2010/06/08 - PL. ÚS 3/09: SEARCHES OF OTHER PREMISES AND LAND

HEADNOTES

The interpretation of the right to privacy in spatial form, i.e. the right to respect for, and protection of, a dwelling from external interference, does not limit themselves to protection of premises used for residing in, but consider the right to respect for, and protection of, a dwelling together with the right to inviolability of the person and privacy and with the right to protection of personal freedom and dignity, as an inseparable part of the private sphere of every individual, defined spatially in the case of a dwelling.

The abovementioned maxims, arising from the constitutional order of the Czech Republic, require that an independent and impartial body rule in issuing a warrant for a search of other premises and lands. The state prosecutor cannot be considered as such a body, not can a police body.

The Constitutional Court is of the opinion that, especially at the present time, when autonomous fulfillment of private life and work or hobby activities are closely related to each other, it is not possible to make a sharp spatial division of privacy in places used for living in from privacy created in places and environments used for work or entrepreneurial activity, or for satisfying one's own needs or hobby activities, even if activities conducted in premises that are accessible to the public, or are not closed, e.g., entrepreneurial activities, may be subject to certain limitations that could represent a certain interference in the right to a private life. However, these are narrowly defined in advance, as regards the purpose of such restrictions, and are also known to a person, e.g. an entrepreneur, in advance, and such a person enters into various kinds of activities, e.g. conducting business, with that knowledge. Nevertheless, this does not, of course, affect that person's right to seek judicial protection from particular interference, which may be foreseen by statute, but which, in terms of the warrant or the conduct thereof, does not meet the principle of proportional restriction of the right to a private life. As regards unfenced lands (e.g. forests or fields), we must fundamentally distinguish between entering them and "searching" them, the latter being connected with interference in the integrity of the real estate (land). Therefore, the conduct of the search must be subject to the same regime as a search of enclosed premises. It is a generally known and shared experience (especially from the times before 1989), that it is often precisely in such premises that private life was often exercised through hiding things that were meant to remain hidden from the eyes of the public, and especially the public authorities.

This requirement is all the more pressing in a situation where our Criminal Procedure Code does not permit subsequent review of a court-ordered search warrant for other premises and lands. Thus, these acts, which are obvious interference in the fundamental right to a private life, are outside any immediately judicial review.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

On 8 June 2010, the Plenum of the Constitutional Court, consisting of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Vladimír Kůrka, Dagmar Lastovecká, Jan Musil, Jiří Nykodým, Pavel Rychetský, Eliška Wagnerová (judge rapporteur) and Michaela Židlická, ruled on a petition from panel II. of the Constitutional Court seeking the annulment of § 83a of Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations, with the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic participating as parties to the proceeding, as follows:
The provisions of § 83a par. 1, part of the first sentence and the second sentence, of Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations, which read: "'in a preliminary proceeding the state prosecutor or police body. A police body needs the prior consent of the state prosecutor thereto," are annulled as of the day this judgment is promulgated in the Collection of Laws.

REASONING

I.

I. A) Definition of the matter and recapitulation of the petition

1. In a proceeding on a constitutional complaint, file no. II. ÚS 1414/07, the complainant, Ing. M. B. van S., sought annulment of Supreme Court resolution of 28 February 2007, file no. 3 Tdo 161/2007, decision of the Regional Court in Pilsen of 22 June 2006, file no. 9 To 255/2006, and decision of the District Court Pilsen-south of 8 February 2006, ref. no. 2 T 127/2005-1028, because she believed that these general court decisions violated her fundamental rights guaranteed by Art. 36 par. 1 and 2 of the Charter of Fundamental Rights and Freedoms (the "Charter"), and also violated Art. 4 par. 1, 2 and 4 of the Charter. In the abovementioned general court decisions the complainant was found guilty of the crime of unlicensed production and possession of narcotic and psychotropic substances and poisons under § 187 par. 1 a par. 2 let. a) of the Criminal Code, and sentenced to 2 years in prison, conditionally suspended for 2 years.

2. In the constitutional complaint, the complainant expressed doubts about the legality of a house search and search of other premises, because she believed that the statutory conditions for them had not been met, and therefore the general courts should not have taken that evidence into account at all.

3. The second panel of the Constitutional Court did not consider it constitutional for the Criminal Procedure Code, as the statutory regulation governing a particular procedure in criminal matters (§ 82 et seq.), to specify different (stricter)

conditions under which an individual's right to privacy can be violated by a house search (§ 83) than in the case of a search of other premises and land (§ 83a), although an inspection of other premises is undoubtedly also interference in an individual's right to privacy, in an extent comparable to that of a house search.

4. Thus, the second panel of the Constitutional Court concluded that § 83a par. 1 of the Criminal Procedure Code (the "CPC") is inconsistent with the constitutional order of the Czech Republic. Therefore, by resolution of 26 February 2009, file no. II. ÚS 1414/07, it suspended the proceeding on the constitutional complaint under § 78 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") and submitted to the Plenum of the Constitutional Court a petition seeking the annulment of § 83a par. 1 of the CPC under § 64 par. 1 let. c) of the Act on the Constitutional Court.

I. B) Briefs from the parties to the proceeding

5. In accordance with § 42 par. 4 a § 69 of the Act on the Constitutional Court, the Constitutional Court sent the petition for the annulment of the contested provisions to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic.

6. The Chamber of Deputies of the Parliament of the Czech Republic, represented by its chairman, Ing. Miloslav Vlček, in its brief of 21 April 2009, merely recapitulated the course of the legislative process leading to the adoption of the current wording of the contested provision, § 83a of the CPC. It also consented to waive a hearing.

7. The Senate of the Parliament of the Czech Republic, represented by its chairman, MUDr. Přemysl Sobotka, in its brief of 22 April 2009, also described the legislative process of adoption of the current wording of the contested provision, § 83a of the CPC (an amendment of the CPC implemented by Act no. 265/2001 Coll.) by the Senate. It also stated that, in view of the discussion during the adoption of the amendment, relating to the authorization of the state prosecutor when extending detention during preliminary proceedings, one can conclude, that it inclines toward the opinion of the amendment's proponent, that under the amendment the state prosecutor becomes the real master of the preliminary proceeding, and thus judicial aspects of his role are significantly strengthened. The majority of the Senate agreed that the legal framework presented as a whole pursues a substantively and legally progressive trend toward making law more streamlined and enforceable. The Senate also consented to waive a hearing.

II.
Requirements for the petitioner's active standing

8. The petition for the annulment of § 83a par. 1 of the Criminal Procedure Code due to inconsistency with the constitutional order of the Czech Republic was filed by panel II. of the Constitutional Court in a proceeding on a constitutional complaint by Ing. M. B. van S., file no. II. ÚS 1414/07, where the substance of the

constitutional complaint was, among other things, the complainant's disagreement with the actions of the general courts in evaluating the legality of a search of other premises and land, the requirements for which are contained in the contested Criminal Procedure Code provision. This is a petition filed in accordance with § 64 par. 1 let. c) of the Act on the Constitutional Court, and therefore the requirements for active standing to file it were met.

III.
Constitutionality of the legislative process

9. In proceedings on review of a norm under Art. 87 par. 1 let. a) of the Constitution of the Czech Republic (the "Constitution"), the Constitutional Court, under § 68 par. 2 of the Act on the Constitutional Court, must first review whether the statute in question was adopted and issued in a constitutionally prescribed manner [regarding the algorithm of review in a proceeding on review of a norm see point 61 of Constitutional Court judgment file no. Pl. ÚS 77/06 of 15 February 2007 (N 30/44 SbNU 349; 37/2007 Coll.)].

10. In relation to Act no. 558/1991 Coll., which amends and supplements the Criminal Procedure Code and the Act on Protection of State Secrets, based on which the statutory provision in question, § 83a, was inserted into the Criminal Procedure Code with effect as of 1 January 1992, the Constitutional Court did not determine whether it was adopted and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner, because, in the case of legal regulations that were issued before the Constitution went into effect, the Constitutional Court is authorized to review only whether their content is consistent with the contemporary constitutional order, but not the constitutionality of the process by which they were created or observance of norm-creating authority [see Constitutional Court resolution, file no. Pl. ÚS 5/98, of 22 April 1999 (U 32/14 SbNU 309)].

