2001/10/31 - PL. ÚS 15/01: PRINCIPLE OF EQUAL WEAPONS

HEADNOTES

1) The constitutional principles forming one of the components of the fundamental right to a fair trial, include the principle of "equal weapons", or the principle of equal opportunity (or the principle of equality of parties to proceedings) under Art. 37 para. 3 of the Charter, Art. 96 para. 1 of the Constitution a Art. 6 para. 1 of the Convention. This principle becomes especially important in criminal proceedings, where, in relation to the defendant, it is closely tied to the right to defend one's self, with the right to present factual and legal arguments, and with the right to respond to all evidence admitted. The principle of equality of the parties to criminal proceedings, apart from the function of protecting the position of the defendant, who is entitled to a presumption of innocence, is also part of the overall concept of a democratic criminal trial, characterized by the principle of adversarial proceedings.

The principle of "equal weapons" in criminal proceedings is reflected in all stages of criminal proceedings, as well as in all their aspects. Thus, it is applied both in trial proceedings and in review proceedings, in the full scope of both, but particularly in evidentiary proceedings (in proposing evidence, the right to respond to admitted evidence, and so on). The principle of "equal weapons" in criminal proceedings is not absolute; generally the maxim applies that the state, in any context, is not entitled to more rights or a more advantageous procedural position than the defendant [cf. e.g. the time limitation on the state attorney's authorization to file a petition to re-open proceedings to the detriment of the defendant under § 279 let. a) of the Criminal Procedure Code].

Unlike all other remedial measures provided by the Criminal Procedure Code, only the complaint for violation of the law can be used by only one party – the state. If the state, as a party in criminal proceedings (it can not be considered decisive, which state body is entitled to act in the name of the state at which stage of criminal proceedings), has at its disposal, compared to the defendant, an additional procedural means, which establishes the possibility of obtaining annulment of a decision in a criminal matter which has gone into effect, one can not but conclude from this that there is infringement of the defendant's right to "equal weapons" in a criminal trial, arising from Art. 37 para. 3 of the Charter, Art. 96 para. 1 of the Constitution and Art. 6 para. 1 of the Convention.

The relevance of the charge of failure to accept the principle of "equal weapons" appears even more pressing in cases of possible application of a complaint for violation of the law to the detriment of the defendant against decisions of bodies active in preliminary proceedings (e.g., against decisions by the investigator or state attorney to stop criminal prosecution). The leading principles of criminal proceedings in a state governed by the rule of law, ever since the age of enlightenment, include the accusation principle (§ 2 para. 8 of the Criminal Procedure Code), which overcame and replaced the inquisition principle in criminal trials. Under the accusation principle, institutional division among different procedural entities of the procedural functions of

preparing and filing an accusation, and deciding on guilt and punishment is an essential part of the democratic criminal trial, respecting the value of independent judicial decision making. From a constitutional viewpoint this principle arises from Art. 80 para. 1, Art. 90 of the Constitution and Art. 40 para. 1 of the Charter.

2) In the settled opinion of the Constitutional Court, the Court is bound in its decision making by the scope of the filed petition, and may not step outside its limits (ultra petitum) in its decision (see e.g., the judgment in the matter under file no. Pl. US 8/95).

In a situation where, as a result of the annulment of a particular statutory provision by a derogative judgment of the Constitutional Court another provision, different in content from the first one, loses reasonable meaning, i.e. loses the justification of its normative existence, this is grounds for annulling this statutory provision as well, even without this being a step ultra petitum. That provision ceases to be valid on the basis of the principle of cessante ratione legis cessat lex ipsa; the derogation made by the Constitutional Court is thus only of an evidentiary, technical nature.

3) If, on the basis of a legal regulation which was annulled, a court issued a verdict in criminal proceedings which went into effect but has not yet been executed, annulment of that legal regulation is, under the cited statutory provision, grounds for re-opening proceedings under the Act on Criminal Court Proceedings. However, the adjudicated matter does not involve such grounds. Violation of the principle of "equal weapons" in the legal regulation of active standing to file an extraordinary remedial measure does not concern the constitutionality, or lawfulness of actual proceedings before the Supreme Court, or proceedings connected to them. Thus, annulment of § 272 of the Criminal Procedure Code does not establish grounds for re-opening proceedings under § 71 para. 1 of Act No. 182/1993 Coll., as amended by later regulations.

4) In the area of intertemporality in civil and criminal trials, the principle applies that, unless the law provides otherwise, the court proceeds according to the procedural regulations valid and effective at the time of decision making. In the adjudicated matter, annulling § 272 of the Criminal Procedure Code annuls only the cassation and appellate authority of the Supreme Court in proceedings on a complaint for violation of the law filed to the detriment of the defendant, but does not annul the proceedings as such, i.e. it does not annul the possibility of issuing an academic verdict in a given matter for the purpose of unifying case law pro futuro (§ 268 para. 2 of the Criminal Procedure Code). This indicates that, in cases where the Minister of Justice filed a complaint for violation of the law to the detriment of the defendant, but as of the day the annulling judgment went into effect, the Supreme Court had not decided on it, after the derogative judgment of the Constitutional Court goes into effect, only a decision by an academic verdict can be made.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, after a hearing on 31 October 2001, with the participation of a secondary party, the Supreme Court, decided in the matter of a petition from Panel III of the Constitutional Court, filed under § 78 para. 2 of Act No. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, to annul § 272 of Act No. 141/1961 Coll., the Criminal Procedure Code, as amended by later regulations, as follows:

The provisions of § 272 and § 276 fourth sentence of Act No. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations, are annulled as of 31 December 2001.

REASONING

I.

By constitutional complaint filed for delivery to the Constitutional Court on 2 August 2000, the complainant E. Č., seeks annulment of the Plzeň Regional Court decision of 16 June 2000, file no. 8 To 237/2000, and the Rokycany District Court decision of 22 April 1999, file no. 1 T 69/97, which found her guilty of the crime of false accusation under § 174 para. 1 of the Criminal Code and was sentenced to a fine. She feels that these decisions have affected her fundamental right to inviolability of a dwelling and her fundamental right to a fair trial, arising under Art. 12 and Art. 36 of the Charter of Fundamental Rights and Freedoms (the "Charter").

The following facts were determined from Rokycany District Court file no. 1 T 69/97, which the Constitutional Court requisitioned:

By Rokycany District Court decision of 22 April 1999, file no. 1 T 69/97-17, the complainant was found guilty of the crime of false accusation under § 174 para. 1 of the Criminal Code, and under the same provision she was sentenced to a fine of CZK 11,000 with an alternative sentence of 3 months in prison and was also sentenced to forfeiture of a thing – the amount of CZK 1,500. She was alleged to have committed the crime by falsely accusing a police officer of taking a bribe, in a letter sent to the Police of the Czech Republic.

In response to the complainant's appeal, the Plzeň Regional Court, by decision of 18 August 1999, file no. 8 To 217/99, annulled the decision of the first-level court under § 258 para. 1 let. a), b) and c) of the Criminal Procedure Code, and under § 260 of the Criminal Procedure Code returned the matter to the prosecutor to complete investigation. The Regional Court justified its decision by defects in the home search conducted in the complainant's home, during which evidentiary material was obtained, and which suffered from several defects. These, in the court's opinion, consisted of not questioning the person whose home was to be searched (§ 84 of the Criminal Procedure Code) and of not stated specific reasons which led to the procedure; the appeals court also found that the protocol on conduct of the home search was insufficiently specific about which things were handed over voluntarily and which things were taken (§ 85 para. 3 of the Criminal Procedure Code). For all the cited reasons, the Plzeň Regional Court did not consider the evidentiary material to have been obtained lawfully. If, after the home search, the complainant and her defense counsel confirmed the voluntary handing over of the evidentiary material under § 78 para. 1 of the Criminal Procedure Code (the material which had been previously obtained during the home search), in the court's opinion, this led to handing over of a thing which the complainant (thus accused in the criminal proceedings), at the time of handing over, did not have in her control, due to which, even if these things were returned to the complainant in a procedurally non-defective manner, this procedure could not cure the previous unlawful obtaining of a thing which was important for the criminal proceedings. Thus, this would be circumvention of the law, taking advantage of a situation which was created by illegal conduct, i.e. the illegal home search.

