2002/06/25 - PL. ÚS 36/01: BANKRUPTCY TRUSTEE

HEADNOTES

1) The public purpose of the institution of the bankruptcy trustee must be seen in the acceptance of limited public interference into resolving property rights which have reached a critical state. The manner of the trustee's appointment is provided by a decision by a state body (court). His powers, which are established in a number of provisions in the Bankruptcy and Settlement Act (§ 14, § 17 to 20, § 24, § 26 to 29), in view of their heteronomous nature (the trustee can not be considered the representative of the creditors or the bankrupt), are an exercise of authority (in contrast to the heteronomous nature of public law acts, private law acts – legal acts – are of an autonomous nature). From a constitutional viewpoint, performance of the office of bankruptcy trustee on the basis of court appointment can not be classified as labor or service imposed by law for the protection the rights of others under Art. 9 para. 2 let. d) of the Charter of Fundamental Rights and Freedoms (the "Charter"). Performance of the office of bankruptcy trustee is not part of an employment relationship, and thus does not fall within the content, purpose or meaning of Art. 26 of the Charter. It is not the conduct of business or the conduct of other economic activity, and thus, in constitutional terms it can not be classified in the framework defined by Art. 26 of the Charter.

In view of the diversity of purposes of public offices, no safeguards automatically arise from the constitutional order concerning the source of remuneration and compensation of expenses related to their performance, nor do safeguards, concerning their structure and amount. Nonetheless, the maxim of proportionality arises for remuneration and compensation of expenses related to the performance of public offices from the constitutional principle of non-accessory equality, whose function is ruling out arbitrariness on the part of the legislature in differentiating subjects of law and rights.

2) The constitutional basis of a general incorporative norm, and thereby the overcoming of the dualistic concept of the relationship between international and domestic law, can not be interpreted in terms of removing the reference point of ratified and promulgated international agreements on human rights and fundamental freedoms for the evaluation of domestic law by the Constitutional Court with derogative results. The scope of the constitutional order concept can not be interpreted only with regard to § 112 para. 1 of the Constitution, but must be interpreted in view of Art. 1 para. 2 of the Constitution and must include ratified and promulgated international agreements on human rights and fundamental freedoms.

For these reasons Art. 95 para. 2 of the Constitution must be interpreted to the effect that a general court has an obligation to present to the Constitutional Court for interpretation a matter in which it concludes that a law which is to be used in resolving the matter is in conflict with a ratified and promulgated international agreement on human rights and fundamental freedoms.

CZECH REPUBLIC

CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, without a hearing, decided on 25 June 2002 in the matter of the petition from the Prague High Court to annul § 5 para. 1 second sentence and § 8 para. 3 second sentence of Act No. 328/1991 Coll., on Bankruptcy and Settlement, as amended by later regulations, as follows:

Section 5 para. 1 second sentence and § 8 para. 3 second sentence of Act No. 328/1991 Coll., on Bankruptcy and Settlement, as amended by later regulations, are annulled as of 31 March 2003.

REASONING

I.

On 23 November 2001 the Constitutional Court received a petition from the Prague High Court to annul § 5 para. 1 second sentence and § 8 para. 3 second sentence of Act No. 328/1991 Coll., on Bankruptcy and Settlement, as amended by later regulations, (the "Bankruptcy and Settlement Act").

A Panel of the Prague High Court, in proceedings concerning the appeal of a bankruptcy trustee, JUDr. V. L., an attorney with his registered office in Prague, against the decision of the Prague City Court of 17 April 2001, file no. 99 K 76/2000-28, in the matter of bankruptcy of the company Bohemia Enterprises, s. r. o., with its registered office in Prague (the "bankrupt"), conducted at the Prague City Court, concluded, under Art. 95 para. 2 of the Constitution of the Czech Republic (the "Constitution"), that § 5 para. 1 second sentence and § 8 para. 3 second sentence of the Bankruptcy and Settlement Act are in conflict with Art. 9, Art. 26 and Art. 28 of the Charter of Fundamental Rights and Freedoms (the "Charter"), due to which, under § 109 para. 1 let. c) of the Civil Procedure Code it interrupted the proceedings and, under 95 para. 2 of the Constitution and § 64 para. 4 Act No. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, submitted the matter to the Constitutional Court. Together with the petition to annul the cited provisions, Prague City Court file no. 99 K 76/2000 was submitted to the Constitutional Court.

The reporting judge determined the following from the submitted file and petition: By decision of 6 February 2001, file no. 99 K 76/2000-11, the Prague City Court opened bankruptcy proceedings against the bankrupt, and appointed JUDr. V. L., an attorney with his registered office in Prague as the trustee (the "trustee"). A decision by the same court

of 17 April 2001, file no. 99 K 76/2000-28, approved the trustee's excluding from the bankruptcy estate the bankrupt's non-collectible receivable and three telephone cards (verdict I.) and cancelled the bankruptcy proceedings due to insufficient assets under § 44 para. 1 let. d) of the Bankruptcy and Settlement Act (verdict II). The court also approved the accounting of the trustee's cash expenses in the amount of CZK 1,193.60 and his remuneration in the amount of CZK 10,000, and stated that these receivables of the trustee would not be met, as the bankruptcy estate were not sufficient to pay the expenses of the bankruptcy proceedings (verdict III.), and charged the trustee to inform the court within thirty days whether he had closed the accounting records and compiled closing accounting statements (verdict IV.). In the reasoning of its decision, concerning verdict III., it stated that the trustee's claims for payment of his cash expenses and remuneration, although they had been awarded by the court, could not be satisfied, as no assets from the bankruptcy estate had been converted to money and, on the contrary, the only assets had been excluded from the inventory of the bankruptcy estate. The trustee's claims also could not be satisfied from the deposit for bankruptcy expenses, because it had not been paid in the matter, as the petitioner seeking bankruptcy proceedings, as a creditor of the bankrupt seeking satisfaction of a wage claim, was exempt from that obligation under § 5 para. 1 of the Bankruptcy and Settlement Act.

