2004/11/30 - PL. ÚS 15/04: DISCIPLINARY FINES

HEADNOTES

Disciplinary fines are a penalty for an offense. They are set by law, and intended as a preventive and also repressive measure by the state authority. They can be imposed discretionarily, so that a possible discriminatory effect in their being imposed on various subjects is not ruled out. Thus, they are generally decisions on a criminal charge under Art. 6 par. 1 of the Convention.
In terms of the existence of effective procedural guarantees or remedy, the existing wording of § 146 par. 2 of the Criminal Procedure Code suffers from a constitutional defect, which consists of the lack of a legal framework which meets the requirements of Art. 6 par. 1 of the Convention in relation to persons who received a disciplinary fine under § 66 of the Criminal Procedure Code in preliminary proceedings by a police body or Public Prosecutor.

The unconstitutionality of the existing §146 par. 2 of the Criminal Procedure Code appears especially marked in cases (analogous to the on which preceded the petition from panel IV of the Constitutional Court) in which a disciplinary fine is imposed after the preliminary proceedings have begun, but before criminal prosecution begins. The Constitutional Court states that given the possibility of beginning preliminary proceedings not by beginning criminal prosecution but by a police body writing a record in which it states the facts because of which it is starting criminal proceedings and how it learned of them (§ 158 par. 3 of the Criminal Procedure Code), from a constitutional viewpoint, the right of a police body to impose disciplinary fines – N.B., without the possibility of judicial review – in this segment of criminal proceedings can not stand under any circumstances.

CZECH REPUBLIC
CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of its Chairman JUDr. Pavel Rychetský and justice JUDr. Stanislav Balík, JUDr. František Duchoň, JUDr. Vojen Güttler, JUDr. Pavel Holländer, JUDr. Ivana Janů, JUDr. Dagmar Lastovecká, JUDr. Jiří Mucha, JUDr. Jan Musil, JUDr. Jiří Nykodým, JUDr. Miloslav Výborný, JUDr. Eliška Wagnerová a JUDr. Michaela Židlická, decided, on 30 November 2004, in the matter of a petition from panel IV of the Constitutional Court seeking the annulment of § 146 par. 2 of the Criminal Procedure Code, with the consent of the parties without ordering oral proceedings, as follows:

The provision of § 146 par. 2 of Act no. 141/1961 Coll., on Criminal Court Procedure (the Criminal Procedure Code), as amended by later regulations, is annulled as of 30 September 2005.

REASONING

By decision of 10 March 2004, file no. IV. ÚS 403/03, panel IV of the Constitutional Court (the "panel") suspended proceedings in the matter of a constitutional complaint from Ing. J. N., represented by JUDr. J. H., attorney. The complaint is aimed against a decision by the Public Prosecutor of the District Public Prosecutor's Office in Zlín of 25 June 2003, file no. Zn 2415/2003-5, and a decision of a body of the Police of the Czech Republic, Criminal Police and Investigation Service in Zlín, of 27 May 2003, ČTS: ORZL-1212/KPV-233-2003. The reason for the suspension was the fact that panel IV of the Constitutional Court, after reviewing all circumstances repeatedly and in detail, and in particular taking into account a number of decisions by the European Court of Human Rights, concluded that § 146 par. 2 of the Criminal Procedure Code is in its essence unconstitutional, and that this unconstitutionality can not be eliminated merely by interpretation or relying on a constitutionally consistent interpretation of it.

I.
Circumstances of the Case

The plaintiff was one of two registered executives of M., spol. s r.o., with its registered office in Z.

A body of the Police of the CR, District Headquarters Zlín, Criminal Police and Investigation Service, department of business crimes, (the "police body") by record 19 March 2003, ČTS: ORZL-1212/KPV-233-2003, on beginning actions in criminal proceedings under § 158 par. 3 of the Criminal Procedure Code, began investigating facts indicating that a crime defined in § 126 par. 2 of the Criminal Code had been committed. In the description of the event, the police body stated that as of 28 January 2003 the plaintiff, Ing. J. N., and Ing. H. N., although they were required to file a petition for bankruptcy as the statutory representatives of the company M., spol. s r.o., but did not do so, even though the company is over-indebted, has numerous creditors whom it has not been able to for a long time, and is insolvent under § 1 par. 2 of Act no. 328/1991 Coll., and by this conduct they caused damages in unpaid health insurance in the amount of CZK - 1,549,185 to the notifying party, Všeobecná zdravotní pojišťovna ČR, OP Zlín [the General Health Insurance Company of the CR, Zlín office].

By a notice to surrender a thing under § 78 par. 1 of the Criminal Procedure Code, dated 9 April 2003, the police body called on the plaintiff to surrender the company's complete accounting from 1 January 1999, no later than 11 April 2003 at 1 p.m.. At the same time,

it instructed the plaintiff that if he did not comply with the notice, he could be given a disciplinary fine under § 66 of the Criminal Procedure Code of up to CZK 50,000.

By decision of 27 May 2003, the police body imposed a fine on the plaintiff under 66 par. 1 of the Criminal Procedure Code, in the amount of CZK 20,000, on the grounds that, despite its notice under § 78 par. 1 of the Criminal Procedure Code, he did not turn over the requested accounting documents, and did not explain his conduct in any way, although he had promised to turn over the accounting documents in an explanation of 19 March 2003. By official letter of the same date, the plaintiff was again called on to surrender a thing under § 78 par. 1 of the Criminal Procedure Code, with the appropriate instructions.

On 17 June 2003 the plaintiff filed a complaint under 141 of the Criminal Procedure Code against the police body decision of 27 May 2003 imposing the disciplinary fine. In it he objected that he can not be required, like a suspect, to hand over to the police body materials which might lead to his conviction of a crime. He stated that he did not yet have the complete accounting at his disposal, and proposed that the decision be annulled.

By decision of the Public Prosecutor of the District Public Prosecutor's Office in Zlín of 25 June 2003, file no. Zn 2415/2003-5, the complaint was denied as groundless under § 148 par. 1 let. c) of the Criminal Procedure Code. In the reasoning of his decision, the Public Prosecutor said that the plaintiff did not respond to the previous notice in any way. The plaintiff's reference to the fundamental right against self-incrimination was considered groundless, because under § 78 par. 1 of the Criminal Procedure Code everyone, i.e. including a suspect, who has a thing which is important for criminal proceedings is required to surrender it. There is also no doubt that a company's accounting is important for evaluating whether or not the crime of violation of obligation in bankruptcy proceedings under § 126 par. 2 of the Criminal Code has been committed. Regarding the plaintiff's objection that the complete accounting was not yet available, the Public Prosecutor said that the plaintiff did not inform the police body of any problems with turning over the complete accounting. He pointed to Act no. 563/1991 Coll., on Accounting, as amended by later regulations, under which an accounting unit is required to record individual transactions on an on-going basis.