The Minister of Justice filed a complaint for violation of the law against the Plzeň Regional Court decision, to the detriment of the defendant (the complainant in proceedings before the Constitutional Court). He claimed that the contested decision violated the law in § 254 para. 1, § 258 para. 1 let. a), b) and c) and § 260 of the Criminal Procedure Code, to the benefit of the defendant. In his complaint, the Minister of Justice concludes that the defects in the protocol keeping and the conduct of the home search, as stated by the Regional Court, were not of such a nature as could lead to a conclusion that the home search was being conducted illegally and, as a result, the evidence obtained during that home search was obtained illegally.

On the basis of the complaint for violation of the law, the Supreme Court, in its decision of 29 March 2000, file no. 5 Tz 35/2000, decided, under § 268 para. 2, § 269 para. 2 and § 270 para. 1 of the Criminal Procedure Code, and with fulfillment of conditions under § 272 of the Criminal Procedure Code, that the decision of the Plzeň Regional Court of 18 August 1999, file no. 8 To 217/99, now in effect, violated the law in § 254 para. 1, § 258 para. 1 let. a), b) and c) and § 260 of the Criminal Procedure Code, to the benefit of the defendant E. Č. (the complainant in proceedings before the Constitutional Court), annulled the decision, and ordered the Plzeň Regional Court, as the appeals court to review the matter again in the necessary scope and decide again. In the reasoning of its decision, the Supreme Court basically endorsed the opinion of the Minister of Justice when it said that certain shortcomings did occur in the procedure during protocol keeping of the conduct and results of the home search, but that these are only of a formal nature and can be overcome taking into account the rest of the content of the criminal file, and so these defects, in his opinion, are not of such a nature as to justifiably lead to a conclusion that

the home search was conducted illegally and, as a result, the evidence obtained during that home search was obtained illegally.

Subsequently, the Plzeň Regional Court, by its decision of 16 June 2000, file no. 8 To 237/2000, denied the complainant's appeal against the Rokycany District Court decision of 22 April 1999, file no. 1 T 69/97.

The constitutional complaint points, in particular, to violation of the conditions prescribed for conducting a home search in § 84 of the Criminal Procedure Code, and in that regard it argues with the Supreme Court's opinion concerning its interpretation. The complainant believes that the illegal conduct of the home search impinges on her fundamental right to inviolability of a dwelling under Art. 12 of the Charter, and believes that the fact that the guilty verdict in the criminal matter was, as the complainant believes, based on acceptance of illegally obtained evidence impinges on her fundamental right to a fair trial under Art. 36 of the Charter.

II.

On 26 April 2001, Panel III of the Constitutional Court, without a hearing and without the parties being present, by its decision interrupted the proceedings on the constitutional complaint in the matter under file no. III. US 464/2000 and submitted to the Plenum of the Constitutional Court, for its decision, a petition to annul § 272 of Act No. 141/1961 Coll., the Criminal Procedure Code, as amended by later regulations.

III.

Under § 42 para. 3 and § 69 of Act No. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the Constitutional Court sent the petition to the Chamber of Deputies. In his position statement of 4 July 2001 the chairman of the Chamber of Deputies of the Parliament of the Czech Republic, prof. Ing. Václav Klaus, CSc., in the introduction clarifies the circumstances surrounding the passing of the legal regulation in question. He states that the institution of a complaint for violation of the law was introduced in our legal system in 1950, and was later also transferred to other criminal procedure codes, include the one currently in effect, Act No. 141/1961 Coll. The chairman of the Chamber of Deputies also points out that, since 1990, objections have been raised to this institution, primarily in the expert literature; these objections were practically identical with the arguments in the petition of Panel III of the Constitutional Court. Taking into account the content of this institution, he basically acknowledges in the position statement, that it is not completely consistent with the principle of equality of parties in criminal proceedings under Art. 37 para. 3 of the Charter, as a complaint for violation of the law can be filed only by the Minister of Justice and not by the other party in the criminal proceedings, i.e. the defendant. It is further pointed out that this problem was repeatedly evaluated in the previous amendments to the Criminal Procedure Code, and at present, for reasons including this one, another amendment has introduced a new extraordinary corrective measure – appeal on a point of law, which is to guarantee equality of the parties to

criminal proceedings, and which, with effect as of 1 January 2002, is to virtually completely replace the complaint for violation of the law, including § 272. However, the amendment does not propose annulling the actual institution of a complaint for violation of the law because, in the opinion of the chairman of the Chamber of Deputies, until recodification of the Criminal Procedure Code, it should address certain exceptional cases where a potential defect will not be corrected by an appeal on a point of law or in another manner. On the basis of the foregoing, the position statement says that it can basically agree with annulling § 272 of the Criminal Procedure Code, but the legal effect of the Constitutional Court's judgment should be postponed at least until 1 January 2002, when the amendment to the Criminal Procedure Code will go into effect, or perhaps even longer, because in connection with the judgment a corresponding amendment to the Criminal Procedure Code will probably be passed, particularly concerning the possibility of correcting defects concerning persons other than the defendant ...

The Constitutional Court, under § 42 para. 3 and § 69 of Act No. 182/1993 Coll., as amended by later regulations, also sent the petition to the Senate of the Parliament of the Czech Republic. In his position statement of 11 July 2000, its chairman, doc. JUDr. Petr Pithart, in the introduction recapitulates the history of § 272 in the Criminal Procedure Code. He states that this provision has been part of the Criminal Procedure Code since the day this law was passed by the National Assembly, i.e. since 29 November 1961; up to the present time it has, in terms of the present issues, gone through rather insignificant changes: the provision has reflected changes in the entities entitled to file complaints – at first these were the general prosecutor and chairman of the Supreme Court, later the chairman of the court was replaced by the Minister of Justice (under the amendment of the Criminal Procedure Code, implemented by Act No. 149/1969 Coll.) and after an amendment made several years ago (by Act No. 292/1993 Coll.), the only remaining party entitled to file a complaint was the Minister of Justice. Act No. 30/2000 Coll. then added a new paragraph 2, which adopted the present content of the provision.

The position statement also points out that the Senate of the Parliament of the Czech Republic was established and began its constitutional function in December 1996, as a result of which the Senate can not give the Constitutional Court a position statement on a matter based on the actual discussion and passing of § 272 the Criminal Procedure Code, or the entire institution of a complaint for violation of the law and most of its amendments ...

Taking as a starting point the ability given by § 49 para. 1 of Act No. 182/1993 Coll., as amended by later regulations, and because the application of § 272 of the Criminal Procedure Code directly affects the Supreme Court and the Ministry of Justice, the Constitutional Court asked these state bodies for position statements on the petition to annul the cited statutory provision.

In the introduction of her position statement of 29 June 2001, the chairwoman of the Supreme Court, JUDr. Eliška Wagnerová, Ph.D., agreed with the petition of Panel III of the Constitutional Court, which interrupted proceedings in the matter file no. III. US 464/2000 and which submitted to the Plenum of the Constitutional Court for review and decision a petition to annul § 272 of the Criminal Procedure Code. Beyond the framework of the reasons given in the decision, the position statement also points to other reasons why § 272

of the Criminal Procedure Code is inconsistent with the constitutional order. it states that the purpose of a complaint for violation of the law can be found at two levels – first, in the presumption that the law, i.e. objective law, deserves protection, and second, in inspection of the procedures of state bodies involved in criminal proceedings (the investigator, prosecutor, judge, or court - § 266 para. 1 of the Criminal Procedure Code).