11. In the period from 1 January 1993, i.e. from the date when the Constitution of the Czech Republic entered into force, the following amendments were made to the statutory provision in question. The first amendment, effective as of 1 January 1994, was made by Act no. 292/1993 Coll., which amends and supplements Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), Act no. 21/1992 Coll., on Banks, and Act no. 335/1991 Coll., on Courts and Judges. The contested provision was subsequently amended in connection with the adoption of Act no. 283/1993 Coll., on the State Prosecutor's Office, and 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.

12. As the amendments to the contested provision introduced by the abovementioned statutes were primarily technical legislative changes, with no fundamental effect on the actual content of the contested provision, in this case the Constitutional Court, in view of the principles of procedural efficiency, dispensed with a closer review of whether the cited statutes were adopted and issued within the bounds of constitutionally provided jurisdiction and in a

constitutionally specified manner, and limited itself, taking into account the briefs from the Chamber of Deputies and the Senate, to formally verifying the course of the legislative process of their adoption from publicly available sources of information (resolutions and parliamentary publications available in the digital library on the webpages of the Chamber of Deputies and the Senate, at www.psp.cz and www.senat.cz). The Constitutional Court concluded that the cited statutes were adopted and issued within the bounds of constitutionally provided jurisdiction and in a constitutionally prescribed manner. Therefore, it turned to reviewing the content of the contested provision,§ 83a par. 1 of the CPC, for consistency with the constitutional order [Art. 87 par. 1 let. a) of the Constitution].

IV.
The text of the contested provision

13. The contested provision, § 83a par. 1 of Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations, reads:

§ 83a
Search warrant for other premises and lands

(1) A search of other premises or lands may be ordered by the panel chairman, in a preliminary proceeding a state prosecutor or police body. A police body needs the prior consent of the state prosecutor thereto. The warrant must be issued in writing, and must contain a justification. It must be delivered to the user of the premises or land in question, and if he is not available during the search, immediately after removal of any obstacle that prevents delivery.

V.
Aspects for reviewing the petition

V. A) Inviolability of private life and dwelling, as fundamental rights, and definition of the term “dwelling”

14. Prosecution of crimes and the just punishment of perpetrators is a constitutionally approved public interest, the essence of which is to transfer the responsibility for prosecution of the most serious violations of fundamental rights and freedoms by individuals and legal entities to the state. Insofar as the criminal law permits implementation of the public interest in prosecution of criminal activity through robust instruments that restrict an individual’s personal integrity, use of these instruments must observe constitutional law limits, because such use carries with it a serious limitation of an individual’s fundamental rights and freedoms. Thus, the state authority can restrict personal integrity and privacy (i.e. breach respect for them) only in quite exceptional cases, and only if it is necessary in a democratic society and the aim pursued in the public interest cannot be achieved in a different manner [cf. Constitutional Court judgment, file no. I. ÚS 3038/07, of 29 February 2008 (N 46/48 SbNU 549), also available in the electronic database of decisions: http://nalus.usoud.cz].

15. The case of a house search or search of other premises involves restriction of a person's fundamental right to the inviolability of his dwelling, guaranteed by Art. 12 par. 1 of the Charter, according to which "A person's dwelling is inviolable. It may not be entered without the permission of the person living there." Likewise, Art. 8 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") guarantees this fundamental right, stating that: "Everyone has the right to respect for his private and family life, his home and his correspondence;" and likewise Art. 17 of the International Covenant on Civil and Political Rights (the "Covenant") guarantees the individual this fundamental right, protecting him from "arbitrary or unlawful interference with his privacy, family, home or correspondence."

16. While Art. 8 par. 1 of the Convention guarantees respect (by the public authorities) for, among other things, private and family life and one's dwelling, i.e. it formulates the fundamental right or freedom in its classic, i.e. negative, function, Art. 12 par. 1 of the Charter proclaims one's dwelling to be inviolable, and this formulation is quite evidently open to interpretation of both the negative and the positive right to protection of the inviolability of one's dwelling from interference by third parties. The textual difference between the two provisions, however, must be considered marginal, because in Europe interpretation of classic fundamental rights and political rights, however formulated, has become settled in two functional levels. The first function requires that the state authority respect the fundamental rights, i.e. the rights function as negative rights; they function to protect individuals from excessive or completely improper interference by the state authority in the individual's sphere of freedom, which he autonomously completes with his actions as expressions of his free will. The second function of fundamental rights recognized in Europe is the protective function. That, in contrast, binds the public authorities, the state, and especially the legislative and executive branches, to positive actions (legislative or administrative), with the aim of protecting the fundamental rights from possible interference by third (private) parties, or the protective function of the fundamental right requires that the state authority engage in activity that is intended to create conditions for the exercise of fundamental rights. These two functions of the fundamental rights are considered equal. Because virtually every statute contains certain limitations on the fundamental rights, and because its purpose is equally often protection of other fundamental rights, or protection of constitutionally approved public goods, it is the task of the legislature to bring the two competing interests into balance, as far as possible, so that both will be preserved in the greatest extent possible. Given the acknowledged lack of a hierarchy in the fundamental rights, there is no other path than balancing the competing fundamental rights, and the legislature may not do either "too much" or "too little." (On the functions of the fundamental rights, see, e.g., Grimm, D.: The Protective Function of the State in European and US Constitutionalism, Council of Europe Publishing, Strasbourg, p. 119 et seq., or German Constitutional Court decision BVerfGE 39, 1 (42)).

17. In its case law, the Constitutional Court has defined the significance that must be accorded to the constitutionally guaranteed right to the inviolability of one's dwelling under Art. 12 of the Charter. In judgment file no. III. ÚS 287/96, of 22 May 1997 (N 62/8 SbNU 119), it stated that, "Freedom of one's dwelling, as a

constitutionally guaranteed right under Art. 12 of the Charter, by its nature and significance, falls among the fundamental human rights and freedoms, because together with personal freedom and other constitutionally guaranteed fundamental rights it completes the personal sphere of an individual, whose individual integrity, as a completely essential condition for dignified existence and development of a human life generally, must be respected and thoroughly protected; therefore, this protection quite right comes under constitutional protection, because – seen from an only somewhat different viewpoint – this is an expression of respect to the rights and freedoms of man and of citizens (Art. 1 of the Constitution)." [similarly, cf. judgment file no. I. ÚS 201/01, of 10 October 2001 (N 147/24 SbNU 59), or judgment file no. II. ÚS 362/06, of 1 November 2006 (N 200/43 SbNU 239)]. Thus, the right guaranteed by Art. 12 of the Charter is closely connected to the rights guaranteed by Art. 7, 8 and 10 of the Charter, which, together, form the personal (private) sphere of every individual, which the right guaranteed by Art. 12 of the Charter defines spatially as the dwelling.

18. Of course, neither the Charter nor the Convention specify the content of the institution of a "dwelling" in more detail. It is defined by § 82 par. 1 of the CPC, the case law of the general courts, and Czech criminal law doctrine, as a space used for living in (apartments, family homes, recreational cottages, replacement apartments, rooms in facilities intended for permanent housing as dormitories and residence halls, but also rented hotel rooms, etc.) and premises belonging to it, which must be considered to include all premises which one is entitled to use on the grounds of the ownership title or other legal title that authorizes use of the space in question for residence or habitation. Usually this will be a lease or sublease agreement, although the entitlement may also come from an easement. According to prevailing opinions, the right to inviolability of a dwelling cannot be claimed by someone who lives in premises without an entitlement. In contrast, the concept of a dwelling does not include premises not used for living in (other premises) under § 82 par. 2 of the CPC, which include, in particular, non-residential premises such as offices, workshops, factory halls, warehouses, premises for conduct of a trade, but also free-standing garages that are not part of a dwelling (cf. Šámal, P. a kol.: Trestní řád, komentář, I. díl, 5. vydání, [The Criminal Procedure Code, part I., 5th ed.] C. H. Beck, Prague 2005, p. 629n., or, somewhat differently, Klíma, K. a kol.: Komentář k Ústavě a Listině [Commentary on the Constitution and the Charter], Nakl. A. Čeněk, Pilsen 2005, p. 693).