In response to the Constitutional Court's question, the police body stated that the plaintiff, on the basis of a repeated notice of 27 May 2003, delivered on 14 June 2003, voluntarily turned over the accounting of the company M., spol. s r.o., (according to the protocol on surrendering a thing of 21 July 2003) and it was returned to him on 12 September 2003.

The text of § 66 of the Criminal Procedure Code reads:
"Disciplinary fine
§ 66
(1) Anyone who, despite a previous reminder, cancels proceedings or behaves insultingly to a court, Public Prosecutor, or police body, or who without a sufficient excuse does not obey an order or does not comply with a notice which was given to him under this Act may

be given a fine of up to CZK 50,000 by the chairman of the court panel, or, in preliminary proceedings, by the Public Prosecutor or police body.
(2) If the conduct described in paragraph 1 is committed by a member of the armed forces or an armed unit on active duty, he may be handed over to the appropriate commander or leader for disciplinary punishment. If such conduct is committed by a person who is in custody or serving a prison sentence, he may be handed over to the prison director for disciplinary measures or punishment. The commander, leader, or director is required to inform the body active in the criminal proceedings about the outcome.
(3) If the conduct described in paragraph 1 is committed by a defense attorney or, in proceedings before a court, a Public Prosecutor, he shall be handed over to the appropriate body for disciplinary prosecution. That body is required to inform the body active in criminal proceedings about the outcome.
(4) A complaint may be filed against a decision under paragraphs 1 to 3, and it shall have suspensory effect."

II.
Arguments of Panel IV in the Decision to Suspend Proceedings

As regards the subject matter of the complaint, the panel concluded that the legally effective decision to impose a disciplinary fine in the amount of CZK 20,000 was, in view of its nature (financial penalty) and the seriousness of the impending consequence (a fine to a maximum of CZK 50,000), a decision on a criminal charge under Art. 6 par. 1 of the Convention for the Protection of Fundamental Rights and Freedoms (the "Convention"), even though the definition of the offense does not fall in the area of substantive criminal law, or the area of misdemeanors. The panel then concluded that in Art. 36 par. 1 and 2 of the Charter and Art. 6 par. 1 and Art. 13 of the Convention the plaintiff had, and has, a constitutionally guaranteed right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, regarding the grounds for a disciplinary penalty imposed on him.

As the European Court of Human Rights (the "ECHR") has said many times, article 6 par. 1 of the Convention guarantees everyone the right to have any complaint related to criminal charges against him reviewed by an independent and impartial tribunal. This provision thereby enshrines the "right to a court," where the right to access to a court, i.e. the right to initiate court proceedings, is only one of its aspects; of course, it is an aspect which de facto makes possible the enjoyment of other guarantees provided in Art. 6 par. 1 of the Convention. (Kreuz v. Poland, 2001, ECHR 3/2002).

Under Art. 13 of the Convention, "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." This article guarantees the existence of a remedy in domestic law, through which the rights and freedoms granted by the Convention can be exercised, however they are enshrined in the domestic law. Thus, a consequence of this provision is that it requires

a domestic remedy which authorizes the evaluation of a "defensible claim" ("grief defendable") based on the Convention and permitting adequate compensation to be made. The scope of the obligation imposed on states parties by Art. 13 of the Convention changes depending on the nature of the complaint. Nevertheless, the remedy required by Art. 13 of the Convention must be "effective" both in legal terms and in practice. However, the "effectiveness" of the "remedy" under Art. 13 does not depend on certainty of a positive outcome for the plaintiff (Čonka v. Belgium, 2002, ECHR 3/2002).

The panel believes that Art. 6 par. 1 of the Convention includes fundamental rights contained in the remaining cited articles of the Charter and the Convention; for that reason it subsequently cited only Art. 6 par. 1 of the Convention (see, e.g. ECHR decision in the matter Lauko v. Slovakia, 1998, paragraph 61.).

Procedural Remedies Provided by the Criminal Procedure Code
"§ 146
Proceedings Before a Body against Whose Decision a Complaint is Aimed
(1) The body against whose decision a complaint is aimed may grant the complaint itself, if the change of the original decision does not affect the rights of another party in the criminal proceedings. In the case of a decision by a police body which was issued with the prior consent of a Public Prosecutor or at his instruction, the police body may grant the complaint itself only with the prior consent of the Public Prosecutor.
(2) If the deadline for filing a complaint has already expired for all authorized persons and the complaint was not granted under paragraph 1, the matter shall be submitted for a decision:
a) by the police body to the Public Prosecutor who supervises the preliminary proceedings, and in the event of a complaint against a decision to which that Public Prosecutor consented or gave an instruction, through him to his superior Public Prosecutor,
b) by a Public Prosecutor to his superior Public Prosecutor or a court,
c) by the Chairman of a District Court panel to the Regional Court, the Chairman of a Regional Court panel to the superior High Court, and the Chairman of a High Court panel to the Supreme Court; if necessary, he shall give a copy of the complaint to the Public Prosecutor and to any person who could be directly affected by a decision on the complaint,
d) a Public Prosecutor in the Supreme Public Prosecutor's Office to the supreme Public Prosecutor."

In the panel's opinion, we can conclude the following from the foregoing legal regulation:
- A person who was given a disciplinary fine under § 66 of the Criminal Procedure Code by a panel chairman has at his disposal a remedy (a complaint) which is decided by a superior complaint court (a Regional Court, High Court, or the Supreme Court), always in a panel composed of three judges [§19 par. 2, §27, §31 par. 2 let. b) of Act no. 6/2002 Coll., as amended], that is, bodies which meet the criteria of an independent and impartial tribunal under Art. 6 par. 1 of the Convention. Thus, § 146 par. 2 of the Criminal Procedure Code ensures for these persons the ability to exercise their procedural right to judicial protection.

- A person who was given a disciplinary fine under § 66 of the Criminal Procedure Code in

preliminary proceedings by a police body or a Public Prosecutor also has a remedy (a complaint) at his disposal. However, in these case the complaint deciding body is not a court, but a Public Prosecutor who supervises the preliminary proceedings (if the fine was imposed by a police body), or a superior Public Prosecutor. However, in this case these complaint deciding bodies can not be considered to meet the criteria of an independent and impartial tribunal under Art. 6 par. 1 of the Convention. Thus, § 146 of the Criminal Procedure Code does not guarantee persons thus penalized an opportunity to exercise the constitutional procedural right to judicial protection enshrined in Art. 6 par. 1 of the Convention. Moreover, these persons are in a constitutionally unacceptable unequal procedural position in terms of exercising the fundamental right enshrined in Art. 6 par. 1 of the Convention, compared to persons who were given a disciplinary fine under § 66 of the Criminal Procedure Code by a panel chairman, which can be considered a violation of the equal rights enshrined in Art. 1 of the Charter.

The panel considers the cited § 146 par. 2 of the Criminal Procedure Code to be unconstitutional to that extent, for the reasons given above.