The chairwoman of the Supreme Court, in connection with the cited starting point, states that a complaint for violation of the law filed to the detriment of the defendant is an institution which interferes in the defendant's right to a fair trial in the wider sense, and therefore it is essential to also examine such intervention into a fundamental principle (which can be derived from Art. 1 of the Constitution, in a breadth beyond the specific fundamental procedural rights and guarantees contained in part five of the Charter) in terms of the principle of reasonableness (also derivable from Art. 1 of the Constitution). In this regard, she considers it important to answer the question of whether this institution is an essential measure in a democratic society. The position statement formulates an answer according to which the purpose pursued by a complaint for violation of the law filed to the detriment of the defendant - i.e. protection of observance of objective law and procedural methods – is evidently itself problematic, because both of the elements which are to be protected are protected in isolation, but not in relation to the subjective rights of the defendant or the injured party or in relation to protection of the public good. In the end, only the product of the state is protected, i.e. objective law in the form of a statute; alternately correction of the conduct of state or official persons or bodies is sought. Thus, in the opinion of the chairwoman of the Supreme Court, a complaint for violation of the law filed to the detriment of the defendant is, in terms of its purpose, a problematic institution in a democratic state governed by the rule of law, whose immanent element is respect for the rights and freedoms of the individual, as the state may legitimately intervene in these only by law, but only for reasons of protection of the rights and freedoms of others, or protection of the public good. In this regard, the position statement emphasizes that intervention can scarcely be justified merely as correction of error by the state itself, which the individual affected by the error did not participate in. The chairwoman of the Supreme Court believes that, due to this, the institution of a complaint for violation of the law filed to the detriment of the defendant can also violate the principle contained in Art. 1 of the Constitution.

The second reason, which the chairwoman of the Supreme Court, in her position statement, places outside the framework of justification of the unconstitutionality of § 272 of the Criminal Procedure Code, contained in the petition of Panel III of the Constitutional Court, is a reference to the fact that in some cases the institution of complaint for violation of the law filed to the detriment of the defendant can also represent intervention in the right not to be prosecuted twice for the same crime, as intended by Art. 4 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). Unlike Art. 40 para. 5 of the Charter, which speaks in the plural about the possibility of applying extraordinary remedial measures (evidently responding to the legal regime in effect), which could break through this principle, Art. 4 of Protocol no. 7 to the Convention recognizes only re-opening of proceedings, the scope of whose admissibility it defines itself. It ties the scope of admissibility only to newly discovered facts or to a substantive defect in the foregoing proceedings, both to be applied only if they could influence the decision in the matter. From this, the position

statement concludes that, unlike a complaint for violation of the law, whose purpose is protection of objective law or correction of a defective procedure in proceedings, so to speak, "about themselves", re-opening under of Protocol no. 7 to the Convention is strictly tied to influencing a specific individual decision in the matter. Because para. 3 of Art. 4 of Protocol no. 7 to the Convention provides that no derogation from the article shall be made under Art. 15 of the Convention, i.e. even in exceptional (e.g. wartime) situations, it is considered evident that scope for breaking through the fundamental principle of not being prosecuted twice for the same crime can not be expanded, as is evidently done by a complaint for violation of the law filed to the detriment of the defendant. Because of this, the position statement considers that the institution of a complaint for violation of the law to the detriment of the defendant in some cases interferes with the fundamental right contained in Art. 4 of Protocol no. 7 to the Convention.

For all the stated reasons the chairwoman of the Supreme Court endorses the petition of Panel III of the Constitutional Court to annul § 272 of the Criminal Procedure Code due to inconsistency with Art. 1 of the Constitution and Art. 4 of Protocol no. 7 of the Convention.

At the request of the Constitutional Court, the chairwoman of the Supreme Court, submitted, in filings of 31 August 2001 and 5 September 2001, for purposes of these proceedings, statistical data concerning complaints for violation of the law filed from 1996 to 2001.

The data submitted indicate that during that period there was a change in the ratio of complaints for violation of the law filed to the benefit and to the detriment of the defendant and in the total growth of complaints for violation of the law filed. While in 1996 the Minister of Justice filed 174 complaints to the benefit of the defendant and only 49 to the detriment of the defendant (12 were filed to the defendant's benefit and detriment simultaneously), in 1997 this ratio was 88 to 58 (with 3 filed to the defendant's benefit and detriment), in 1998 it was 74 to 98 (with 6 filed to the defendant's benefit and detriment), i.e. for the first time the number of complaints filed to the defendant's detriment exceeded the number of complaints filed to the defendant's benefit, in 1999 the ratio was 88 to 117 (with 13 filed to the defendant's benefit and detriment), in 2000 it was 113 to 166 (with 22 filed to the defendant's benefit and detriment) and finally in the first seven months of 2001 it was 75 to 102 (with 10 filed to the defendant's benefit and detriment). The submitted statistics also indicate that, while in 1996 the proportion of complaints filed to decisions in preliminary proceedings was 14 %, in 1997 it was 18 %, in 1998 22 %, in 1999 21 %, in 2000 26 % and in the first seven months of 2001 it climbed to 29 %.

The Minister of Justice, JUDr. Jaroslav Bureš, in the introduction of his position statement to the petition of Panel III of the Constitutional Court to annul § 272 of the Criminal Procedure Code, emphasizes that the legal institution of a complaint for violation of the law was introduced in the Czech legal order by Act No. 87/1950 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), and later also transferred to other Acts on Criminal Court Proceedings (no. 64/1956 Coll. and no. 141/1961 Coll.) and, despite partial amendments, remained in the legal order of the Czech Republic after 1993 [§ 266 et seq. of Act No. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations]. He also believes that this extraordinary remedial measure was considerably connected to the complaint for a breach of law aimed at

preserving justice, which, on the basis of Act No. 119/1873 Imperial Laws, which introduces the Criminal Procedure Code, as amended by later regulations (cf. § 33, § 292 and § 479), was already used in our territory in the former Czechoslovakia (in the Czech and Moravian-Silesian land), but was enriched and supplemented by several elements which were typical for the socialist legal order. The position statement also points to the fact that after 1990 objections were raised against the complaint for violation of the law as an extraordinary remedial measure, particularly in the literature; these objections contained arguments similar to those in the cited decision of the Constitutional Court, particularly in terms of the equality of the parties, as the amendment implemented by Act No. 292/1993 Coll., although it did, with effect as of 1 January 1994 leave the power to file a complaint for violation of the law only with the Minister of Justice (until then a complaint for violation of the law could also be filed by a prosecutor), in terms of the equality of the parties in criminal proceedings (the state versus the defendant) he is still a state body, and it is not decisive who represents the state in a particular phase of the proceedings. The Minister of Justice points out that in this regard it was repeatedly emphasized that the complaint for violation of the law is deeply inconsistent with the concept of a state based on the rule of law, because the right to file a complaint for violation of the law, as an "official remedial measure," to the benefit of the convicted party, is entrusted only to a high state official, who can then file this remedial measure even to the detriment of the defendant.

Relying on these viewpoints, the Minister of Justice agrees that if a state, represented by a state body as a party in criminal proceedings (it is not decisive whether, depending on the phase of the proceedings, this is the state attorney or the Minister of Justice), compared to the defendant, has at its disposal another, even if extraordinary, remedial measure, establishing the opportunity to obtain annulment of a decision which has gone into effect in a criminal matter, this is inconsistent with the principle of equality of the parties under Art. 37 para. 3 of the Charter, if equality of the parties is derived from this provision both in civil and in criminal proceedings, and this principle applies not only to natural persons and legal entities, but also to the state, or a state body, if it appears in proceedings as a party (not as the holder of state power -potentior persona). Criminal proceedings, as stated further in the position statement, are adversarial proceedings, i.e. proceedings in which the sides stand opposite each other as procedural opponents, where in criminal proceedings the issue is primarily equality of the plaintiff and the defendant, that is the state attorney and the defendant, but the requirement for equality of the parties ("equal weapons") can also be applied, though with a certain reservation, to the relationship between the Minister of Justice and the defendant, particularly if the Minister of Justice files a complaint for violation of the law to the detriment of the defendant.