19. In contrast to the indicated sub-constitutional definition of the institution of a "dwelling," the case law of the European Court of Human Rights (the "ECHR") is built on a wider concept of the term for purposes of setting the scope of the fundamental right guaranteed by Art. 8 par. 1 of the Convention, and is based on a close connection between it and the right to a private life. The ECHR identified the wider concept of "dwelling" when interpreting the Convention in the light of current conditions, in accordance with the aim pursued by Art. 8 of the Convention, i.e. protection of individual's privacy from unjustified interference by the public authorities, because in modern times it is not possible to maintain a sharp spatial division of privacy in premises used for housing and privacy exercised in a person's working environment. Therefore, under the right to respect for one's dwelling under Art. 8 par. 1 of the Convention, the ECHR also includes a requirement for respect for the privacy of a company's headquarters, branches, or

the operating premises of legal entities (cf. judgment of 16 April 2002 in the case Colas Est. v. France), office premises (cf. judgment of 25 February 1993 in the case Crémieux v. France, or judgment of 25 February 1993 in the case Miailhe v. France) or attorneys' offices (cf. judgment of 12 December 1992 in the case Niemietz v. Germany). It added that restricting the concept of a dwelling in a manner that would exclude places where one conducts one's profession is not always possible, as it is enough to point to the interconnectedness and impossibility of separating an individual's personal activities from his work activities (Niemietz v. Germany, § 29 and 31). To this case law the Constitutional Court adds that although the first three cited judgments are based in domestic administrative proceedings, the case law can also be applied in the present case, which concerns review of criminal law regulations, applying the argument a fortiori, because it is obvious that criminal law instruments have even more intensive effects on the sphere of fundamental rights, let alone the fact that the ECHR defines the concept of a crime autonomously and without regard to national classification. Likewise, the last cited judgment is relevant to the review of the present case, because it addresses the extension of the right to privacy.

20. The case law of foreign constitutional courts and their constitutional scholarship takes a similar approach. For example, the case law of the German Constitutional Court also defines more widely the institution of a "dwelling" (Wohnung) under Art. 13 of the German Grundgesetz, which guarantees the right to inviolability of a dwelling and defines the conditions for limiting it more closely. Privacy enjoys respect and protection not only premises used for residential purposes (a dwelling in the narrower sense of the word), but also, e.g., commercial premises, office spaces, premises for conduct of trades, craftsmen's premises, warehouses, or agricultural buildings, etc, i.e. places where work or entrepreneurial activity is conducted. The German doctrine is based on the opinion that autonomous fulfillment of private life and work activities are closely connected. Even opening commercial premises to the public does not remove their protection under the right to privacy, or the inviolability of a dwelling. The intensity of this right, however, decreases, and justification for restricting it in such a case is subject to different prerequisites. Nevertheless, one must start with the premise that even such commercial premises are not accessible to the public without limitation. Entry to them depends solely on the will of their user (cf. Mangoldt, H., Klein, F., Starck, Ch.: Kommentar zum GG, Band I., 5. vyd. [Commentary on the Grundgesetz, Vol. I, 5th ed.], Verlag Franz Vahlen, Munich 2005, p. 1235n. and the case law of the German Constitutional Court cited therein).

21. When interpreting the right to privacy in spatial form, i.e. the right to respect for, and protection of, a dwelling from external interference, the ECHR and the German Constitutional Court do not limit themselves to protection of premises used for residing in, but consider the right to respect for, and protection of, a dwelling together with the right to inviolability of the person and privacy and with the right to protection of personal freedom and dignity, as an inseparable part of the private sphere of every individual, defined spatially in the case of a dwelling.

V. B) The role of the court in permitting interference in the right to inviolability of one's dwelling

22. As the Constitutional Court already stated above, if robust instruments that restrict an individual's personal integrity are to be used in promoting the public interest in prosecuting criminal activity, it is necessary that they remain within constitutional law limits. "The criminal law determines the border between the state's punitive power and the individual's freedom with the intent that the exercise of the state's punitive power not become an instrument of arbitrariness against the individual used by the temporary holders of state power." (cf. Kallab, J.: Zločin a trest, Úvahy o základech trestního práva [Crime and Punishment: Deliberations on the Foundations of Criminal Law], J. R. Vilímek, Prague 1916, p. 8). In terms of the imperative of constitutional law limits in applying the instruments of the criminal trial, we must state that interference in an individual's fundamental right or freedom by the state authority is permissible only if it is interference that is necessary in a democratic society, and if it is acceptable in terms of the statutory existence and observance of effective, concrete guarantees against arbitrariness. The essential prerequisites of a fair trial require that an individual have sufficient guarantees against the possible abuse of power by the public authorities [e.g., judgment file no. II. ÚS 502/2000, of 22 January 2001 (N 11/21 SbNU 83) or judgment file no. II. ÚS 789/06, of 27 September 2007 (N 150/46 SbNU 489), also available in the electronic database of decisions: http://nalus.usoud.cz, and others].

23. These guarantees are provided primarily by court review of the most intensive interference in individuals' fundamental rights and freedoms, because even in a criminal proceeding the courts have an obligation to provide individuals with protection of their fundamental rights and freedoms (Art. 4 of the Constitution). Art. 13 of the Convention also explicitly requires that a person who believe that his fundamental rights were violated shall have an effective remedy before a national "authority," which must be interpreted in connection with Art. 4 of the Constitution. It is also not permissible for a court, or judge, to be in the position of a mere "helper" for a public complaint, because the very basis of the institution of a court (judge) requires that it (he) be absolutely impartial and independent [in judgment file no. Pl. ÚS 11/04, of 26 April 2005 (N 89/37 SbNU 207; 220/2005 Coll.), the Constitutional Court stated: "At an objective level, impartiality and independence are generally evaluated in terms of the relationship to other components of power (the principle of separation of powers), in terms of the ability of persons (with a potential interest in a particular outcome or course of a dispute) to influence the creation, duration and termination of the office of a member of judicial body (tribunal). Therefore, judges and members of judicial-type bodies must have a sufficiently independent status to rule out the possibility that their decision-making activity can be directly or indirectly influenced. The existence of protection against external pressures is evaluated, e.g., in terms of the existence of a potential opportunity to influence a judge's career, or the opportunity to bring about the termination of his office. A guarantee of financial independence is also undoubtedly part of an independent status. Only then does the formal order to not be guided by the orders of others receive material content, and only thus are neutrality and distance from the parties ensured."].

24. When evaluating impartiality and independence, we cannot completely overlook the "image" aspect of the matter, where the "appearance of independence and impartiality for third parties" is also considered a valid criterion, because it is precisely this aspect that is important for ensuring confidence in judicial decision making. This criterion reflects the social nature of judicial decision making, which means that even if grounds for doubts concerning impartiality and independence do not exist (subjectively or objectively), one cannot overlook the possible existence of a collective belief that such grounds exist (cf. the abovementioned judgment file no. Pl. ÚS 11/04 or ECHR judgment of 23 June 1981 in the case of Le Compte, Van Leuven and de Meyere v. Belgium).

25. In the case of application of criminal law instruments that restrict an individuals' fundamental rights and freedoms (in particular, a house search, a search of other premises and lands, a personal search, detention, holding and opening mail, wiretapping telecommunications) the requirement for judicial protection of fundamental rights must be evident in the issuance of a court warrant and in the adequate justification for it. It must meet both the requirements of the law and, especially, the constitutional principles on which the statutory provision is based, or which retroactively limit interpretation thereof, because application of such a provision is especially serious interference in each individual's fundamental rights and freedoms (similarly, see the cited judgment file no. II. ÚS 789/06).

26. The abovementioned maxims, arising from the constitutional order of the Czech Republic, require that an independent and impartial body rule in issuing a warrant for a search of other premises and lands. The state prosecutor cannot be considered as such a body, not can a police body. One cannot overlook the fact that, in an adversarial proceeding, state prosecutors play the role of a body submitting a public complaint, and are bound by law, as well as their oath of office, personally bound to protect the public interest (§ 18 par. 3 of the Act on the State Prosecutor's Office). In preliminary proceedings, whether they have a dominant position, they, together with the police body, are required to organize their activities so as to effectively contribute to the timeliness and justification of criminal prosecution (§ 157 par. 1 of the CPC). All this can lead to legitimate doubts regarding their independence (or the appearance thereof) when reviewing the conflict of individuals' fundamental rights and freedoms with the public interest in prosecuting criminal activity. In the already cited judgment file no. Pl. ÚS 11/04 the Constitutional Court clearly defined the requirements for a body that, materially speaking, demonstrates a quality that can be identified with a court, "the constitutional order of the Czech Republic (Art. 81 and 82 of the Constitution) provides that the judicial power is exercised only by independent and impartial courts, or independent and impartial judges, who are guided by the fundamental rules of a fair trial (Art. 1 par. 1 of the Constitution, Chapter Five of the Charter). These provisions can be interpreted as institutional guarantees of a materially understood exercise of the judicial power, and therefore, in terms of the right to a fair trial, it is not necessary that the court, under Art. 36 par. 2 of the Charter, be exclusively a body in the structure of the general courts, but it must be an independent body whose members are independent and impartial in their decision making. It must also have unconditional access to review all relevant aspects of the case (factual and legal), respecting the principles of a fair trial (e.g. the principle

that no one can be a judge in his own matter or the principle that both sides must be heard), and an effective decision cannot be overturned by another act by a state authority (definition of the judiciary in the material sense)."