In the panel's opinion, in terms of a narrow view of the text of this constitutional act, there can be no objection to the existing legal framework in § 146 par. 2 of the Criminal Procedure Code, insofar as it provides that a complaint regarding a disciplinary fine shall be submitted by a police body to the Public Prosecutor supervising preliminary proceedings, or by a Public Prosecutor to his superior Public Prosecutor. It is up to the legislature how to regulate the procedural guarantees of the lawfulness of a decision to impose a disciplinary fine, or how many remedies it permits. However, from a wider viewpoint, in terms of the existence of effective procedural guarantees or remedies, the panel is forced to say that this provision suffers from a constitutional defect in the scope explained above, the essence of which lies in the absence of a legal framework which meets the requirements of Art. 6 par. 1 of the Convention.

As regards the unconstitutional gaps in the Act, the Senate pointed to an article by Vojtěch Šimíček, "Opomenutí zákonodárce jako porušení základních práv" [Legislative Omission as a Violation of Fundamental Rights] in the gazette "Deset let listiny základních práv a svobod v právním řádu České republiky a Slovenské republiky," [Ten Years of the Charter of Fundamental Rights and Freedoms in the Legal Order of the Czech Republic and the Slovak Republic] Brno 2001, and the case law of the German Constitutional Court cited therein, as well as to the Constitutional Court judgment in the matter file no. Pl. ÚS 36/01. In such cases, the German Constitutional Court, in the verdict of its decision, may only state that the existing legal framework violates Art. 6 par. 1 of the Convention by not permitting a particular group of persons to exercise their constitutional procedural rights.

However, in view of the need to correct the existing unconstitutional situation, the Senate is of the opinion that a mere statement that the relevant provisions of the Criminal Procedure Code are unconstitutional, in the sense that they contain unconstitutional gaps, will not suffice. In its opinion, § 146 par. 2 of the Criminal Procedure Code should be annulled, either entirely or only in part, and the legislature should be given an appropriate

time to make such amendments to Part One, Chapter Seven – The Complaint and Proceedings Thereon (§§ 141 - 150), of the Criminal Procedure Code, as would meet the requirements of Art. 6 par. 1 of the Convention.

If § 146 par. 2 of the Criminal Procedure Code were partly annulled, this would annul in let. a) the words "to the Public Prosecutor who supervises the preliminary proceedings, …in the event of a complaint against a decision to which that Public Prosecutor consented or gave an instruction, through him to his superior Public Prosecutor …," and in let. b) the words: "b)" and "...to his superior Public Prosecutor or …," and the entire letter d), so that § 146 par. 2 of the Criminal Procedure Code would then read: "(2) If the deadline for filing a complaint has already expired for all authorized persons and the complaint was not granted under paragraph 1, the matter shall be submitted for a decision:
a) by a police body or Public Prosecutor to a court,
c) by the Chairman of a District Court panel to the superior Regional Court, the Chairman of a Regional Court panel to the superior High Court, and a Chairman of a High Court panel to the Supreme court; if necessary, he shall give a copy of the complaint to the Public Prosecutor and to any person who could be directly affected by a decision on the complaint."

The Senate also stated that in its opinion the gap in the law can not be overcome by any supporting application of civil or administrative procedural regulations, in particular in view of their different purpose, the court jurisdiction provided in them, and the related principle contained in Art. 2 par. 2 of the Charter, under which the state authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law. It is evident that civil and administrative procedural regulations do not presume any judicial review of the lawfulness of disciplinary fines imposed in criminal proceedings, and thus do not presume any real influence by the civil or administrative courts on criminal proceedings.

Similarly, the possibility of review of a decision on a disciplinary fine by the Constitutional Court within proceedings on a constitutional complaint must be rejected. Otherwise, the Constitutional Court would find itself in the position of an appeals court, although it is not, and can not be, an appeals court in the general court system.

For all the foregoing reasons, the panel decided, under § 78 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, as amended, to suspend the proceedings and submit a petition to the Plenum of the Constitutional Court seeking full, or partial, annulment of § 146 par. 2 of the Criminal Procedure Code.

III.
Statements of the Parties and the Ministry of Justice

The statement submitted regarding the petition by the Chamber of Deputies of the Parliament of the Czech Republic on 27 April 2004, signed by its Chairman, PhDr. Lubomír Zaorálek, states that to evaluate this matter one must first consider the question whether Art. 6 par. 1 of the Convention applies to decision making on complaints against decisions. It describes how the concept of a "criminal charge" is understood in the case law of the European Court of Human Rights, e.g. in the matter Engel and others v. the Netherlands. It also points to the Constitutional Court judgment in the matter Pl. ÚS 28/98 (Collection of Decisions of the Constitutional Court, volume 16, p. 185 et seq.), in which the Constitutional Court concluded that in the legal order of the Czech Republic, fines are a penalty for an offense under Art. 6 par. 1 of the Convention. It also points to the fact that the Constitutional Court has already in the past considered a factually analogous case, and in its decision of 28 January 2003 in the matter II. ÚS 118/01 it stated that it found no grounds to evaluate the constitutionality of applied substantive and procedural law. In view of the case law of the ECHR and of the Constitutional Court, we must agree with the opinion that the Public Prosecutor is not a body which meets the criteria of an independent and impartial tribunal under Art. 6 par. 1 of the Convention. In conclusion, the statement said that the legislature acted in the belief that the statute was consistent with the Constitution, the constitutional order, and the legal order of the Czech Republic. It is up to the Constitutional Court to evaluate the constitutionality of this statute in connection with the petition and issue an appropriate decision.

The statement submitted regarding the petition by the Senate of the Parliament of the Czech Republic on 26 April 2004, signed by the Chairman of the Senate, Doc. JUDr. P. P., states that § 146 par. 2 has been part of the Criminal Procedure Code from the day the Code was passed by the National Assembly, i.e. 29 November1961. It has had no changes until the present day as regards the constitutional problem at issue. Several amendments of the provision have made only formal changes in the wording in relation to changes in the structure and names of individual bodies active in criminal proceedings. The Senate of the Parliament of the Czech Republic was created and began its constitutional functioning in December 1996. The Senate can not give the Constitutional Court a statement on the matter based on direct discussion and passing of the relevant Criminal Procedure Code provision, or the entire institution of proceedings on a complaint, because these legislative events took place before it was created.

In the time of the Senate's existence, this subject matter was affected only by the "large amendment" to the Criminal Procedure Code" (Act no. 265/2001 Coll.), which added to § 146 par. 2 the rule that a complaint against a decision by a Public Prosecutor in the Supreme Public Prosecutor's Office shall be decided by the Supreme Public Prosecutor, which means a certain confirmation of the criticized model, and expansion of § 146a, which provides a list of complaints against decisions by a Public Prosecutor or a police body in matters of securing persons and property which must be decided exclusively by a

court. In the Senate's discussion of the draft "large amendment" to the Criminal Procedure Code the issue of deciding on complaints was not discussed by name.