When filing a complaint for violation of the law to the benefit of the defendant, it is necessary, according to the Minister of Justice, to see this as a certain means of favor defensionis, which can be accepted from a constitutional viewpoint, because it can not worsen his position either in substantive law or procedural terms, even though it also evokes certain doubts in terms of the equal weapons under Art. 6 of the Convention, particularly in a case where the defendant seeks a complaint for violation of the law to his benefit, but the Minister of Justice does not file it, for in these case one could conclude that there is conflict with the principles of a state based on the rule of law, which should

guarantee equal means for protection of rights to trial parties, or parties to proceedings, as part of the right to a fair trial under Art. 36 para. 1 of the Charter.

According to the Minister of Justice, these considerations are all the more valid in the case of a complaint for violation of the law to the detriment of the defendant against a decision on the merits by bodies active in preliminary proceedings, e.g. against the decision of an investigator or state attorney to stop criminal prosecution under § 172 of the Criminal Procedure Code or assignment of a matter to another body under § 171 of the Criminal Procedure Code, which, in the case of a decision of the Supreme Court in which it finds violation of the law under § 268 para. 2 of the Criminal Procedure Code and simultaneously annuls the contested decision under § 269 para. 2 and § 272 of the Criminal Procedure Code and, under § 270 para. 1 of the Criminal Procedure Code, orders the state attorney (generally) to review the matter again in the necessary scope and decide again, undoubtedly involves inadmissible intervention to the accusation principle (§ 2 para. 8 of the Criminal Procedure Code), even though the Supreme Court can not, in such a decision, order the state attorney to file an indictment against the defendant in that matter. Under § 270 para. 4 of the Criminal Procedure Code, the body to which a matter was assigned is bound by the legal opinion stated in the matter by the Supreme Court, and is required to take procedural steps whose implementation the Supreme Court ordered, whereby the Supreme Court significantly influences the basis for filing an indictment, and thus also the accusation principle, which has its constitutional foundations in Art. 80 para. 1 of the Constitution, but also in the related provisions of Art. 90 of the Constitution and Art. 40 para. 1 of the Charter.

The position statement also states that the Ministry of Justice repeatedly considered all these issues during individual amendments of the Criminal Procedure Code and in connection with the planned recodification of criminal procedure law, which then found expression in the "large" amendment of the Criminal Procedure Code, which establishes the regime of the new extraordinary remedial measure – the appeal on a point of law, which will apply to precisely enumerated court decisions, will preserve the equality of the parties (cf. § 265a to 265s of the Criminal Procedure Code) and which, during the legislative process was, in accordance with the above mentioned opinions, at the initiative of parties including the Ministry of Justice and the Supreme Court, supplemented with the authority of the Supreme State Attorney to annul, in a very short period, unlawful decisions from lower state attorneys on stopping criminal prosecution or on assigning a matter (cf. § 173a and § 174a of the Criminal Procedure Code) which have gone into effect. In the opinion of the Minister of Justice, these institutions are supposed to basically replace the complaint for violation of the law, with effect as of 1 January 2002, although, until passage of the recodification of the Criminal Procedure Code, it will be preserved (including § 272 of the Criminal Procedure Code) for certain exceptional cases, where error would not be corrected by a appeal on a point of law or other remedial measures (e.g. for annulment of a decision to stop criminal prosecution in criminal matters concerning persons accused of crimes committed during the totalitarian regime, in connection with Act No. 119/1990 Coll., on Judicial rehabilitation, as amended by later regulations, and Act No. 198/1993 Coll., on the Illegality of the Communist Regime and Opposition Against It). In this regard, reference is made to certain cases from recent years, where certain persons responsible for crimes committed to the benefit of the communist regime were finally prosecuted, but their prosecution was stopped in preliminary proceedings or in

proceedings before the court, which lead the Ministry of Justice and the government to leave the institution of a complaint for violation of the law (including § 272 of the Criminal Procedure Code) in the Criminal Procedure Code, because other wise these errors could no longer be corrected. In this regard, illustrating the issue with a specific case, the Minister of Justice also points to § 71 para. 1 of Act No. 182/1993 Coll., as amended by later regulations, and problems related with its impact on cited cases ...

IV.

On 11 July 2001 the Constitutional Court received a petition from the Supreme Court to annul § 272 of the Criminal Procedure Code, filed under Art. 95 para. 2 of the Constitution, § 224 para. 5 of the Criminal Procedure Code per analogiam and § 64 para. 4 of Act No. 182/1993 Coll., as amended by later regulations. The petition is based on the Supreme Court decision of 26 June 2001, file no. 11 Tz 106/2001, which interrupted proceedings on the complaint for violation of the law, filed by the Minister of Justice to the detriment of the defendant D. B., against a decision of the state attorney of the Děčín District State Attorney's Office of 19 December 2000, file no. 2 Zt 897/2000-5, on assignment of a criminal matter, and under the above mentioned constitutional and statutory provisions the matter was submitted to the Constitutional Court.

In the opinion of the Panel of the Supreme Court, the institution of a complaint for violation of the law is inconsistent with the concept of a democratic state based on the rule of law, because the right to use this extraordinary remedial measure is entrusted only to the representative of the executive branch – the Minister of Justice. The defendant can not obtain filing of this extraordinary remedial measure to his benefit even in the event of flagrantly serious violation of the law, and must rely on the decision of the Minister of Justice. The Minister, except for isolated exceptions arising from the Rehabilitation Act, does not have an obligation to use this extraordinary remedial measure. It is up to his consideration whether the law was violated, and whether the violation is so serious that it requires intervention in the principle of stability of judicial decision making. For these reasons, the panel of the Supreme Court states that this is an institution which should not have a place in a modern criminal procedure code. In its opinion, all the cited shortcomings come to the forefront even more with complaints for violation of the law filed to the detriment of defendants, particularly in cases where this extraordinary remedial measure contests decisions on the merits made by bodies in preliminary proceedings. Therefore, the panel of the Supreme Court concluded that the existence of this institution is a denial of the equality of all parties to proceedings expressed in Art. 37 para. 3 of the Charter and does not respect the right to a fair trial guaranteed by Art. 6 of the Convention. Moreover, the Supreme Court's statutory ability, in proceedings on a complaint for violation of the law filed by the Minister of Justice to the detriment of the defendant, to annul a decision by an investigator or state attorney on stopping prosecution or assigning a matter to another body which has gone into legal effect, and to order bodies active in preliminary proceedings to continue in criminal proceedings, breaks, in a fundamental way, the accusation principle, which is a leading principle of criminal proceedings in a state governed by the rule of law. For these reasons, in the opinion of the

panel of the Supreme Court, it is not possible to tolerate the institution of a complaint for violation of the law to the detriment of the defendant.

By decision of 10 October 2001, file no. Pl. US 19/01-6, the Constitutional Court denied the petition of the panel of the Supreme Court on grounds of a pending suit under § 35 para. 2 of Act No. 182/1993 Coll., as amended by later regulations, with the provision that the Supreme Court, as an entitled petitioner, has, under § 35 para. 2 in fine of the Act on the Constitutional Court, the right to participate as a secondary party in discussions on the previously filed petition, i.e. the petition under file no. Pl. US 15/01.