VI. Substantive Review

27. The contested provision, § 83a par. 1 of the CPC, sets the conditions under which a search of other premises and lands can be ordered and conducted, i.e. the conditions for using an instrument of the criminal trial that restricts an individual's fundamental rights and freedoms, in this case the right to privacy in a spatial form, i.e. the right to respect for, and protection of, one's dwelling from external interference.

28. Thus, the Constitutional Court had to review, in light of the abovementioned constitutional law aspects, whether parts of the contested provision meet the requirements arising from the abovementioned principles; it concluded that they did not.

29. It is quite evident from the overall concept of the contested provision, § 83a par. 1 of the CPC, which sets the conditions under which a search of other premises and lands can be ordered and conducted, and especially from comparing it with § 83 of the CPC, which sets conditions for ordering and conducting a house search, that it reflects a narrower concept of the term "dwelling." In this provision, as stated above (see point 18), a dwelling is limited to space actually used for living in, which must be distinguished from premises not used for living in. This approach, which results in a blanket, restrictive interpretation of the right to a private life, is then reflected in the setting of different (stricter) conditions for ordering and conducting a house search, compared to the conditions for ordering and conducting a search of other premises and lands.

30. The Constitutional Court considers this concept, based on a strict distinction between an individual's private life, exercised in premises used for living in, which is given a higher degree of protection from potentially excessive interference by the public authorities, and an individual's private life exercised, e.g., in his work environment or in places that he uses to conduct hobby activities, or even inactivity, in the form of simple relaxation or entertainment, to be impermissible in terms of the principles stated in part V. A) of the judgment, because it bypasses the purpose of the fundamental right to a private life [see, e.g., judgment file no. II. ÚS 2048/09, of 2 November 2009, point 19 (available in the electronic database of decisions: http://nalus.usoud.cz)]. The Constitutional Court is of the opinion that, especially at the present time, when autonomous fulfillment of private life and work or hobby activities are closely related to each other, it is not possible to make a sharp spatial division of privacy in places used for living in from privacy created in places and environments used for work or entrepreneurial activity, or for satisfying one's own needs or hobby activities, even if activities conducted in premises that are accessible to the public, or are not closed, e.g., entrepreneurial activities, may be subject to certain limitations that could represent a certain interference in the right to a private life. However, these are narrowly defined in advance, as regards the purpose of such restrictions, and are also known to a

person, e.g. an entrepreneur, in advance, and such a person enters into various kinds of activities, e.g. conducting business, with that knowledge. Nevertheless, this does not, of course, affect that person's right to seek judicial protection from particular interference, which may be foreseen by statute, but which, in terms of the warrant or the conduct thereof, does not meet the principle of proportional restriction of the right to a private life. As regards unfenced lands (e.g. forests or fields), we must fundamentally distinguish between entering them and "searching" them, the latter being connected with interference in the integrity of the real estate (land). Therefore, the conduct of the search must be subject to the same regime as a search of enclosed premises. It is a generally known and shared experience (especially from the times before 1989), that it is often precisely in such premises that private life was often exercised through hiding things that were meant to remain hidden from the eyes of the public, and especially the public authorities.

31. Therefore, just as in the conduct of a house search, so in the case of a search of other premises, including agricultural buildings, including lands, there is necessarily interference in an individual's private sphere, spatially defined, and such interference requires the prior permission of a court.

32. This requirement is all the more pressing in a situation where our Criminal Procedure Code does not permit subsequent review of a court-ordered search warrant for other premises and lands. Thus, these acts, which are obvious interference in the fundamental right to a private life, are outside any immediately judicial review. The ECHR addressed the need of such review in the case Camenzind v. Switzerland (judgment of 16 December 1997). In that case the ECHR found violation of Art. 13 of the Convention in relation to Art. 8 of the Convention, even though the complainant had a procedural remedy, which he exercised before the appropriate chamber of the Swiss Federal Court. However, the court rejected the appeal, due to the doctrine of "continuing interference." In this situation, the ECHR found the existing procedural remedy to be ineffective. Similarly, in the Czech Republic one could consider a constitutional complaint directly against a search warrant for other premises, but the case law of the Czech Constitutional Court also partly shares the doctrine of "continuing interference," and, moreover, the Constitutional Court has consistently ruled that in the event of interference by public authorities that does not represent an irreparable violation of fundamental rights, priority must be given to the principle of subsidiarity. This means that, in a proceeding on a constitutional complaint, it can review only the final decision in a case, which should also address the objection of interference in the right to private life in the form of a house search [regarding application of the principle of subsidiarity, cf., e.g. resolution file no. IV. ÚS 122/99, of 8 September 1999 (U 56/15 SbNU 315) and the unpublished resolutions file no. I. ÚS 690/2000, file no. I. ÚS 313/06, file no. II. ÚS 434/06, file no. III. ÚS 887/09 or file no. III. ÚS 1986/09 (available at http://nalus.usoud.cz)]. Within the framework of the foregoing, our constitutional complaint also appears to be an ineffective remedy. Moreover, it is certainly not desirable for the Constitutional Court, in similar matters, to be the first to evaluate the proportionality and conduct of searches of all premises. it could disproportionately and prematurely interfere in the competence of the general courts to gather and evaluate evidence, and as a consequence also predetermine the outcome of a criminal proceeding.

33. In view of the foregoing, the Constitutional Court states that the contested parts of § 83a par. 1 of the CPC cannot be considered constitutional, because they clearly violate the constitutional law limits indicated above (Art. 12 par. 1 of the Charter, Art. 8 par. 1 of the Convention and Art. 17 of the Covenant), which absolutely must be respected in statutory construction (as well as in the application) of instruments of the criminal trial that limit the fundamental rights and freedoms of individuals.

34. For these reasons, the Constitutional Court ruled, under § 70 par. 1 of the Act on the Constitutional Court to annul parts of the contested provision, § 83a par. 1 of Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations, as is stated in the verdict of this judgment, which will become enforceable on the day it is promulgated in the Collection of Laws (§ 58 par. 1 of the Act on the Constitutional Court).

Chairman of the Constitutional Court:
JUDr. Rychetský /signed/

Dissenting opinions to the decision of the Plenum, under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, were filed by judges Vladimír Kůrka, Jan Musil and Michaela Židlická.

1. Dissenting opinion of judges Jan Musil and Michaela Židlická

We disagree with the verdict and reasoning of the judgment of the plenum of the Constitutional Court of 8 June 2010, file no. Pl. ÚS 3/09, which annulled part of § 83a par. 1 of Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code), as amended by later regulations.

Under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, we are submitting a dissenting opinion to the judgment, reasoning as follows:

I. There is no constitutional regulation that would require that a prior court warrant be issued for a search of other premises and lands in a preliminary criminal proceeding.

1. The provision of § 83a of the CPC, which permits a state prosecutor (or police body, with the consent of the state prosecutor) to order a search of other premises and lands in a preliminary criminal proceeding is not inconsistent with constitutional regulations.

2. Neither the Constitution, nor the Charter of Fundamental Rights and Freedoms (the “Charter,” nor international treaties on protection of fundamental rights and freedoms recognize any institution of the “inviolability of other premises and lands.” It is obvious that such premises are protected by legal regulation from

unjustified interference (e.g. protection of property rights), and that the entry by bodies active in criminal proceedings to these premises and search thereof must be governed by law, which the legal framework contained in § 83a of the CPC does quite satisfactorily.

3. Nor can the Constitutional Court, if it is not to find itself in the impermissible position of a positive legislature, find a "sub-constitutional" statute to be inconsistent with a non-existent positive constitutional positive regulation.