The statement filed at the request of the Constitutional Court by the Ministry of Justice on 22 April 2004, signed by the justice minister, JUDr. K. Č., states that in terms of the guarantees which should be provided in proceedings on imposing a disciplinary fine to the person being fined, the key concept is "criminal charge" under article 6 of the Convention. The ministry pointed to an article by JUDr. J. K. "K některým aspektům zásady ne bis in idem ve světle judikatury Evropského soudu pro lidská práva" ["On Certain Aspects of the ne bis in idem Principle in Light of the Case Law of the European Court of Human Rights"], Trestní právo [Criminal Law] 1/2004, p. 24, which cites the ECHR judgment in the matter Engel and others v. the Netherlands, and states that ECHR case law in this area is very casuist, and therefore it is not easy to determine to which proceedings on which offenses under domestic law the guarantees of article 6 of the Convention apply.

The ministry also pointed to the ECHR's recent decision on the admissibility of a complaint, T. J. v. The Slovak Republic, concerning imposing a disciplinary fine in criminal proceedings, the reasoning of which indicates that article 6 of the Convention does not apply to proceedings on imposing a disciplinary fine within criminal proceedings and that the guarantees provided in proceedings which decide on a criminal charge do not extend to proceedings on imposing a disciplinary fine. The ministry concluded from that decision that the regulation of proceedings on imposing a disciplinary fine and the regulation of proceedings on a complaint in the Criminal Procedure Code do not suffer from a constitutional deficit, and guarantee the parties sufficient rights. It proposed that § 146 par. 2 of the Criminal Procedure Code be left in its present form.

IV.

Constitutional Court Case Law Concerning Disciplinary Fines

The Constitutional Court has considered disciplinary fines in civil, administrative and criminal proceedings several times.

In its judgment file no. Pl. ÚS 28/98 (Collection of Decisions of the Constitutional Court, volume 16, judgment no. 161, p. 185, 2/2000 Coll.) the Court concluded that disciplinary fines imposed in administrative law and as part of inspection activities are, by there nature, generally capable of interfering in an individual's fundamental rights and freedoms depending on the amount of the fine and the possibility of being imposed repeatedly. They may be issued on a discretionary basis, so that a discriminatory effect in their imposition on various persons can not be ruled out. They are a penalty for an offense under Art. 6 par. 1 of the European Convention. They are provided by law, and intended as a preventive and repressive measure by the state power. Therefore, the amount of the fines must be balanced with the nature of crimes for which a monetary punishment can also be imposed. There are tens of such crimes in our Criminal Code, and they are related to the issues of

conducting certain legal processes and inspections (those similar in nature are, e.g., § 124a to 124c, § 125, § 129, § 145a, § 148a, § 169b, § 171, § 175, 176, § 255, and § 257a of the Criminal Code). Under § 53 of the Criminal Code, a monetary punishment consists of the obligation to pay the state from CZK 2 thousand to CZK 5 million. In these cases, the right to a fair trial is guaranteed. Thus, if the punishment for these crimes takes the form of a monetary punishment (often lower than a disciplinary fine) under Art. 6 par. 1 of the European Convention, there are no reasonable grounds why this could not be the case with disciplinary fines, where causation is often not even required.

Similarly, in its judgment file no. I. ÚS 211/99 (Collection of Decisions of the Constitutional Court, volume 20, no. 152) the Constitutional Court stated that disciplinary fines imposed in civil court proceedings are also capable of interfering in fundamental rights and freedoms, and the Constitutional Court therefore sees no rational and constitutionally acceptable reason for a different evaluation of disciplinary fines imposed within individual types of proceedings, all the more so because the purpose of civil court proceedings is to ensure just protection of the rights and authorized interests of the parties.

The Constitutional Court considered disciplinary fines imposed under § 66 of the Criminal Procedure Code in its judgment in the matter file no. IV. ÚS 13/99 (Collection of Decisions of the Constitutional Court, volume 15, no. 120). The Constitutional Court annulled a decision by an investigator of the Investigation Office of the CR and a decision by the District Public Prosecutor's Office which imposed a disciplinary fine of CZK 20,000 Kč on the plaintiff, a natural person, for not responding to a notice. The reason for cassation of these decisions was a finding that the plaintiff was not authorized to handle the required data, and that it was thus appropriate to impose a disciplinary fine on the company, and not its employee. The Constitutional Court panel did not consider the question of lack of judicial review.

Similarly, in its judgment in the matter file no. II. ÚS 118/01 (Collection of Decisions of the Constitutional Court, volume 29, no. 13) the Constitutional Court annulled a decision by the District Public Prosecutor and a decision by a police body imposing a disciplinary fine of CZK 15,000. The constitutional complaint was granted primarily because, for one thing, the criminal proceedings in that case did not progress to the point of preliminary proceedings, so that (under the then valid regulation of criminal proceedings) notice to surrender a cash book could not be given, and thus a disciplinary fine could not be imposed either, and for another because in that case the imposition of a disciplinary fine forced the plaintiff to cooperate in presenting evidence which could incriminate him. In this case as well, the Constitutional Court panel did not consider the issue of lack of judicial review.

In its decision in the matter file no. III. ÚS 315/03 the Constitutional Court rejected a constitutional complaint against a decision by the Police of the CR and a decision by a District Public Prosecutor's Office on a disciplinary fine of CZK 5,000 Kč imposed under § 66 of the Criminal Procedure Code, on the grounds that the steps taken by the public authorities were in accordance with the Criminal Procedure Code. The Constitutional Court panel did not consider the issue of lack of judicial review.

In all three of these cases the subject matter of the constitutional complaint was a legally effective decision imposing a disciplinary fine under § 66 of the Criminal Procedure Code. At the first level the decisions were made by a police body. Subsequent complaints were denied by a Public Prosecutor. All the cited constitutional complaints were addressed substantively by the Constitutional Court panels. Of course, none of the deciding panels of the Constitutional Court considered the issue where the existing law sufficiently provides the constitutional guarantees enshrined in Art. 6 of the Convention.

V.
ECHR Case Law Relating to Disciplinary Fines

The ECHR case law in evaluating this issue is considerably casuistic and non-uniform, as can be seen, e.g. in the ECHR decisions Engel and others v. the Netherlands, 1976, Ötztürk v. Germany, 1984, Weber v. Switzerland, 1990, Ravnsborg v. Sweden, 1994, Putz v. Austria, 1996, Lauko v. Slovakia, 1998, Jurík v. Slovakia, 2003.

The test which the ECHR applies when evaluating whether a particular penalty is "criminal" was formulated in the ECHR decision in the matter Engel and others v. the Netherlands, 1976. First of all, it is necessary to determine whether under the legal system of the state, the provision which defines an offense belongs in the area of criminal law, disciplinary law, or both simultaneously. Of course, this is only a starting point, and the facts thus acquired are of only formal and relative value. Of greater importance is the substance of the offense, but primarily the strictness of the penalty which can be imposed on the affected person. The ECHR takes these criteria into consideration when evaluating whether the plaintiff was subject to a "criminal charge" under Art. 6 par. 1 of the Convention.