For the same reasons, the Constitutional Court, by decisions of 20 September 2001, file no. Pl. US 23/01-10, of 28 August 2001, file no. Pl. US 26/01-11, of 18 September 2001, file no. Pl. US 30/01-11, and of 10 October 2001, file no. Pl. US 32/01-10, also denied the analogous petitions of the Supreme Court to annul § 272 of the Criminal Procedure Code, with the provision that, in these matters as well, the Supreme Court, as an entitled petitioner, has, under § 35 para. 2 in fine of the Act on the Constitutional Court, the right to participate as a secondary party in discussions on the previously filed petition, i.e. the petition under file no. Pl. US 15/01.

V.

The text of § 272 of Act No. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations, whose constitutionality is evaluated by the Constitutional Court in proceedings on review of norms, is the following:

"§ 272

(1) If the law was not violated to the detriment of the defendant, the Supreme Court may proceed under § 269 para. 2 to § 271 only if the Minister of Justice so proposed in a complaint for violation of the law filed within six months of the contested decision and if the Supreme Court decided on this complaint within three months after it was filed.

(2) If the complaint for violation of the law cited in paragraph 1 was submitted to the large senate of the collegium within three months after it was filed, the Supreme Court may proceed under § 269 para. 2 to § 271 only if it decided on the complaint within three months after it was transferred to the large senate of the collegium."

VI.

Under § 68 para. 2 of Act No. 182/1993 Coll., as amended by later regulations, the Constitutional Court, when deciding in proceedings to annul statutes and other legal regulations, evaluates only the content of these regulations in terms of their consistency with constitutional acts, international agreements under Art. 10 of the Constitution, or statutes, in the case of another legal regulation, and determines whether they were passed and issued within the bounds of constitutionally prescribed jurisdiction and in a

constitutionally prescribed manner. If, as part of review of norms, the Constitutional Court evaluates the jurisdiction of a norm-creating body and the constitutionality of the norm-creating process, it relies on § 66 para. 2 of the Act on the Constitutional Court, under which a petition in proceedings to annul statutes and other legal regulations is inadmissible if a constitutional act or an international agreement, with which the reviewed regulations are inconsistent according to the petition, ceased to have legal effect before the petition was delivered to the Constitutional Court. This indicates that in the case of legal regulations issued before the Constitution of the Czech Republic no. 1/1993 Coll. went into effect, the Constitutional Court is entitled to review only whether their content is consistent with the existing constitutional order, but not the constitutionality of the procedures n which they were created and observance of norm-creating jurisdiction. (See judgment file no. Pl. US 9/99, published in the Collection of Judgments and Resolutions, vol. 16, pp. 13-14).

On the basis of the cited interpretation of § 68 para. 2 of Act No. 182/1993 Coll., as amended by later regulations, in the case of § 272 of the Criminal Procedure Code the Constitutional Court reviewed whether the contested statutory provision was passed and issued within the bounds of constitutionally prescribed jurisdiction and in a constitutionally prescribed manner only in terms of the amendments implemented after 1 January 1993. The Constitutional Court stated that the statute was passed and issued within the bounds of constitutionally prescribed jurisdiction and in a constitutionally prescribed manner...

VII.
VII/a

Under § 266 et seq. of the Criminal Procedure Code, a complaint for violation of the law is an extraordinary remedial measure, which can only be applied by the state and which can be used to obtain the annulment of a decision by a court, state attorney or investigator which has gone into effect. The Supreme Court, which has jurisdiction to decide about a complaint for violation of the law (§ 266 para. 1 of the Criminal Procedure Code) and, in addition to the authorization to issue an academic verdict in the matter (§ 268 para. 2 of the Criminal Procedure Code), is also empowered with “cassation” or appellate jurisdiction (§ 269 para. 2, § 271 of the Criminal Procedure Code), in the event of a complaint filed to the detriment of the defendant (§ 272 of the Criminal Procedure Code).

The legal institution of a complaint for violation of the law was introduced into the Czechoslovak legal order by Act No. 87/1950 Coll., the Criminal Procedure Code, and then transferred to other codifications of criminal procedure (Act No. 64/1956 Coll. and Act No. 141/1961 Coll.) and was also preserved in the legal order of the Czech Republic after 1993 [§ 266 et seq. of Act No. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations].

Act No. 87/1950 Coll. abandoned the previous concept of a democratic criminal trial and assumed the Soviet totalitarian concept of Stalinist coinage. In discussions of the outline of the Act by the National Assembly on 11 July 1950 in this regard, then Minister of Justice Rais declared: “If it has been granted us to contribute to the socialist building of our homeland by developing important new laws, including criminal regulations, then above all

we owe warm thanks to Soviet socialist legal scholarship and the outstanding Soviet workers in the field of criminal law. (Applause.) As in other fields, in criminal law as well Soviet scholarship has undisputed primacy in the world. The Soviet Union's lawyers have lifted the problems of socialist criminal law to unseen heights and worked through them in an unsurpassable manner, and, on the basis of Marxist-Leninist teachings have enriched knowledge of criminal law with new, important experiences, which bourgeois knowledge never achieved and can not achieved, and with solutions which bourgeois knowledge no longer even attempts. Knowledge of Soviet laws and Soviet theory was a necessary and basic prerequisite for the formulation of our new criminal laws, without which we could not, in such a short time, complete the outline which the National Assembly is now discussing. Obviously, during this process it was necessary to make connections to our previous developments and to the historical experiences of our working people. However, it must be emphasized that the substance of the issues with which the new criminal law concerns itself was revealed and exemplarily developed amid the experiences of the Soviet Union. The results of legislative work on the new criminal laws are therefore a new success, not only of our working class, but of Marxist-Leninist thought in general, and especially of the socialist knowledge of the great Soviet Union." (see www.psp.cz)

Introduction of the institution of a complaint for violation of the law to the detriment of the defendant in the Criminal Procedure Code of 1950 was an expression of strengthening the executive branch over the judicial branch (particularly the prosecutor's office as the "guard of socialist legality"). It also came from lack of faith in the reliability of the judicial branch as a repressive apparatus of the totalitarian state and installed the possibility of using a central decision to achieve revocation of any criminal law decision in effect, including to the detriment of the defendant.

We can agree with the statements of the Chairman of the Chamber of Deputies and the Minister of Justice that the problem of the constitutionality of the institution of a complaint for violation of the law was repeatedly addressed in the post-November [1989] amendments to the Criminal Procedure Code, and was also viewed critically in the theory of criminal procedural law (see e.g. P. Šámal, Remedial Measures in Criminal Proceedings: the Complain for Violation of the Law. Re-opening of Proceedings. Prague 1999, pp. 160-161).

VII/b

The constitutional principles forming one of the components of the fundamental right to a fair trial, include the principle of "equal weapons", or the principle of equal opportunity (or the principle of equality of parties to proceedings) under Art. 37 para. 3 of the Charter, Art. 96 para. 1 of the Constitution a Art. 6 para. 1 of the Convention. This principle becomes especially important in criminal proceedings, where, in relation to the defendant, it is closely tied to the right to defense counsel, with the right to present factual and legal arguments, and with the right to respond to all evidence admitted. The principle of equality of the parties to criminal proceedings, apart from the function of protecting the position of the defendant, who is entitled to a presumption of innocence, is also part of the overall concept of a democratic criminal trial, characterized by the principle of adversarial proceedings.

The principle of "equal weapons" in criminal proceedings is reflected in all stages of criminal proceedings, as well as in all their aspects. Thus, it is applied both in trial proceedings and in review proceedings, in the full scope of both, but particularly in evidentiary proceedings (in proposing evidence, the right to respond to admitted evidence, and so on). The principle of "equal weapons" in criminal proceedings is not absolute; generally the maxim applies that the state, in any context, is not entitled to more rights or a more advantageous procedural position than the defendant [cf. e.g. the time limitation on the state attorney's authorization to file a petition to re-open proceedings to the detriment of the defendant under § 279 let. a) of the Criminal Procedure Code].