II. In terms of the intensity of interference in fundamental rights and freedoms a search of other premises and lands is not comparable to a house search

4. The judgment is based on the premise that a search of other premises and lands is among "the most intensive interference in the fundamental rights and freedoms" (point 32 of the reasoning), and it bases the requirement of judicial review (in the form of a prior court warrant for the search) on that argument. In several places the reasoning of the judgment compares a search of other premises and lands to a house search. Point 3 of the reasoning states that second panel of the Constitutional Court, which submitted the petition to annul § 83a of the CPC to the Plenum, believes that "a search of other premises is undoubtedly also interference in an individual's right to privacy, in an extent comparable to that of a house search." Point 15 of the reasoning even claims that "a house search or search of other premises involves restriction of a person's fundamental right to the inviolability of his dwelling."

5. We believe these deliberations are incorrect. We consider it undeniable that the constitutionally protected values are very different in terms of their significance, and that their different degrees of gravity must be matched by different degrees of legal protection.

6. A sensitive differentiation of the constitutional rights and freedoms is necessary, both for the legislature, and for the bodies applying the law. It is generally known that constitutional rights are often in conflict with each other, and one must weigh, using the proportionality test, which fundamental right or public good must be given priority. Such evaluation of values in conflict is typical of criminal proceedings, because it is necessary to balance, on the one hand, the public interest (and the interest of crime victims) in the effective suppression of criminality, with, on the other hand, protection of the rights and freedoms of the defendant.

7. Leveling all fundamental rights and freedoms on the same level makes it impossible to successfully apply the proportionality test, and thus leads to curious conclusions, such as the one that a former cow shed – now an illegal hemp farm (precisely such a place was subject to a search in the criminal matter that gave the second panel of the Constitutional Court grounds to submit the petition for annulment of the contested statutory provision) – deserves the same constitutional law protection as a private apartment or human dwelling.

8. To justify the alleged unconstitutionality of the contested provision, the

judgment relies on Art. 12 par. 1 of the Charter and Art. 17 of the International Covenant on Civil and Political Rights (the "Covenant"). We maintain that the cited (nor any other) constitutional norms do not provide any such protection to "other premises and lands."

9. Art. 12 par. 1 of the Charter expressly speaks only of protection of a "dwelling" (a "dwelling is inviolable."). The Convention for the Protection of Human Rights and Fundamental Freedoms contains the same term, in Art. 8 par. 1 ("Everyone has the right to respect for his private and family life, his home and his correspondence."). Art. 17 par. 1 of the Covenant uses the term "home" ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation"). We consider interpretation of the terms "dwelling" and "home" to include a cow shed – a hemp farm – to be completely inappropriate – if only because common language usage, which cannot be ignored when interpreting legal norms, does not allow any such interpretation.

10. One can add that the term "dwelling" is also used in other sub-constitutional legal norms, e.g. the Criminal Code, in the elements of the crime of "violation of domestic freedom" under § 178. As point 18 of the judgment correctly states, settled case law and criminal law doctrine interpret the term expansively, and include not only apartments and residential houses, but also, e.g., recreational cottages, replacement apartments, rooms in facilities intended for permanent residence such as dormitories and residence halls, but also a rented hotel room, etc. We can, of course, agree with all that. However, Czech criminal law teaching and case law has never included under the term "dwelling" spaces such as cow sheds, factory halls, warehouses, offices, etc.; on the contrary, it distinguishes these spaces from dwellings, and uses for them the separate term "non-residential premises," giving them protection in § 208 of the Criminal Code ("unjustified interference in the rights to a house, apartment, or non-residential premises").

11. We consider it extremely undesirable, and inconsistent with the principle of legal certainty and the principle of the definiteness of law, for an autonomous or parallel definition or interpretation to be introduced in the area of constitutional law that is different from other legal branches in the same legal system. If bodies active in criminal proceedings allowed themselves to be inspired by such procedures and, began to include the spaces mentioned in the judgment under the term "dwelling" in the elements of a crime, that would lead to a criminalization unintended by the legislature of a different kind of conduct and to violation of the constitutional principle of nullum crimen sine lege certa (Art. 39 of the Charter).

III. A search of other premises and lands in preliminary criminal proceedings is usually not interference in privacy, and is not sufficiently intensive interference to require the prior consent of a judge

12. Apart from the fact that the judgment improperly compares "other premises" and "land" to the constitutional law concepts "dwelling" and "home," it is also based on the premise that the criminal law procedure "search of other premises and lands" also means interference in "private life," protected by Art. 8 par. 1 of

the Convention and Art. 17 par. 1 of the Covenant.

13. We disagree with this generalized claim. If the concept "private life" is not to become completely vague, boundless, and legally ungraspable, a more precise definition of it must exist – other wise, almost anything could be included under this concept. We have searched in vain for attributes that could be used to describe a private life led in a cow shed / hemp farm. With such a wide concept of private life, the special constitutional protection of values such as domestic freedom (the right to respect for one's dwelling or house), protection of telecommunications secrets, protection of family life, protection of personal information, etc. would be practically redundant, because all of that would be covered by this widely understood protection of "private life."

14. No doubt it is very difficult to define the term "private life" so that one could draw relevant legal conclusions from it; nevertheless, when interpreting it in law it is necessary to come to a more definite definition. We believe that the term "private life" must always be applied to a particular person and his activities – it is conduct that is characterized by a certain intimacy, not intended for the eyes of the public, takes place in a relatively delimited private space, to which the person in question has a particular relationship. In our opinion, the essential thing is that the defining element of "private life" is personally conducted activity that is tied to specific emotional experience. We consider defining the term "private life" only using an unbounded spatial definition and conduct of any sort of activity – even an activity that is criminal (e.g. illegal cultivation of drugs) to be completely vague and inadequate for the requirement of certainty of legal terms.

15. We agree that under certain circumstances "private life" can also take place elsewhere than in a dwelling, e.g., in places otherwise used for work or entrepreneurial activity, or even in other premises (as the reasoning states in point 30). However, we consider it important that conducting private life in such other premises is exceptional and episodic. It is part of the typical features of any legal framework that it generalizes collective, typical events, and these certainly do not include the conduct of private life in non-residential premises or on plots of land. We can imagine protection of the elements of private life in such exceptional cases within individual cases of application of the law, but not as a general legal regulation.

16. We can perhaps agree with the claim in point 30 of the reasoning that, "especially at the present time, when autonomous fulfillment of private life and work or hobby activities are closely related to each other, it is not possible to make a sharp spatial division of privacy in places used for living in from privacy created in places and environments used for work or entrepreneurial activity, or for satisfying one's own needs or hobby activities." However, we must add that even in these new conditions, each person has freedom to choose the place where he intends to conduct his private life, and everyone is certainly aware of the differences in the degree of protection provided to privacy in different spaces – protection of privacy in a dwelling is certainly higher than protection of privacy in a work or other environment.

17. It is perhaps also worth noting that there is a modern trend not only of

transferring privacy into work premises, but also a conscious conduct of private life and intimacies directly in public space (see, e.g. television programs such as “Big brother” or “The Chosen”). It is to be considered, whether the entire gamut of such expressions of pseudo-private life are to be provided equally intensive constitutional law protection as in the case of domestic freedom, and it is a question whether the persons involved even care to receive such protection.

18. No constitutional law regulation provides that protection of private life conducted in other premises and lands must be so intensive as to require a preliminary court warrant for a search of other premises and lands.

19. On the contrary, systematic interpretation of Art. 12 of the Charter (by argument a contrario) one can conclude that the requirement of a prior court warrant applies only to a house search for purposes of a criminal proceeding (Art. 12 par. 2 of the Charter), but not to a search of other premises and lands.

IV. The state prosecutor provides sufficient guarantees of lawfulness and constitutionally in the decision to order a search of other premises and lands in a preliminary criminal proceeding

20. We believe that § 83a par. 1 of the CPC, permitting a state prosecutor or police body (with the prior consent of the state prosecutor) to issue a search warrant for other premises and lands in a preliminary criminal proceeding, fully meets the need to protect fundamental rights (including protection of private life) and is not inconsistent with any constitutional regulation.

21. The judgment’s arguments (points 22 to 26) are based on the requirement “that an independent and impartial body rule in issuing a warrant for a search of other premises and lands. The state prosecutor cannot be considered as such a body, not can a police body.” We maintain that such a requirement for a prior court warrant cannot be derived from any constitutional law regulation.