However, one can conclude from these ECHR decisions that the test applied by the ECHR is not completely satisfactory, in particular when evaluating whether a particular disciplinary punishment provided in domestic law is a "criminal charge" under Art. 6 par. 1 of the Convention.

For example, in the matter Weber v. Switzerland, 1990, a court imposed a disciplinary fine on the plaintiff in the amount of 300 Swiss francs for violating the confidentiality of a criminal investigation. The ECHR concluded that the disciplinary fine imposed by a court was a criminal charge under Art. 6 par. 1 and 3 of the Convention.

In contrast, in the matter Ravnsborg v. Sweden, 1994, courts of various levels gave the plaintiff 3 disciplinary fines for inappropriate expressions in written submissions. The ECHR concluded that Art. 6 par. 1 of the Convention does not apply to these violations. It stated that the rules permitting a court to penalize improper conduct in proceedings before it are a common element of legal systems in the states parties. These rules and penalties are derived from the essential power of a court to ensure the proper and orderly conduct of court proceedings. Measures ordered by a court under such rules are more similar to the exercise of disciplinary authority than the imposition of punishment for causing a crime.

The reasoning of the ECHR decisions in the matters Jurík v. Slovakia, 2003 and the decision in the matter Putz v. Austria, 1996 (see below) are based on the same foundation as the Ravnsborg matter.

In 1985 the Austrian courts conducted criminal proceedings against Mr. Putz (in connection with bankruptcies). During proceedings at the Regional Court in Wels he was given two fines for disrupting court proceedings. He was given the third fine by the Appeals court in Linz. The plaintiff claimed, among other things, violation of Art. 6 and Art. 13 of the Convention, saying that he was not given a fair trial before an impartial tribunal or any effective remedy in terms of the decisions on disciplinary fines. The ECHR concluded that there was no violation of the Convention, which it justified primarily on the grounds that the provisions concerning disruption of court proceedings are not part of Austrian criminal law. As regards the nature of the offense, the rules permitting a court to punish improper conduct in proceedings before it are a common feature of the legal systems of the states parties. Such rules and penalties are derived from the court's own power to ensure the appropriate and disciplined conduct of its proceedings. The measures ordered by the courts under such rules are more similar to the exercise of disciplinary authority than imposing punishments for committing a crime. The ECHR concluded from this that the kind of unlawful conduct for which the plaintiff was fined falls outside the reach of article 6 of the Convention. As regards the nature and degree of severity of the penalty, the ECHR was of the opinion that what was at stake in that case was not sufficiently important to merit classification of the offense as a "crime."

Judge de Meyer filed a dissenting opinion in the last cited ECHR decision in the matter of Mr. Putz, particularly as regards the overly narrow interpretation of the term "criminal charge" contained in Art. 6 par. 1 of the Convention.

In his opinion, experience has shown that the test in the decision Engel and others v. the Netherlands, and the criteria applied in it, are not very satisfactory. The decision itself expressly states that the elements provided by the first criterion, i.e. classification of the offense in domestic law, "have only a formal and relative value." From that point of view, it should have been of no importance that "the fines imposed on Mr. Putz were based" not on the criminal code, but on the criminal procedure code, the law on courts, and the law on civil proceedings. None of that can justify an exception from the obligation to meet the principles of a fair trial.

The ECHR clarified the importance of the second criterion – the nature of the offense – in terms of distinguishing criminal law from procedural provisions, in the decision Weber v. Switzerland, 1990, where it stated that disciplinary fines are generally imposed to ensure that members of special groups observe special rules which govern their conduct (par. 33). As regards proceedings before courts, the ECHR said in the same decision that "the parties … only take part in the proceedings as people subject to the jurisdiction of the courts, and they therefore do not come within the disciplinary sphere of the judicial system." Therefore, in judge de Meyer's opinion, it is hard to understand, in what way the Ravnsborg and Putz cases (to which, in the opinion of the ECHR, article 6 of the Convention did not apply, because the measures applied against these two plaintiffs were "more akin to the exercise of disciplinary powers than to the imposition of a punishment

for commission of a criminal offence") (Ravnsborg, par. 33 and 34), can differ from the decision in Mr. Weber's case. Just like Mr. Weber, so Mr. Putz and Mr. Ravnsborg also did nothing more than "take part in the proceedings as people subject to the jurisdiction of the courts," and the provisions which were applied to them, just like those applied to Mr. Weber, "potentially affects the whole population."

Likewise, application of the third criterion, the degree of severity of the punishment which the affected person faces, led to different conclusions in these cases, which clearly shows that it is inadequate. The severity of a penalty may be taken into consideration in order to ascertain that it was fair, in particular in light of the proportionality principle, or to examine more closely the way in which it was imposed, or to determine if it requires there to be a remedy.

In conclusion judge de Meyer stated that any sanction imposed on someone on account of conduct for particular behavior which can be considered to be a deterrent is a "penalty" and accordingly, by its very "nature" comes within the criminal sphere. This must certainly be true of any pecuniary or custodial sanction. Such sanctions can only be imposed on someone by, or under the supervision of, a judicial authority that afford the person concerned the safeguards laid down more or less perfectly in Article 6 of the Convention. It is for the states to ensure this, under the supervision of the ECHR.

Nevertheless, in matters concerning, for example, discipline within the armed forces, or a code of conduct within a professional association, the judicial nature, independence and impartiality of the authority imposing the sanction do not necessarily have to be assessed in the same way as where a case is being tried under the ordinary criminal law. When exercising disciplinary powers, a hierarchical superior or a professional disciplinary council does not have to be regarded a priori as being a tribunal less independent or less impartial than an "ordinary" court or jury in relation to an offense under the ordinary law. However, at all events, in the fields covered by special sanction systems, as well as under the general criminal law, the trial must be a fair one. In order for it to be so, it is necessary, among other things, that the sanction should be reasonably proportionate to the offense, and that an adequate appeal against it should lie, if it exceeds a certainly threshold of severity.

The case of Mr. Putz came not so much within the field of maintaining order in proceedings as within that of challenging a judge, bringing an action against a judge for misuse of his authority, or disqualification on the ground of reasonable suspicion of bias. This aspect of the case, taken together with the fact that the applicant had no remedy against the decisions, led the judge to conclude that Mr. Putz did not have a fair trial. Because there were no remedies, in the judge's opinion there was also violation of Art. 13 of the Convention.

VI.
Evaluation by the Plenum of the Constitutional Court

After evaluating all the foregoing opinions and statements, the Plenum of the Constitutional Court concluded that the petition of panel IV to annul the entire § 146 par. 2 of the Criminal Procedure Code is justified.