The principle of "equal weapons" (Art. 6 para. 1 of the Convention) has been markedly reflected in the case law of the European Court of Human Rights. In this connection it can be characterized particularly by the fact that in the Court's opinion its foundation is the idea of equality, wherefore it is comparable with the principle of the ban on discrimination under Art. 14 of the Convention. In addition, in a criminal trial it serves to protect the defendant, who is entitled to a presumption of innocence until he is convicted, and is closely tied to the adversarial nature of criminal proceedings. (See, in particular, the cases Bönisch vs. Austria and Brandstetter vs. Austria – doctrinal analysis is presented by, e.g., J. A. Frowein, W. Peukert, Europäische Menschenrechtskonvention. EMRK-Kommentar. Kehl-Straßburg-Arlington 1996, p. 219 et seq., M. de Salvia, Compendium de la CEDH. Kehl-Straßburg-Arlington 1998, p. 147 et seq.)

Unlike all other remedial measures provided by the Criminal Procedure Code, only the complaint for violation of the law can be used by only one party – the state. If the state, as a party in criminal proceedings (it can not be considered decisive, which state body is entitled to act in the name of the state at which stage of criminal proceedings), has at its disposal, compared to the defendant, an additional procedural means, which establishes the possibility of obtaining annulment of a final decision in a criminal matter, one can not but conclude from this that there is infringement of the defendant's right to "equal weapons" in a criminal trial, arising from Art. 37 para. 3 of the Charter, Art. 96 para. 1 of the Constitution and Art. 6 para. 1 of the Convention.

If the right to file a complaint for violation of the law to the benefit of the defendant is removed from this statement, on the grounds of it being seen as a procedural expression of a kind of "charity," which is not capable of interfering with the defendant's rights in the area of substantive law, the charge of unconstitutionality narrows to the institution of a complaint for violation of the law to the detriment of the defendant.

In the period before the Criminal Procedure Code no. 87/1950 Coll. was passed, the Criminal Procedure Code in effect (Act No. 119/1873 Imperial Laws, as amended by later regulations) contained, in the group of extraordinary remedial measures, the complaint for a breach of law aimed at preserving justice, which "in the interests of uniformity of law" permitted "the general prosecutor the right, by his official powers or by order of the Minister of Justice to appeal for a decision of the Supreme Court on the question of whether the law was violated by a particular 1. verdict, 2. decision or 3. procedure of a criminal court (or state attorney's office)" (J. Kallab, Criminal Proceedings Textbook. Brno 1930, p. 207). However, as a rule the Supreme Court's decision had no effect on the defendant, it was only a matter of "an authoritative resolution of a disputed, perhaps legal question, without the courts being bound to take the opinion of the Supreme Court as their

own" (ibid., p. 208). The legal regime of the complaint for a breach of law aimed at preserving justice (§ 292 of Act No. 119/1873 Imperial Laws, as amended by later regulations) foresaw the consequences for the defendant, reformation or cassation, only exceptionally, only to the benefit of the defendant in the event of his being sentenced. This recapitulation indicates that the legal regime contained in the pre-February [1948] criminal procedure code in proceedings on the complaint for a breach of law aimed at preserving justice filed to the detriment of the defendant, enabled the acceptance of only an academic verdict for purposes of unifying case law in resolving a given legal issue, but did not permit detrimental or reformative effects for the defendant. This concept of the complaint for a breach of law is still in effect in Austria at the present time.

In a basic international comparison, no parallel can be found for the institute of a complaint for violation of the law, which is available to only one of the parties, the state, and can be directed to the detriment of the defendant against decisions by courts and bodies active in preliminary proceedings which have gone into effect.

Merely as illustration, in this connection we can mention, for example, the German legal regime. The remedial measures established in the current criminal procedure code (Act No. 253/1877 RGBl., as amended by later regulations) include the institutions of complaints, appeals, revisions and re-opening of proceedings, which fully meet the requirements arising under Art. 6 of the Convention, i.e., including the principle of "equal weapons".

The relevance of the charge of failure to accept the principle of "equal weapons" appears even more pressing in cases of possible application of a complaint for violation of the law to the detriment of the defendant against decisions of bodies active in preliminary proceedings (e.g., against decisions by the investigator or state attorney to stop criminal prosecution). The leading principles of criminal proceedings in a state governed by the rule of law, ever since the age of enlightenment, include the accusation principle (§ 2 para. 8 of the Criminal Procedure Code), which overcame and replaced the inquisition principle in criminal trials. Under the accusation principle, institutional division among different procedural entities of the procedural functions of preparing and filing an accusation, and deciding on guilt and punishment is an essential part of the democratic criminal trial, respecting the value of independent judicial decision making. From a constitutional viewpoint this principle arises from Art. 80 para. 1, Art. 90 of the Constitution and Art. 40 para. 1 of the Charter. If, in proceedings on a complaint for violation of the law filed by the Minister of Justice to the detriment of the defendant against a decision, which has gone into effect, by an investigator or state attorney on stopping criminal procedure, the Supreme Court, under § 272 of the Criminal Procedure Code is authorized to annul the decision and order the bodies active in preliminary proceedings to continue the criminal prosecution, this authorization can not be characterized otherwise than as unconstitutional interference with the precepts related to the accusation principles in criminal proceedings. Under § 270 para. 4 of the Criminal Procedure Code, the body to which the matter was assigned is bound by the legal opinion stated in the matter by the Supreme Court, and is required to take the procedural steps which the Supreme Court ordered. Thus, the Supreme Court significantly influences the facts on which the filing of an indictment is based, and thus also the accusation principle. In this regard we must also

point to the consistent growth in the number of complaints filed and their ratio to decisions in preliminary proceedings.

If the position statement of the Minister of Justice points to the positive effects of the institution of a complaint for violation of the law to the detriment of the defendant in the context of balancing with the period of totalitarian despotism, the following must be stated:

The amendment of the Criminal Procedure Code, no. 265/2001 Coll. introduces the institution of appeal on a point of law to the detriment of the defendant, which can be used to contest a court decision in the matter which has gone into effect, and which is entrusted to the supreme state attorney [§ 265a para. 1, § 265d para. 1 let. a) of the Criminal Procedure Code, as amended by Act No. 265/2001 Coll.]. In relation to decisions by lower state attorneys on stopping criminal prosecution or assigning a matter which have gone into effect, the amendment introduces the authority of the Supreme State Attorney to annul these decisions due to their inconsistency with the law (§ 173a, § 174a of the Criminal Procedure Code, as amended by Act No. 265/2001 Coll.). As of the day the amendment to the Criminal Procedure Code implemented by Act No. 265/2001 Coll. went into effect, i.e. as of 1 January 2002, this creates a legal mechanism which permits the state to effectively apply the public interest in achieving the purpose of criminal proceedings, but at the same time meet the requirements arising for a fair trial from Art. 37 para. 3 of the Charter and Art. 6 para. 1 of the Convention, i.e. in particular the requirement of equality of the parties to the proceedings (the requirement of "equal weapons"). Postponing the derogative effect of the judgment of the Constitutional Court in the present matter to 31 December 2001 thus does not leave any gaps in the legal regime in terms of the analyzed purpose of the extraordinary remedial measure.

In this context it must be pointed out that the Constitutional Court extensively considered the question of equality of parties to criminal proceedings and grounds for its possible restriction to the detriment of the defendant in the matter file no. Pl. US 4/94. In connection with the constitutionality of the institution of anonymous witnesses in criminal proceedings, it stated: "The purpose of the right to a public hearing, in connection with the right to respond to all evidence presented, is to provide the defendant in a criminal trial the opportunity to examine evidence against him, in full view of the public. With witness testimony, this examination has two components: the first is verifying the witness's reliability; the second is verifying a witness's reliability. The institution of anonymous witnesses limits the defendant's opportunity to verify the truthfulness of witness testimony directed against him, because it rules out the opportunity to speak concerning the person of the witness and his reliability. Thus, it limits his right to defend himself, and is inconsistent with the principle of adversarial proceedings and the principle of equality of participants. Restriction of fundamental rights and freedoms, even if their constitutional regulation does not foresee it, can occur in the even of conflict between them. In this regard, the maxim that a fundamental right or freedom can be restricted only in the interest of another fundamental right or freedom is fundamental. Mutual balancing of fundamental rights and freedoms standing in conflict is based on the following criteria: The first is the criterion of suitability, i.e. an answer to the question of whether the institution restricting a certain fundamental right makes it possible to achieve the pursued aim (protection of another fundamental right). The second criterion for balancing

fundamental rights and freedoms is the criterion of necessity, which consists of comparing the legislative means which restricts a fundamental right or freedom with other measures which permit achieving the same aim, but not affecting the fundamental rights and freedoms.