22. We find an explicit constitutional law provision on the exclusive competences of a court or judge in a criminal proceeding only for cases of deciding on guilt and punishment for crimes (Art. 40 par. 1 of the Charter), deciding on detention and issuing an arrest warrant for a defendant (Art. 8 par. 3 and 4 of the Charter) and on issuing a search warrant for a house (Art. 12 par. 2 of the Charter).

23. In accordance with the generally recognized principle that the legislature may, through an “ordinary” statute, provide stronger protection to the fundamental rights and freedoms than is required by constitutional regulations or an international treaty, the Czech Criminal Procedure Code contains several other instances where it entrusted decision making on interference in fundamental rights in a preliminary proceeding to a court. Such instances are limiting restrictions on the defendant in serving a prison sentence under § 74a, consent with opening mail under § 87 par. 1, ordering a wiretap and recording telecommunications under § 88 par. 2, a warrant to secure data on telecommunications under § 88a par. 1, ordering monitoring of a defendant in a medical facility under § 116 par. 2, permission to follow someone, if it is to involve interference in the inviolability of

one's dwelling, confidentiality of mail, or determining the content of other written matter and records that are kept private, using technical means under § 158d par. 3, and permission to use an agent under § 158e par. 4 of the CPC. As is evident, the legislature did so (beyond the framework of constitutional regulations) only in a few cases of exceptionally intensive interference in the fundamental rights and freedoms.

24. Of course, nothing would prevent the legislature from establishing, beyond the framework of constitutional requirements, the exclusive competence of the court to issue a search warrant for other premises and lands under § 83a par. 1 of the CPC. If the legislature did not do so, that was evidently because in this case it considered the interference in fundamental rights not to be too intensive, and after weighing other conflicting constitutional interests (e.g. the interest in the effectiveness of criminal prosecution, in the speed and efficiency of the criminal proceeding, etc.) it concluded that the state prosecutor would provide sufficiently reliable protection of fundamental rights. We believe that this legal framework is not inconsistent with any constitutional regulations, and the Constitutional Court had no grounds to annul the contested provision.

25. There is no doubt that the guarantors of protection of the fundamental rights and freedoms in criminal proceedings are not only the courts, but all bodies active in criminal proceedings, i.e. including the state prosecutors and police bodies.

26. The legal status of the state prosecutor is sufficiently strong to provide effective guarantees of lawfulness and constitutionality in cases of less intensive interference in the fundamental rights and freedoms, i.e. such acts as, for example, a search of other premises and lands. The requirements of independence and impartiality, typical of judges, are not essential with this less intensive interference, and lack of them is not grounds, on a constitutional law level, to annul the contested statutory provision.

27. One cannot conclude that legal protection provided by a state prosecutor is inadequate merely from the fact that Article 80 of the Constitution includes the state prosecutor's office among the bodies of the executive branch. These bodies are also required to follow the Constitution and the law. Moreover, we must keep in mind that the position of the state prosecutor's office among the other bodies of the executive branch is unique and different.

28. This unique position of the state prosecutor is established by the independent, special legal framework in Act no. 283/1993 Coll., on the State Prosecutor's Office. This Act sets very demanding qualification requirements for the office of state prosecutor (§ 17 of the Act). A state prosecutor is required to act professionally, conscientiously, responsibly, impartially, fairly, and without unnecessary delay (§ 24 par. 1 of the Act). Legal norms also establish requirements for a state prosecutor's increased legal responsibility, including disciplinary responsibility (§ 27 et seq. of the Act) and criminal liability (the crime of abuse of power by a public official under § 329 of the Criminal Code).

29. In a criminal proceeding, the state prosecutor acts according to the Criminal Procedure Code, not according to administrative norms. A criminal proceeding

generally contains much stricter control mechanisms and creates more effective guarantees against abuse than other kinds of legal proceedings.

30. Domestic and foreign legal doctrine generally accepts the opinion that the state prosecutor's office is not an ordinary administrative body, but displays, apart from elements typical of administrative bodies, also elements typical of court bodies. The state prosecutor's office is described as an institution sui generis (see, e.g., Fenyk, J.: Veřejná žaloba, díl I. [The Indictment, part I.] Prague: Institut Ministerstva spravedlnosti pro další vzdělávání soudců a státních zástupců [Ministry of Justice Institute for Continuing Education of Judges and State Prosecutors], 2001, p. 208; Koetz, A. G., Feltes, T.: Organisation der Staatsanwaltschaften. [Organisation of State Prosecutor's Offices] Köln : Bundesanzeiger Verlagsges., 1996, p. 31).

31. The European Court of Human Rights stated the thesis that the degree of objectivity and impartiality of a state prosecutor is sufficient for him to also fulfill certain judicial functions in the judgment in the case Schliesser v. Switzerland (Application no. 7710/76, 4 December 1979). Of course, there are exceptions for deciding on guilt and punishment, and on detention and issuing warrants fro house searches – in these cases the ECHR insists on the jurisdiction of the court.

32. From our many years of experience as constitutional judges, we can state the justified conviction that in practice there are no significant excesses in the actions of state prosecutors in ordering searches of other premises or lands in preliminary proceedings (or giving prior consent to police bodies) that would indicate a need to change the existing legal framework. Neither criminal procedure doctrine nor the case law of the general courts indicates any systemic flaws regarding these acts in the legal framework or in its application in particular cases. Individual cases of failure or defects in the actions of state prosecutors can, of course, occur, but we consider that they are no more frequent or serious than in other cases, perhaps even with judges.

V. Judicial review of a search warrant for other premises and lands issued by a state prosecutor in a preliminary proceeding is ensured within the criminal proceeding

33. It is characteristic of the entire criminal proceeding that there are many control and correction mechanisms that are intended to correct possible errors by the bodies active in criminal proceedings. This is also the case with a search warrant for other premises and lands. Such means include, e.g., the defendant's right to request that defects in the actions of the state prosecutor be removed; that request is handled by the state prosecutor of the immediately superior state prosecutor's office (see § 157a par. 2 of the CPC).

34. Defects in the state prosecutor's actions can also be corrected within a review conducted by a higher state prosecutor's office under § 12d of Act no. 283/1993 Coll., on the State Prosecutor's Office.

35. A very effective method of control is that a court will regularly review the

lawfulness of issuing a search warrant as part of the presentation of evidence before the court, where the defendant can, in each individual case, raise objections against a search. If the court determines that a search was conducted unlawfully, it will declare the evidence obtained through the search to be inadmissible. This court action will prevent an unlawfully conducted search from having negative consequences for the defendant. At the same time, this has a general disciplinary effect; the knowledge that unlawfully obtained evidence will be unusable preventively deters from repeating flawed procedures in the future.

36. We believe that these control mechanisms are quite adequate in the case of a search warrant for other premises and lands, and are proportionate to the importance of the action.

VI. Expanding the number of actions in a preliminary criminal proceeding for which a prior warrant from a judge is required strengthens the inquisitional nature of a criminal proceeding

37. A criminal proceeding can never take place without interference in the fundamental rights and freedoms, and this interference is relatively very frequent. Virtually every action taken against a defendant affects his fundamental rights – beginning with the opening of criminal prosecution, summons, escort, questioning, recognition, confrontation, review of his mental condition, etc. In terms of intensity, some of these actions are fully comparable to issuing a search warrant for other premises and lands, or are even more serious – as examples we can cite a personal search (§ 83b of the CPC), confiscation of a thing (§ 79 of the CPC), freezing funds in a bank account, securing book-registered securities, securing real estate, securing other property values, securing replacement values (§ 79a to § 79f of the CPC), a body search, and other similar actions (§ 114 of the CPC). Nevertheless, in all these instances the Criminal Procedure Code permits them to be ordered in a preliminary proceeding by the state prosecutor (sometimes even by a police body).

38. By the nature of the matter, it is unthinkable for a judge to give prior consent to all these actions in a preliminary proceeding – that is not the case in any country. If it were so, a criminal trial would be completely paralyzed – if only because handling the massive incidence of criminal activity (roughly 350,000 crimes take place in the Czech Republic each year) greatly exceeds the capacity of a limited number of judges. Therefore, it is quite obvious that there must be a certain “division of labor” in a preliminary proceeding, and that the main weight of the work in the preparatory phase of a criminal proceeding lies on the police bodies and state prosecutors. The intervention of courts in preliminary proceedings is required only for some of the most serious actions – a search of other premises and lands is certainly not one of them.