The fact that the Plenum of the Constitutional Court considers disciplinary fines to be by their nature capable of interfering in fundamental rights and freedoms, depending on their amount and the possibility of being imposed repeatedly is clear from its judgment in the matter Pl. ÚS 28/98. The Constitutional Court found no grounds to diverge from the opinion stated in that case. Disciplinary fines are a penalty for an offense. They are set by law, and intended as a preventive and also repressive measure by the state authority. They can be imposed discretionarily, so that a possible discriminatory effect in their being imposed on various subjects is not ruled out. Thus, they are generally decisions on a criminal charge under Art. 6 par. 1 of the Convention.

We must also conclude from that statement that a person affected by a disciplinary fine must have at his disposal the constitutional procedural guarantees required in Art. 6 par. 1 of the Convention, under which "In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Therefore, the Plenum of the Constitutional Court accepted the foregoing opinion of panel IV, that, in terms of the existence of effective procedural guarantees or remedy, the existing wording of § 146 par. 2 of the Criminal Procedure Code suffers from a constitutional defect, which consists of the lack of a legal framework which meets the requirements of Art. 6 par. 1 of the Convention in relation to persons who received a disciplinary fine under § 66 of the Criminal Procedure Code in preliminary proceedings by a police body or Public Prosecutor. Thus, § 146 par. 2 of the Criminal Procedure Code does not guarantee persons thus affected the ability to exercise the constitutional procedural right to judicial protection enshrined in Art. 6 par. 1 of the Convention. Moreover, these persons are in a constitutionally unacceptable, unequal procedural position in terms of the practical exercise of the fundamental right enshrined in Art. 6 par. 1 of the Convention, in comparison with persons who were given a disciplinary fine under § 66 of the Criminal Procedure Code by the chairman of a court panel, which can be considered violation of the equal rights enshrined in Art. 1 of the Charter.

The unconstitutionality of the existing §146 par. 2 of the Criminal Procedure Code appears especially marked in cases (analogous to the on which preceded the petition from panel IV of the Constitutional Court) in which a disciplinary fine is imposed after the preliminary proceedings have begun, but before criminal prosecution begins. The Constitutional Court states that given the possibility of beginning preliminary proceedings not by beginning criminal prosecution but by a police body writing a record in which it states the facts because of which it is starting criminal proceedings and how it learned of them (§ 158 par. 3 of the Criminal Procedure Code), from a constitutional viewpoint, the right of a police body to impose disciplinary fines – N.B., without the possibility of judicial review – in this

segment of criminal proceedings can not stand under any circumstances. The question whether the possibility of beginning preliminary proceedings by a record by a police body is constitutionally parallel, but could not be addressed by the Constitutional Court in these proceedings, in view of the contents of the petition from panel IV of the Constitutional Court.

The majority opinion of the Plenum of the Constitutional Court did not incline to the possibility of annulling the contested § 146 par. 2 of the Criminal Procedure Code only in part, because by doing so it would - de facto in the role of a positive legislature – change the statutorily provided system of remedies against a decision to impose a disciplinary fine (or not only a fine) (not to mention the fact that these parts of § 146 par. 2 are not unconstitutional in and of themselves; what is unconstitutional is the gap in the law), although naturally an advantage of that approach would be the immediate correction of an unconstitutional statutory provision.

The unconstitutionality of § 146 par. 2 of the Criminal Procedure Code does not arise from analysis of that provision itself, but from the constitutional gap contained in it, which the Constitutional Court finds to exist. In view of the need to correct the existing unconstitutional situation, the Constitutional Court is of the opinion that a positive act by the legislature is necessary to remove the unconstitutional gaps in the law, which may be set in motion only by annulling an individual provision of the statute which contains the unconstitutional gap, in this case § 146 par. 2 of the Criminal Procedure Code, with the provision that the legislature will be given an appropriate time to make such amendments to Part One, Chapter Seven – Complaints and Proceedings on Them (§ 141 - 150) of the Criminal Procedure Code, as will meet the requirements of Art. 6 par. 1 of the Convention.

Thus, it will be up to the legislature, within the requirements of this judgment, to pass, in a timely manner, a constitutionally regulation for deciding on a remedy (remedies) against a decision by a police body or Public Prosecutor imposing a disciplinary fine under § 66 of the Criminal Procedure Code. This does not rule out passing a regulation which will leave the decision on such issues in the hands of the Public Prosecutor, whose decision may be followed by a court decision (which will establish three levels of decision-making) or whether – similarly as in the regulation of deciding on a complaint against a decision to secure persons and property (§ 146a of the Criminal Procedure Code) – it will regulate the power of a court to directly review decisions on fines.

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

Brno, 30 November 2004

Dissenting Opinion

of JUDr. Dagmar Lastovecká and JUDr. Jiří Nykodým

In terms of meeting Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), the requirements for proceedings on imposing disciplinary fines, must be drawn from their nature and purpose. Disciplinary fines imposed for a violation of obligations arising from substantive law, whose aim is to penalize the party who committed the violation of law, and disciplinary fines imposed within on-going proceedings, whose aim is to ensure that the aims of the proceedings are achieved, are of a different nature. Imposing a disciplinary fine under § 66 of the Criminal Procedure Code is a procedural measure, whose purpose is to establish order in the proceedings and thus ensure that the matter which is the subject of the proceedings will be publicly and fairly handled in an appropriate time by an independent and impartial court. Thus, a disciplinary fine under this provision can not be considered a criminal charge, as its main aim is to ensure that the aim of the proceedings is achieved, to primarily to punish a person who is impeding that aim. Taken ad absurdum, given the opposite interpretation it would be possible to consider any imposition of obligations by an authority which objectively led to interference in the sphere of interests of the addressee of a legal norm as a criminal charge. Likewise in the Constitutional Court judgment in the matter Pl. ÚS 28/98, which found that disciplinary fines are generally capable of interfering in constitutionally guaranteed rights, the subject for consideration was not fines imposed in the course of proceedings in progress, but disciplinary fines for violation of an obligation established in substantive administrative law.

Art. 6 par. 1 of the Convention requires that an independent and impartial court hear the subject matter of the proceedings (in the Convention's words, a "matter"), not every measure whose aim is to achieve that goal. The case law of the European Court of Human Rights does not provide clear, exact criteria for evaluating what can be considered a "criminal charge." Nevertheless, we can apply to the case reviewed by the Constitutional Court in these proceedings the conclusions from Ravnsbrog v. Sweden. There the European Court of Human Rights stated that imposed a measure on the basis of rules which ensure the proper and orderly conduct of trial proceedings is more akin to the exercise of disciplinary powers than to the imposition of a punishment.

If, based on the foregoing conclusions, disciplinary fines under § 66 of the Criminal Procedure Code can not be treated as criminal charges, it is also not necessary to fully apply the guarantees required from proceedings on criminal charges, as established in the Convention, to proceedings imposing disciplinary fines. In this situation, review under § 146 par. 2 of the Criminal Procedure Code can not be considered, insofar as it does not guarantee judicial review, can not be considered a constitutionally defective regulation.