The third criterion is comparing the gravity of the two conflicting fundamental rights."

In terms of the indicated precepts of the principle of reasonableness, the institution of complaint for violation of the law to the detriment of the defendant, breaking through the fundamental rights, arising from the constitutional principle of equality, will not stand. Although its aim may be protecting the public interest in just punishment of the perpetrator of a crime, and thus the principle of the supremacy of the law, it does not meet the condition of necessity, i.e. a condition which consists of comparing the legislative means which restricts a fundamental right or freedom with other measures which permit achieving the same aim, but not affecting the fundamental rights and freedoms. This fact comes to the foreground especially in connection with the introduction of an extraordinary remedial measure – appeal on a point of law – in criminal proceedings by the amendment to the Criminal Procedure Code, no. 265/2001 Coll.

In connection with the declared purpose of the exceptional use of the institution of a complaint for violation of the law to the detriment of the defendant, we must also point to the statistically proven rise in the ratio of complaints filed to the detriment of the defendants.

If annulment of § 272 of the Criminal Procedure Code impacts not only on cases of violation of the law to the benefit of the defendant, but also on all other cases where the law was not violated to the detriment of the defendant, but was violated concerning other persons to whose benefit or detriment the complaint was filed, and the court finds that the law was violated to the detriment or benefit of such person other than the defendant (e.g., a participating person, an expert witness in connection with an expert's fee, defense counsel in connection with his fee and expenses, and so on), then, in the opinion of the Minister of Justice, these cases would no longer be resolvable by a complaint for violation of the law, nor could they be resolved by an imprecise appeal on a point of law. However, this circumstance can not change anything on the justifiability of annulling the institution of a complaint for violation of the law to the detriment of the defendant. No legal order is, or can be built ad infinitum, from the point of view of a set of procedural means for protection of rights, or from the point of view of a set of organizing levels of review. Every legal order generates, and necessarily must generate, a certain number of errors. The purpose of review proceedings can realistically be to approximately minimize these errors, and not to completely eliminate them. Therefore, the system of review levels is the result of balancing, on the one hand, the effort to achieve the supremacy of the law, and on the other hand the effectiveness of decision making and legal certainty. In terms of this criterion, introducing extraordinary remedial measures, in other words extending proceedings and breaking through the principle of inalterability of decisions which have gone into effect is appropriate only in the case of exceptional reasons. The reasons which the Minister of Justice states in his position statement in this regard can not be considered as such.

Based on all the cited reasons, the Constitutional Court concluded that § 272 of Act No. 141/1961 Coll., the Criminal Procedure Code, as amended by later regulations, is inconsistent with Art. 37 para. 3 of the Charter and Art. 6 para. 1 of the Convention, with regard to the possibility it establishes of annulling, to the detriment of the defendant, decisions in preliminary proceedings which have gone into effect, and also with Art. 80 para. 1 and Art. 90 of the Constitution and with Art. 40 para. 1 of the Charter, wherefore the Plenum of the Constitutional Court decided to annul it. In this context, the Constitutional Court points out that annulling § 272 of the Criminal Procedure Code annuls only the cassation and appellate authority of the Supreme Court in proceedings on a complaint for violation of the law filed to the detriment of the defendant, but does not annul the proceedings as such, i.e. it does not annul the possibility of issuing an academic verdict in a given matter for the purpose of unifying case law pro futuro (§ 268 para. 2 of the Criminal Procedure Code).

VII/c

During the course of these proceedings before the Constitutional Court, § 272 of the Criminal Procedure Code was partly amended by Act No. 265/2001 Coll., which amends Act No. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations, Act No. 140/1961 Coll., the Criminal Code, as amended by later regulations, and certain other acts. Under no. I of point 199 "In § 272 para. 1 and 2 the words ‘within three months after filing’ are replaced by the words ‘within six months after filing’.” This legal regime is valid as of 31 July 2001, i.e. the day of distribution of part 102/2001 of the Collection of Laws, in which the Act was published; under Art. XIV it goes into effect on 1 January 2002.

Under § 67 para. 1 of the Act on the Constitutional Court, grounds to stop proceedings exist if a statute, another legal regulation, or their individual provisions, which are proposed to be annulled, cease to be valid before the termination of proceedings before the Constitutional Court. The Constitutional Court has addressed the interpretation of these statutory grounds for stopping proceedings in decision file no. Pl. US 20/99, of 18 April 2001. It stated that if an amendment to a statute annuls a particular provision, and simultaneously passes it, in the same wording, but in a different place in the scheme of the statute, this is a case of a new expression of will by the legislature, so the provision originally contested by the petitioner ceased to be valid before termination of proceedings before the Constitutional Court. In this situation, the Constitutional Court concluded that grounds for permitting a change to the petition under § 63 of the Act on the Constitutional Court in connection with § 95 para. 1 and 2 of the Civil Procedure Code do not exist.

However, the present matter involves a different case, to which § 67 para. 1 of Act No. 182/1993 Coll., as amended by later regulations, does not apply. The amendment to the Criminal Procedure Code implemented by Act No. 265/2001 Coll. amended only part of § 272 of the Criminal Procedure Code (by extending the deadline for the Supreme Court’s decision making on a complaint for violation of the law to the detriment of the defendant). This part is not decisive from the viewpoint of grounds for evaluating the constitutionality of the entire § 272 of the Criminal Procedure Code, concerning the institution of complaint for violation of the law as such.

VII/d

Under § 276 fourth sentence of the Criminal Procedure Code "securing a defendant by issuing an arrest warrant and taking him into custody is possible only if the Minister of Justice so proposes in a complaint for violation of the law filed to the detriment of the defendant and if the Supreme Court considers it necessary due to the seriousness of the crime and the urgency of grounds for custody".

This statutory provision was not applied by the Supreme Court in the present matter, and so conditions did not exist for proceeding under § 78 para. 2 of the Act on the Constitutional Court.

In the settled opinion of the Constitutional Court, the Court is bound in its decision making by the scope of the filed petition, and may not step outside its limits (ultra petitum) in its decision (see e.g. the judgment in the matter under file no. Pl. US 8/95).

As a result of the annulment of § 272 of the Criminal Procedure Code (that is, as a result of annulment of the cassation, or appellate, authority of the Supreme Court in proceedings on a complaint for violation of the law to the detriment of the defendant), § 276 fourth sentence of the Criminal Procedure Code becomes obsolete. By derogation from the elements contained in § 272 of the Criminal Procedure Code the provision of § 276 fourth sentence of the Criminal Procedure Code loses reasonable meaning: If the cassation, or appellate, authority of the Supreme Court in proceedings on a complaint for violation of the law to the detriment of the defendant is annulled, and if the possibility of issuing only an academic verdict without a specific impact on the defendant remains, then leaving the Supreme Court's authority to decide in such proceedings on the arrest or taking into custody of the defendant can not be considered otherwise than as contradictio in adiecto. In other words: In a situation where, as a result of the annulment of a particular statutory provision by a derogative judgment of the Constitutional Court another provision, different in content from the first one, loses reasonable meaning, i.e. loses the justification of its normative existence, this is grounds for annulling this statutory provision as well, even without this being a step ultra petitum. That provision ceases to be valid on the basis of the principle of cessante ratione legis cessat lex ipsa; the derogation made by the Constitutional Court is thus only of an evidentiary, technical nature.