39. We consider it appropriate to point out the danger that disproportionately increasing the number of actions for which a judge’s consent will be required in a preliminary proceeding could paradoxically turn against the principles of a fair trial, and as a result, to the disadvantage of the defendant. Hundreds of years of experience from the unfortunate history of the “inquisitional” type of criminal

proceeding shows that strong interference by a judge in the preliminary proceeding de facto strengthens the role of the preliminary proceeding and weakens the importance of the main trial and the court phases in general. The results of presentation of evidence in a preliminary proceedings conducted with the presence of a judge are seen uncritically, they are a priori assumed to be more reliable, and these results are transferred with far-reaching consequences to the court phase and they influence the court decision. This de facto weakens the review function of the main trial, which should be the center of presentation of evidence. Strengthening the preliminary proceeding leads to a degradation of the main trial, which changes into “mere theater” or an “attachment” to the preliminary proceeding, as correctly criticized by the Austrian proceduralist Reinhard Moos (Moos, R.: Der Strafprozess im Spiegel ausländischer Verfahrensordnungen. Berlin : H. Jung, 1990, p. 53.). That too is one of the reasons why the institution of an investigating judge in systems of continental criminal trials has been on the wane in recent decades and has been completely eliminated in a number of European countries (e.g. in Germany in 1974, in Italy in 1988). For more on these trends, see Repík, B.: Mezinárodní konference o ochraně lidských práv při výkonu trestní spravedlnosti v postkomunistických zemích. [The International Conference on the Protection of Human Rights in the Exercise of Criminal Justice in the Post-Communist Countries] Právo a zákonnost [Law and Lawfulness], no. 4/1992, p. 249.

VII. A judge’s actual opportunity to review the grounds for issuing a search warrant for other premises and lands is very limited

40. The reality is that a judge’s involvement in a preliminary proceeding is even now (in the situations foreseen by the law) often very formal and superficial. It is undisputed that at the point when a prior court warrant is to be issued, which is most often in the earliest stages of a preliminary proceeding, there are, as a rule, very few procedurally fixed sources of information, and the judge is left to rely on brief and fragmentary information provided by police bodies and the state prosecutor; at that stage in the proceeding, the judge does not have sufficient time or resources to thoroughly verify this information. In fact, the state prosecutor, who maintains consistent supervision over the preliminary proceedings (§ 174 of the CPC), and is in immediate contact with the police bodies, has better actual opportunities to verify the grounds for issuing a search warrant.

41. Certainly, one could require that this difficulty, described in the previous paragraph, be overcome by increased effort by judges in situations that involve really serious interference in the fundamental rights and freedoms, such as in cases of taking someone into custody or house searches, interference in telecommunications privacy, etc. As we state above, in point 23, the number of such actions in a preliminary proceeding, in which a judge’s participation is required, has already exceeded the count of ten, and continues to grow through additional amendments (see, e.g., as introduced by an amendment in 2001, the institution of questioning a witness and recognition in the presence of a judge, if it is a non-postponable or non-repeatable step in the stage before criminal prosecution is begun under § 158a of the CPC).

42. Although no statistical data are available on the nationwide number of searches

of other premises and lands conducted under § 83a of the CPC, one can estimate that it is hundreds, if not thousands, of cases each year; in terms of the burden on judges this number is not negligible.

43. The constant increase in cases where judges intervene in preliminary proceedings has a natural limit, because performing these actions, if it is not to degenerate into a mere formality, necessarily imposes considerable demands on court time and personnel, and increases the administrative burden and thus also the costs of a criminal proceedings. If, on the one hand, one hears justified cries about the judicial system being overburdened and the resulting delays in trials, on the other hand one cannot constantly expand the judicial agenda with more and more tasks that can be performed just as well (if not better) by other bodies, e.g. state prosecutors.

44. Nor can we overlook purely practical problems that are caused by the trend of expanding judges' involvement in preliminary proceedings. A judge's participation in a preliminary proceeding leads to his being excluded from the later proceeding. Especially with small, first-level courts, this cause not inconsiderable organizational difficulties, which, in practice, leads to the tasks in preliminary proceedings being assigned to judges that normally handle not a criminal, but a civil agenda, who have no criminal law experience; thus, the true meaning of judicial review is de facto lost. As the scope of the judicial agenda in preliminary proceedings increases (as this Constitutional Court judgment requires), these problems will continue to grow.

45. It is appropriate to point out that we cannot expect this situation to be solved by increasing the number of judges. It is generally known that the number of judges in the Czech Republic today, compared with other European countries, is exceptionally high. The Czech Republic has 29 judges per 10,000 residents; Germany has 18 judges, Sweden has 11 judges, France has 9 judges (see the publication Aroma, K., Heiskanen, M. (eds.): Crime and Criminal Justice Systems in Europe and North America 1995–2004. Helsinki: European Institute for Crime Prevention and Control HEUNI, 2008, Czech translation Prague: IKSP, 2009, p. 39). As the Ministry of Justice of the Czech Republic has made it clear that it does not intend to increase the number of judges in the future, managing the increasing court agenda can be achieved only by increasing the workload of judges.

46. The requirement established by the Constitutional Court of a mandatory preliminary warrant by a judge leads, of course, not only to an increased burden on the courts, but also on police bodies and state prosecutors, who will now have to prepare additional written applications to the courts. The growth of these administrative formalities and intermediate steps leads to delays, and leads preliminary proceeding bodies away from purposeful investigative work in the field and toward typewriters and computer keyboards.

VIII. Inappropriateness of arguments based on European Court of Human Rights cases

47. The reasoning of the judgment, in points 19 and 32, bases the

unconstitutionality of the contested statutory provision on several ECHR cases. We do not consider these arguments appropriate; the cited ECHR cases are based on different facts, which do not at all affect the Czech regulation in § 83a par. 1 of the CPC.

48. Only one of the cited cases (Niemitz v. Germany, Application no. 13710/88) involved an actual criminal proceeding (involving the search of an attorney's office), and the search was ordered by a court in Freiburg. The ECHR found that a number of errors by the German court violated the Convention: the intensity of the action was disproportionate in relation to the less serious crime being investigated; the court did not sufficiently justify the search; a disinterested person was not present at the search; during the search, documents belonging to the attorney's clients were also read. It is obvious that these facts do not in any way relate to our problem – whether a search warrant may be issued by a state prosecutor.

49. All the other cited cases involve actions by administrative bodies, usually in proceedings on misdemeanors. For example, Société Colas Est. v. France (Application no. 37971/97) involved a search conducted by antimonopoly office inspectors in a company's headquarters on suspicion of a cartel agreement. In Crémieux v. France (Application no.1147/85) the search of a company's offices was conducted by customs officials on suspicion of financial infractions. In Miailhe v. France (Application no. 12661/87) customs officials searched business premises on suspicion of illegal foreign financial operations. In Camenzind v. Switzerland (Application no. 136/1996/755/954) a telecommunications office official searched the complainant's apartment (not non-residential premises) on suspicion of the infraction of possession of an unauthorized telephone. Obviously, in none of these cases did the ECHR have an opportunity to address the question of whether it would violate the Convention for a state prosecutor to issue a search warrant fro non-residential premises – there was no state prosecutor involved in these cases at all, because he has no jurisdiction in proceedings on misdemeanors. In other respects as well the facts of the Strasbourg cases were quite individual and had nothing to do with the question of the competence of a court or state prosecutor; the ECHR's criticism, which found violation of the Convention, concern the cumulative effect of a number of errors, e.g. an action being disproportionate to the aim pursued (Société Colas Est. v. France), insufficient justification for the search warrant (Crémieux v. France) etc.

50. We believe that the cited ECHR cases do not provide a clear guideline for answering the question of whether the ECHR would find the procedure in the existing Czech legal regulation to violate the Convention. The ECHR always weights the facts in the context of a particular case, evaluates the overall fairness of the proceeding, takes into account all procedural instruments and mechanisms that serve to protect the rights of the complainant, and tests the proportionality of interference in relation to other protected legal values. Given that process, we can justifiably assume that if the ECHR had the opportunity to evaluate a case based on the existing Czech legal regulation, it would not find any a priori violation of the Convention.