Brno, 30 November 2004

Dissenting Opinion
of Judge JUDr. Eliška Wagnerová, Ph. D.

I disagree with the majority opinion in this judgment for several reasons, which must be treated in a certain logical sequence, which I will attempt below.

I. The Panel's Authorization for the Petition

1.The petition to annul § 146 par. 2 of the Criminal Procedure Code was submitted to the Plenum by panel IV of the Constitutional Court, in its former, no longer existing composition, in connection with addressing the constitutional complaint of ing. J. N. The matter then involved the initiation (strictly speaking such cases do not involve a petition, because it is not possible to dispose with a petition submitted to the Plenum – see decision Pl. ÚS 12/94 of 20 February 1995) of proceedings on specific review of norms, i.e. proceedings which are initiated by the court which submits the matter in relation to resolving a specific case, and in this case that court was a panel of the Constitutional Court.

In one of its previous decisions (Pl. ÚS 33/04) the Constitutional Court said: "that, unlike an abstract review of constitutionality, specific review of constitutionality of a statute is conducted within a narrow framework of judicial decision-making. The Constitutional Court may enter into it only under strictly defined conditions, and only in one way – by a decision on the constitutionality of the law which is to be applied in resolving the matter."

In another decision (Pl. ÚS 39/2000) the Constitutional Court said: "under Art. 95 par. 2 of the Constitution, on which the petition is based, if a court concludes that the statute which is to be applied in resolving the matter is inconsistent with a constitutional act, it shall submit the matter to the Constitutional Court. Thus, the key question is how to view the requirement that this must be a law 'which is to be applied in addressing the matter.' There is no doubt that this requirement is always met in the case of a statute or an individual provision which is to be applied directly, and is thus to be applied when deciding the matter itself, thus, in criminal proceedings, in particular when deciding on guilt and punishment. This intention of the framers of the constitution and the legislature can also be drawn from § 224 par. 5 of the Criminal Procedure Code, which regulates the suspension of proceedings in clear connection to a statute which is decisive for deciding on guilt and punishment. In other words, in order for the court to cast doubt on the constitutionality of a procedural regulation, it is necessary that its application be unavoidable, not merely hypothetical, or in some other wider context."

It is true that the initiators of proceedings in both the cited cases were general courts, not a panel of the Constitutional Court. However, I believe that the conclusions given in these decisions are also fully applicable for the initiation of proceedings by a panel of the Constitutional Court. I am led to this conclusion by the same statement of the relevant condition for submitting a petition to annul a statute or individual provisions thereof to the

Plenum of the Constitutional Court both by a panel of the Constitutional Court [§ 64 par. 1 let. c) of the Act on the Constitutional Court], an by a general court (§ 64 par. 3 of the Act on the Constitutional Court). That condition is "connection with the decision-making." A difference in these two provisions can be found only in the description of the procedural means about which proceedings are being conducted, i.e. a constitutional complaint before the Constitutional Court or various types of proceedings before the general courts, in which the submitted matter is being handled.

The second reason which leads me to my conclusion is, of course, even more important and specific to a petition to open proceedings to review a norm by the Constitutional Court itself. This construction is tied to a problem of concentration of power. While there is a general rule that the Constitutional Court may conduct proceedings to review a norm only upon instigation coming from outside (in the case of specific review of norms, coming from general courts), in the case of a petition from a panel of the Constitutional Court this is an exception which must be interpreted very narrowly, in view of the danger arising from concentration of power in the hands of the Constitutional Court.

It also can not be overlooked that this construction places the judges of the Constitutional Court whose petition initiates the proceedings in the position of someone who then also decides on his own petition in the Plenum; moreover, that decision is then important for a decision on the constitutional complaint by the panel.

From a comparative viewpoint, the inspiration for this unusual solution was apparently Austrian; other traditionally democratic countries do not have a similar arrangement. However, the Austrian regulation (Art. 140 par. 3 of the Austrian Constitution) also strictly limits the scope of annulled provisions, either to a petition from a general court, or to actual application of a particular legal norm by the Constitutional Court itself.

2. The matter addressed by the judgment was based in a constitutional complaint in which the plaintiff sought annulment of a decision by a District Public Prosecutor and a decision by a police body. They both drew their substantive and official authority to decide from a framework defined only by § 146 par. 2 let. a) of the Criminal Procedure Code, of course from provisions of the Criminal Procedure Code other than those submitted to the Plenum by the panel. Thus, it is quire evident that if the judgment annuls the entire provision of § 146 par. 2, the decision can not stand, if only because the provision was proposed to be annulled by an entity (the panel of the Constitutional Court), which was not authorized to do so, because, simply speaking, the entire annulled provision simply can not be applied at once, and, of course, it was not applied; the part in let. a), as mentioned above, can be separated from the rest.

3. However, in my opinion, the previous panel IV of the Constitutional Court also was not authorized to file a petition to annul § 146 of the Criminal Procedure Code, even though it was submitted by the panel only in the scope actually applied [par. 2 let. a)]. This is because the judgment states in point V, among other things, that "given the possibility of beginning preliminary proceedings not by beginning criminal prosecution but by a police body writing a record in which it states the facts because of which it is starting criminal proceedings and how it learned of them (§ 158 par. 3 of the Criminal Procedure Code), from a constitutional viewpoint, the right of a police body to impose disciplinary fines – nota bene, without the possibility of judicial review – in this segment of criminal

proceedings can not stand under any circumstances." The phrase "N.B., without the possibility of judicial review" certainly can not be interpreted to the effect that the police body would have this possibility if there were judicial review. Thus, if I understand this sentence correctly, then I can not, of course, even in the abovementioned limited scope, agree with the authorization of panel IV to submit the matter to the Plenum. Such review is inconsistent with the principle, heretofore fairly thoroughly applied by the Constitutional Court, of minimizing interference in the activities of other constitutional bodies, which was always grounds for giving priority to a constitutional interpretation of a disputed norm over annulling it.

4. More as obiter dictum and without applicability in the present case for the reasons given above, I add, that even if a limited review of the contested provision's constitutionality came into consideration, it would be appropriate to think not of annulling part of the provision, but of an "additional" verdict, in which the Constitutional Court would state that § 146 par. 2 let. a) of the Criminal Procedure Code was unconstitutional in so far as it does not foresee judicial review of a decision by Public Prosecutor. Such a decision, although the Act on the Constitutional Court does not expressly foresee that form, would certainly be a much lesser violation of the constitutional principle arising from the requirement of a material law based state (Art. 1 par. 1 of the Constitution of the CR) consisting in minimization of interference by the Constitutional Court in the activities of other constitutional authorities. It would thus be a thorough application of the principle of self-limitation by the Constitutional Court, which would, by such a verdict, give Parliament an opportunity to pass a constitutional regulation without having part of the statute annulled by decision of the Constitutional Court. That approach, also not foreseen by the relevant laws, but motivated by the foregoing principles and considerations, is taken by, for example, the Italian constitutional court.