Due to the foregoing, the Plenum of the Constitutional Court, in connection with the annulment of § 272 of the Criminal Procedure Code, also annulled § 276 fourth sentence of the Criminal Procedure Code.

For the reasons set forth above, the Constitutional Court postponed the effect of the derogative judgment, also in relation to § 276 fourth sentence of the Criminal Procedure Code, to 31 December 2001.

VII/e

Beyond the framework of rationis decidendi, only as obiter dictum, the Constitutional Court considers it necessary to speak to the legal consequences of this derogative judgment.

The first consequence is the impact of § 71 para. 1 of the Act on the Constitutional Court on the present matter.

If, on the basis of a legal regulation which was annulled, a court issued a verdict in criminal proceedings which went into effect but has not yet been executed, annulment of that legal regulation is, under the cited statutory provision, grounds for re-opening proceedings under the Act on Criminal Court Proceedings. However, the adjudicated matter does not involve such grounds. Violation of the principle of "equal weapons" in the legal regulation of active standing to file an extraordinary remedial measure does not concern the constitutionality, or lawfulness of actual proceedings before the Supreme Court, or proceedings connected to them. Thus, annulment of § 272 of the Criminal Procedure Code does not establish grounds for re-opening proceedings under § 71 para. 1 of Act No. 182/1993 Coll., as amended by later regulations.

The second consequence is the question of intertemporality of a derogative judgment, i.e. the question of whether possible derogation from § 272 of the Criminal Procedure Code also applies to cases in which the Minister of Justice filed a complaint for violation of the law to the detriment of the defendant, but, as of the day the annulling judgment went into effect, the Supreme Court had not decided on it. As the Constitutional Court is not authorized, in connection with its jurisdiction to annul statutes and other legal regulations, or their individual provisions, or in a positive manner regulate the arising intertemporal consequences, in this regard we must refer to general legal principles. In the area of intertemporality in civil and criminal trials, the principle applies that, unless the law provides otherwise, the court proceeds according to the procedural regulations valid and effective at the time of decision making. In the adjudicated matter, annulling § 272 of the Criminal Procedure Code annuls only the cassation and appellate authority of the Supreme Court in proceedings on a complaint for violation of the law filed to the detriment of the defendant, but does not annul the proceedings as such, i.e. it does not annul the possibility of issuing an academic verdict in a given matter for the purpose of unifying case law pro futuro (§ 268 para. 2 of the Criminal Procedure Code). This indicates that, in cases where the Minister of Justice filed a complaint for violation of the law to the detriment of the defendant, but as of the day the annulling judgment went into effect, the Supreme Court had not decided on it, after the derogative decision of the Constitutional Court goes into effect, only a decision by an academic verdict can be made.

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

Brno, 31 October 2001

Pl. US 15/01

Dissenting Opinion

of judge JUDr. V. Š. in the plenary matter of the petition of Panel III of the Constitutional Court to annul § 272 the Criminal Procedure Code of Act No. 141/1961 Coll.

In this dissenting opinion I express my disagreement in this matter with the reasoning of the judgment of 31 October 2001, insofar as

a) the Plenum of the Constitutional Court supports its conclusions with a "statistically proven rise in the ratio of complaints filed to the detriment of the defendants (more precisely, the sentenced party) in absolute and relative terms",

b) it derives the unconstitutionality of the provisions annulled by the judgment, § 272 and § 276 third sentence of Act No. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations (by reference to Art. 37 para. 1 of the Charter of Fundamental Rights and Freedoms, and Art. 96 para. 1 of the Constitution of the CR and Art. 6 para. 1 of the Convention for Protection of Human Rights and Fundamental Freedoms) also from the principle of "equal weapons".

re a) One could speak of a statistically proven rise (increase in the number of complaints filed to the detriment of defendants) only if evidence of it were admitted in a hearing held by the Plenum of the Constitutional Court, and if the claimed fact followed from that evidence.

Under long settled procedural principles, for one thing, evidence is admitted (by the court) in hearings (§ 48 para. 1 al. 1 of Act No. 182/1993 Coll., as amended by later regulations, the "Act"), for another, although various means by which the state of the matter can be determined (proven) can be considered evidence (§ 49 para. 1 of the Act), but nevertheless admission of evidence must always be conducted so that the parties to the proceedings can exercise their procedural rights toward the evidence presented in proceedings (§ 32 of the Act, § 123 of the Civil Procedure Code).

However, the Plenum of the Constitutional Court did not admit evidence in the adjudicated matter; if the chairwoman of the Supreme Court of the CR, in response to the request of the Constitutional Court (the reporting judge), submitted the requested statistical data in two filings (of 31 August 2001 and 5 September 2001), "for purposes of the present proceedings", this was – in terms of a hearing held by the Plenum of the Constitutional Court – only a foregoing procedural act by the reporting judge, whereby he secured documentary evidence (for the hearing) (§ 42 para. 3 of the Act), but was not evidence presented by a document in a hearing held by the Plenum of the Constitutional Court (§ 48 para. 1 al. 1, 2 of the Act, § 129 of the Civil Procedure Code), because the report of the reporting judge, even if it indicated the evidentiary source, can not be considered evidence, let alone admitted evidence.

Moreover, in the reasoning of the judgment of the Constitutional Court the cited statistical data, in and of themselves, do not demonstrate anything either in "absolute or relative

terms"; they can – without closer analysis (evaluation) – be interpreted both for the arbitrariness of the decision making public bodies and for the increasing shortcomings in the decision making of lower bodies active in criminal matters, and for the arising need either for unification of the decision making practice, especially of general courts (§ 28, § 29 of Act No. 335/1991 Coll., as amended by later regulations) or redress of unlawfulness.

re b) The reasons for the judgment are based, among other things, on the so-called principle of equal weapons.

However, neither the Charter of Fundamental Rights and Freedoms (Art. 37 para. 3, or Art. 96 para. 1 of the Constitution of the CR) nor the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6 para. 1) recognize such a principle, no matter how it may be used in the foreign professional literature, and no matter how much it has been domesticated in the Czech professional literature.

If this principle means a fundamental idea or principle (for this, cf., e.g., Sborník jazyka českého), then in the intended meaning and in this connection, the issue is equality of parties to the proceedings and not a choice of procedural means which they use to apply (implement) their rights through "weapons" in proceedings, usually before a court. The so-called "equal weapons" are thus subordinate to the equality of the parties to proceedings (it is included in it) and for this alone can not be, as a derivative of it, considered a basic idea or a principle which, moreover, in this case, is to be "reflected in all stages of criminal proceedings".

If a body active in criminal proceedings unjustifiably denies the defendant (the accused) the right to respond to admitted evidence, or if it restricts him in submitting evidence and similarly (see paragraph two of VII/b in the reasoning of the judgment), it does not thereby violate "the principle of equal weapons", but quite clearly violates either the principle of impartial proceedings, or, generally and primarily, in the event of such error to the benefit of another party to the proceedings (in this case to the benefit of the state attorney's office), the principle of equality of the parties to proceedings (Art. 96 para. 1 of constitutional Act No. 1/1993 Coll., Art. 37 para. 3 of the Charter of Fundamental Rights and Freedoms).

The term "equal weapons" has its origins in various historical and cultural conditions of Anglo-Saxon (American) law and its development, and, as such, in our context, in determination of law (protection of constitutionality), is unsuitable as a quasi-doctrinal tough concept and moreover, elevating it to a principle and substituting it for the principle of equality of parties to proceedings is unsuitable; therefore, I am convinced that reference to it is not appropriate in the decision making grounds of court decisions, including judgments (their reasoning) of the of the Constitutional Court.

Brno, 13 November 2001