51. Drawing general conclusions on the compatibility of national legislation with the Convention from particular ECHR cases based on the specific circumstances of

individual cases must always be done very carefully, and the arguments used must be very detailed and complex. In our opinion, one cannot pull isolated quotations from the text of ECHR judgments that fit one of many lines of argument.

IX. Foreign legal regulations

52. We can point out that many foreign criminal procedure codes are completely identical with the existing Czech regulation, i.e. in preliminary proceedings a warrant from a state prosecutor is sufficient for a search of other premises and lands. No one there has any doubts about the constitutionality of these provisions.

53. Such legal regulations are found in, e.g. § 101 par. 1 of the Slovak Criminal Procedure Code (Act no. 301/2005 Z. z.) or Article 220 § 1 of the Polish Criminal Procedure Code (Dz. U. 97.89.555).

54. In some foreign procedural norms there are various individual nuances in the question of competence to issue a search warrant for non-residential premises and lands. In Germany, a court warrant is required to search "an apartment and other premises" (§ 105 dStPO), in Austria, somewhat more narrowly, to search "apartments and premises pertaining to a household" (§ 139 öStPO). Thus, the requirement of a court warrant applies to a wider circle of situations than has been the case so far in the Czech Republic. Such wider protection of fundamental rights is possible, of course, but it is not essential, and it depends on the will of the national legislature.

55. It must be added that all foreign frameworks (just like the Czech one) allow for the possibility that in urgent situations a search of other premises and lands can also be conducted without a prior court warrant (the criminal procedure codes of Germany and Austria permit this even for a house search).

For all the foregoing reasons we believe that the contested provision, § 83a par. 1 of the Criminal Procedure Code, was not inconsistent with any constitutional regulation, and that the petition from panel II. of the Constitutional Court should have been denied.

2. Dissenting opinion of judge Vladimír Kůrka

Because I cannot agree with the arguments used (for the most part), and especially the result reached, I submit this dissenting opinion:

I.

1. – methodological objection – where the judgment can be criticized in terms of the arguments used

The majority opinion, without anything futher, connects specific protection of a dwelling, or privacy, developed on the basis of the case law of the ECHR and

“foreign constitutional court” (points 19 to 21), in relation to the areas defined therein, with all the imaginable forms of non-residential premises, including lands (point 25), in the sense of requiring judicial protection, or conditioning searches of these premises on a court warrant issued in advance, and properly justified.

Thus, the construction used only anticipates that what was concluded to be true for a “dwelling” in the narrower sense (an apartment), as well as in the wider sense (cf. “attorney’s office”), must necessarily apply to everything else, which is not normally included in the concept of a “dwelling” (see point 18); of course, this is methodologically unacceptable, because such a result should first be proved.

It is evident from the interpretation of that “foreign case law” presented under point 20 that it is necessary to distinguish between all the possible premises that are – even if remotely – tied to the concept of “dwelling,” or an element of “private life,” if we note here, for example, that, as regards “commercial premises” open to the public, “the intensity of this right decreases….”

It is not evident (or not proved by the majority opinion) that all the premises concerned – not only those that are a dwelling, but also premises comparable to one – the requirement of protecting them, or protecting aspects of private life tied to them must necessarily be identified with preliminary judicial review (emphasis to be placed on both “judicial” and “preliminary”). Here too the arguments used impermissibly – a priori – connects what is protectable as regards a dwelling (including in a wider sense), directly to all other premises, including “factory halls, warehouses, premises for conduct of a trade, free-standing garages,” etc. (point 18), just as, subsequently, to “lands.” As stated above, even that does not apply without anything further; it should have first been proved. Point 23 indicates that judicial review represents protection against the “most intensive interference,” which can logically be connected not only with the phenomenon of a “search” (as such), but also with a search of a classified object. That, for example, need not include a publicly accessible plot of land owned by the defendant, if the tie to his “private life” is, in concreto, low, or nil.

2. – re ECHR case law

The arguments using the selected ECHR case law is not quite correct, because in all cases it overlooks the wider context of the individual cases. The reason for “interference” by the ECHR was always a quite concretely arranged series of individual circumstances, of which the inadequacy of preliminary judicial review (or other review) was considered to be one. The cited case law does not stated that judicial review is always unavoidable; the opinions expressed in the case Camenzind v. Switzerland (judgment of 16 December 1997, Application no. 136/1996/755/954) are even rather opposite to the conclusions in the present judgment.

II.

Doubts about the constitutionality of the critical provision, § 83a of the CPC, could have been set aside not by derogatory steps, but by interpretative steps, which the

Constitutional Court should have aimed to do primarily, if it wishes to be true to the proclaimed principle of "minimizing (its own) interference."

A constitutionally conforming interpretation could be readily achieved, or would not be unachievable, and the foundations of it have already been stated in the previous "methodological" opposition. It was said that there are various "dwellings," or various "other premises"; on the one hand, they are able to serve as a basis for using a certain means of evidence in criminal proceedings, but on the other hand it is precisely through that use that an objective risk arises that the constitutionally protected values of "dwelling" or "private life" will be affected.

If, as the majority concluded, the fundamental issue is "private life," then there are obviously no doubts (see above) that the substratum ("space") on which it rests, is also potentially quite varied in relation to that (cf. an "apartment," on one hand, and open "land" on the other hand); simply said, private life is "more likely" (cum grano salis) exercised in a dwelling that is an apartment than in "other premises," which could be, for example, a "warehouse," or an unfenced piece of land. That then logically and materially corresponds to a different degree of protection against interference into such diversified "privacy"; in the first case it will be higher, and in the second, naturally, lower; however, it follows that if the existence of preliminary judicial review is required – quite justifiably – for interference in privacy through a house search, "it is not written anywhere" that the same level (i.e. the highest level) must be required for interference in other premises, i.e. those in relation to which the aspect of private life manifests itself less significantly, even insignificantly (see again the previously mentioned warehouses, abandoned factory halls, publicly accessible lands, etc.).

If the potential of a constitutionally relevant interference in the "private life" implied by these "other" premises decreases, or is obviously lower than in the case of a "dwelling" (apartment), because the potential of constitutionally relevant "privacy" decreases, then it is logically and materially apposite , for the place opened up by these constitutional aspects to be taken by a different, "lower" aspect, that of "mere " (sub-constitutional) lawfulness, and that, in a preliminary criminal proceeding, is occupied basically, or in the first place, not by a court, but by the state prosecutor, whose preliminary review – on that basis – is capable of being adequate (constitutional values are not significantly affect here).

If the majority opinion succeeded in shaking the "narrow" concept of "dwelling" (§ 82 par. 1 of the CPC), then – therefore – it was not in any way unavoidable (even contrary to the cited principle of "minimizing interference") for the same regime established for a house search (§ 83 of the CPC), to be applied– in general – to a search of other premises and lands (§ 83a of the CPC), which the majority of the plenum resorted to.

The abovementioned alternative of a constitutional interpretation could rest in an interpretation of § 83a of the CPC, within which "other premises or land" were always evaluated, in a particular case, in terms of the existence of elements of "private life" that could be affected by the search; if particular "other premises" were comparable to a "dwelling" (see point 19 to 21), then, even though not formally a dwelling, it is necessary to apply the regime under § 83 of the CPC; if

such elements are absent, then procedures under § 83a of the CPC will be implemented, and a preliminary review by the state prosecutor – even if not "impartial" as was concluded – concentrated on the criteria of lawfulness is (given the lack of constitutionally relevant elements) a sufficient review.

This, incidentally, does not suppress the element of judicial review; that review is not a priori, but is applied a posteriori at the level of evaluating the lawfulness of evidence obtained in the preliminary proceeding. This does focus attention on circumstances that are by and large specific to the particular case, which can raise the objection of insufficient legal certainty; nevertheless, the general courts are forced to evaluate lawfulness (and thus the applicability) of one or another piece of evidence in other similar cases as well.

The general courts will less easily deal with the results of the derogation adopted by the majority of the plenum. Just as an indication, it will suffice to mention that this further strengthens elements of procedural formality in the criminal trial, which is an obstacle to effectiveness and will bring other organizational burdens to the general courts, because it will widen the circle of tasks that rule a particular judge out of a criminal proceeding after an indictment is filed; as is general known from the regime used to address comparable situations in the general courts in the past (see the former transfer of the agenda for placing people in custody from the state prosecutor's office to the courts), in fact it is difficult to imagine an actual increase in the convenience of protecting fundamental rights, which was supposed to be the point.