II. Fruit from a Poisoned Tree

1. I primarily believe, however, that the petition from panel IVof the Constitutional Court to annul § 146 par. 2 for lack of judicial review of decisions by Public Prosecutors is flawed because it tries to achieve constitutional conformity of "fruit from a poisoned tree." The primary problem defined by the constitutional complaint is that the police body gave the plaintiff a fine because he refused to surrender a thing (accounting) which could lead, or at least contribute, to his being subsequently criminally charged. In other words, the threat of a financial penalty was used to require self-incrimination, or cooperation with the state, represented by the police body, so that the police body could more easily investigate a suspicion that a crime was committed.

The problem described arose because the amendment to the Criminal Procedure Code implemented by Act no. 265/2001 Coll. quietly and without naming it, returned to the code the institution of "opening criminal prosecution in a matter" (§ 158 par. 3 and § 12 par. 10 of the Criminal Procedure Code). This old-new institution, which was quite correctly removed from the Criminal Procedure Code as of 1 January 1994, is connected to, among other things, the possibility of imposing fines for not obeying a demand from a police body, for example, to surrender a thing (§ 66 par. 1 and § 78 par. 1 of the Criminal Procedure Code). Now evidence obtained before opening criminal prosecution (of a particular person) by making a record entry need not be repeated after opening criminal

proceedings, and the cooperation of the next possible defendant can be forced by high fines. The unconstitutionality of this construction is quite evident (I will give the reasons below) and in my eyes no judicial review can mend this fundamental shortcoming. This construction is the poisoned tree which it would be appropriate to consider removing.

2. The case of the possibility for a police body to demand surrender of a thing under threat of a fine, involves chaining interference in fundamental rights, and therefore we must consider whether the law (the Criminal Procedure Code) which foresees this possibility is pursuing a legitimate aim.

A demand by a police body to surrender a thing is always interference in the plaintiff's fundamental right to privacy; if the thing requested has material value, there is also potentially interference in his property rights. The reason for such interference is the public interest in clarifying facts which suggest that a crime has been committed by someone who has not yet been accused of it. The demand to surrender a thing, if it were not accompanied by the threat of a fine, would certainly not be unconstitutional.

However, the situation is different if the current construction of a demand to surrender a thing is accompanied by the threat of a high fine. Such a construction can not be acknowledged as constitutional, because the fine itself interferes in the fundamental right of the person in question to own property without interference. In doing so, it can cause this interference into property rights, forcing entry into the private sphere of the summoned person, e.g., as in this case, regardless of the consequences which the summoned person can bring on himself by acceding to the demand. In my opinion, the aim of this statutory construction can not simply be identified with the public interest cited above. I see the real aim in easing the work of the police when clarifying crimes before charging a specific person, by the use of inadequate means which excessively interfere in the fundamental rights of the summoned persons. In my opinion such an aim lacks legitimacy.

In any case, it is no accident that traditional democratic states do not have a regulation similar to the Czech one – i.e. one under which a police body could, under the threat of a fine, force entry into the privacy of persons before charging a specific person with the commission of a specific crime. In my opinion, through the passing of the contested construction the Criminal Procedure Code inadmissibly expanded the phase of criminal proceedings where a certain degree of state compulsion is typical and certainly legitimate by the segment which runs from the writing up of a record of starting actions in criminal proceedings to the beginning of criminal prosecution of a specific person. However, by its nature and contents this segment belongs in the Act on the Police, with its limitations on opportunities for repression. Of course, a mere formal shift of material characterized by its content into the Criminal Procedure code can not approve interference which is fundamental possible only in connection with criminal prosecution.

Brno, 30 November 2004

Dissenting Opinion

of Judge JUDr.PhDr. Stanislav Balík

Panel IV of the Constitutional Court finds § 146 par. 2 of the Criminal Procedure Code to be unconstitutional in that a Public Prosecutor decides on a complaint against a decision by a police body imposing a disciplinary fine under § 66 of the Criminal Procedure Code. However, in my opinion it is not appropriate to annul the entire § 146 par. 2 of the Criminal Procedure Code on those grounds, because in cases of complaints against decisions by other bodies active in criminal proceedings under § 146 par. 2 let. b), c) a complaint is submitted to a court for a decision. Thus, annulling the entire § 146 par. 2 of the Criminal Procedure Code also annuls a part of the provision which is constitutional.

Although the grounds were given in the petition to annul § 146 par. 2 of the Criminal Procedure Code in relation to a disciplinary fine under § 66 of the Criminal Procedure Code, the annulment will also affect complaints against decisions other than those only about disciplinary fines. Moreover, annulling the entire § 146 par. 2 of the Criminal Procedure Code is interference not in the fact-finding phase of imposing a fine, but in the phase of deciding on an appeal, i.e. a complaint. Thus, granting the petition to annul the entire § 146 par. 2 of the Criminal Procedure Code does not fully respect the principle of minimizing interference.

There was also – as stated on p. 7 of the judgment – the alternative of annulling part of § 146 par. 2 of the Criminal Procedure Code, as a consequence of which all complaints against decision by a police body or Public Prosecutor would be decided by a court. If criminal charges under Art. 6 par. 1 and Art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms are to be decided by an independent and impartial tribunal established by law, then in the Czech legal order, after the annulment of the authority of Public Prosecutor's offices, de lege lata that can not be a body other than a court. In that situation, the existing legal framework provided by § 146 par. 2 of the Criminal Procedure Code is not a gap in the law, but a special, unconstitutional regulation, under which authority was entrusted to a body which does not fully meet the abovementioned attributes of being an independent and impartial tribunal established by law. I would not consider annulment of this unconstitutional regulation to be activism, because by annulling only part of § 146 par. 2 of the Criminal Procedure Code the remaining, non-annulled part, and non-annulled text would remain consistent with the Convention for the Protection of Human Rights and Fundamental Freedoms, which is part of the legal order of the Czech Republic.

Therefore, I voted against the petition to annul the entire § 146 par. 2 of the Criminal Procedure Code, in particular because:

- it did not take into account the wider context of the issue of authority to impose disciplinary fines in the fact-finding and complaint phase, in particular in relation to § 66 of the Criminal Procedure Code,

- it led to annulment of that part of § 146 par. 2 of the Criminal Procedure Code which, in view of the decision-making authority of the court, is constitutional,

- it is interference not only in the area of disciplinary fines imposed under § 66 of the Criminal Procedure Code, but – without justification being provided in this regard – also in the authority of proceedings on complaints against decisions in matters other than the imposition of a disciplinary fine,

- it was based on the conception of a gap in the legal order which, in my opinion, in view of Art. 6 par. 1 and Art. 13 of the Convention for the Protection of human Rights and Fundamental Freedoms, does not exist.

Brno, 30 November 2004