code. In other words, the statutory authorization under § 12 para. 2 of the Civil Code represents an exception to § 12 para. 1 of the Civil Code but may not, in its content, represent the affecting of right under § 11 of the Civil Code.

From the perspective of this maxim, it can be declared that the model of ordinary law under review, as well as its interpretation and application in the instant case, honors the requirements flowing therefrom. The statutory authorization under § 12 para. 2 of the Civil Code, in conjunction with § 93 para. 2 and § 103 Criminal Procedure Code, § 4 of Act No. 75/1957 Coll., and § 2 para. 1 let. l) and § 45a of Act No. 283/1991 Coll. in no sense results in the rights of personhood stemming from § 11 of the Civil Code being affected in any way.

This stated conclusion does not diverge from the bounds of the existing standard in European democracies. In accepting the point of view laid down by the Federal Constitutional Court of the FRG in the matter of the Census Act's constitutionality (BVerfGE, 65, 1), the German Criminal Procedure Code allows for a similar approach (see §§ 483, 484 a 163), as does Land legislation (for example, § 39 of the Act of Lower Saxony on Protection from Danger), as well as the Act on Passports (§§ 21 and 22) and the Act on Personal Identity Cards (§ 2). The ordinary law in the Austrian Republic contains similar provisions according to which the approach under adjudication is admissible, for example § 64 of the Act on the Police, § 24 of the Criminal Procedure Code, as well as § 22 para. 3 of the Criminal Procedure Code in conjunction with § 53 para. 2 of the Act on the Police and also in conjunction with § 22a and 22b of the Act on Passports. In addition, the Constitutional Court of the Austrian Republic declared in two of its decisions in analogous cases (VfSlg. 5.089/1965 a VfSlg. 9.934/1984) that the creation of photographs in the course of an identification procedure does not constitute the violation of fundamental rights or freedoms (Art. 8 of the Basic State Law of Universal Civil Rights of 21 December 1867, which was superseded by the Constitutional Act of 29 November 1988 on the Protection of Personal Liberty).

From the viewpoint of the requirement that encroachment upon basic rights or freedoms be minimized while respecting the conditions of the proportionality principle, reference must be made to the fact that identification by means of photographs represents in intensity a lesser encroachment upon the rights of personhood than does identification in natura, it is thus a more moderate means (agreement in doctrine: H. Artkämper, *Gegenüberstellungen - Erkenntnisquelle mit Kauteln*. Kriminallistik, 10, 1995, p. 650; R. Riegel, *Wahllichtbildvorlage und informationelles Selbstbestimmungsrecht*. ZRP, 12, 1997, p. 477).

In the decided matter, the ordinary courts, in applying and interpreting the relevant ordinary law, also in view of its nature, did not diverge from the safeguards which the proportionality principle places upon them. In view of the above, that is in view of the conclusion that the ordinary courts, in interpreting and application of ordinary law in the decisions contested in the constitutional complaint, did not come into conflict with basic rights arising from the Charter or with treaties under Art. 10 of the Constitution, the

Constitutional Court rejected on the merits the petition to annul the 6 February 2001 judgment of the High Court in Prague file nos. 1 Co 291/2000 a 1 Co 293/2000.

These grounds of decision, in their entirety, have an impact as well on the adjudication of the complainant's petition for a judgment under § 82 para. 3 let. b) of Act No. 182/1993 Coll., as subsequently amended, as well as the petition for the issuance of provisional measures, thus the Constitutional Court rejected these on the merits as well.

## VIII.

### Obiter Dictum

It is a statutory condition for holding a photo identification that all comparison photographs must be of persons who are not involved in the criminal proceeding at issue. Thus, the use in a criminal proceeding of photographs of persons not involved therein for identification purposes does not result in their rights of personhood stemming from § 11 of the Civil Code (for example, the right to the protection of their honor and good name in connection with an unauthorized origination of suspicion of committing a criminal offense and its dissemination in public) being affected. Moreover, a photo identification is included in the court record, but this is not a public document and the opportunity to peruse it is restricted to a class of persons precisely defined by law (§ 65 of the Criminal Procedure Code).

As follows from the evidence taken in the proceeding before the Constitutional Court, it would be possible to find that an intrusion upon the complainants' rights of personhood had been committed by a person who in relation to the complainant expressed and disseminated information which connected the use of their photograph for an identification in a matter in which they were not involved, while designating them as suspects. In respect of determining the capacity to be sued in a proceeding on the protection of personhood, however, the Czech Republic is not a possible defendant.

**Notice: This judgment may not be appealed.**

Brno, 21 March 2002