The trustee filed an appeal against verdict III of the Prague City Court's decision of 17 April 2001, file no. 99 K 76/2000-28, in which he pointed to the fact that the decision in the verdict is not executable, as the trustee's claim will not, nor can it, be paid by anyone, although the trustee fulfilled all the obligations imposed on him by law and imposed on him by the court. He objected that the decision is in conflict with Art. 26 of the Charter and proposed that the appeals court change the decision of the court of the first level in the contested scope, and decide that the Czech Republic is required to pay the trustee's expenses and remuneration.

The Prague High Court, as the appeals court, reviewed the appealed decision and the proceedings preceding it under § 212 Civil Procedure Code (the matter is conducted at that court under file no. 1 Ko 257/2001) and found, as already stated, that it is appropriate to proceed under § 109 para. 1 let. c) of the Civil Procedure Code.

In the opinion of the petitioner in the proceedings before the Constitutional Court, in this case there is no dispute that the trustee is entitled, under § 8 para. 3 first sentence of the Bankruptcy and Settlement Act, to remuneration and compensation of cash expenses, which, in constitutional terms, is justified by Art. 9, Art. 26 and Art. 28 of the Charter. The petitioner points out in this regard that the trustee did not raise any objections against that part of the Prague City Court's decision which is based on the cited provision of the Bankruptcy and Settlement Act and § 8a of Decree no. 476/1991 Coll., which implements certain provisions of the Bankruptcy and Settlement Act, as amended by later regulations, by which the court approved the accounting of the trustee's cash expenses and his remuneration. The petitioner considers the question of whether the trustee in such a situation can be completely denied compensation which he would certainly have received in a case where there were funds from which to satisfy the claim as fundamental for evaluating the justification of the appeal, given the undisputed factual state of the matter, where there are no resources in the bankruptcy estate and the deposit for bankruptcy expenses was not paid.

Section § 8 para. 3 second sentence of the Bankruptcy and Settlement Act merely sets an exclusive range of resources from which the trustee's lawful claims can be satisfied, which, in the petitioner's opinion, can be accepted only in the event that at least one of these resources contains means which can be used to pay the trustee's claims. According to the Prague High Court, in order that fundamental rights arising from Art. 9, Art. 26 and Art. 28 of the Charter not be affected, it is necessary to require that nobody be exempt a priori from the obligation to pay a deposit for bankruptcy expenses. The existence of this situation is made possible by § 5 para. 1 second sentence of the Bankruptcy and Settlement Act. Aware of the need for an instrument to remove harshness, the petitioner notes in this regard that the court need not require the deposit (or need not stop proceedings due to the deposit not being paid) in those cases where there are funds in the bankruptcy estate from which bankruptcy expenses can be paid.

The Prague High Court believes that a legal regulation which exempts some persons from paying a deposit and does not permit satisfying the trustee's lawful and justified claims even from the funds of the state, a body of which appointed the thus-injured person to the position of trustee, is in conflict with Art. 9, Art. 26 and Art. 28 of the Charter. Therefore, the court proceeded in this matter under § 109 para. 1 let. c) of the Civil Procedure Code, § 66a para. 1 and 66b para. 3 of the Bankruptcy and Settlement Act, and filed with the Constitutional Court, under Art. 95 para. 2 of the Constitution and § 64 para. 4 Act No. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, a petition to annul § 5 para 1 second sentence and § 8 para. 3 second sentence of the Bankruptcy and Settlement Act.

II.

Under § 42 para. 3 and § 69 of Act No. 182/1993 Coll., as amended by later regulations, the Chamber of Deputies and the Senate of the Parliament of the CR, as parties to the proceedings, presented their positions on the petition.

III.

Under § 44 para. 2 of Act No. 182/1993 Coll., as amended by later regulations, the Constitutional Court may, with the consent of the parties, dispense with a hearing, if no further clarification of the matter can be expected from one. In view of the fact that this provision could be applied to evaluation of the present matter, the Constitutional Court, after the statements from the parties, dispensed with a hearing.

…

IV.

The Constitutional Court first considered, under § 68 para. 2 of Act No. 182/1993 Coll., as amended by later regulations, whether Act No. 105/2000 Coll., which amends Act No.

328/1991 Coll., on Bankruptcy and Settlement, as amended by later regulations, and certain other Acts, was passed and issued within the bounds of constitutionally prescribed jurisdiction and in a constitutionally prescribed manner. The Constitutional Court stated that the Act was passed and issued within the bounds of constitutionally prescribed jurisdiction and in a constitutionally prescribed manner.

V.

The text of the contested statutory provisions is the following:

Under § 5 para. 1 second sentence of the Bankruptcy and Settlement Act: "If the petitioner's claim arises from wage claims, the petitioner is exempt from paying the deposit, with the exception of employees stated in § 67b."

Under § 8 para. 3 second sentence of the same Act: "The trustee's claims are satisfied out of the bankruptcy estate, and if it is not sufficient, from the deposit for bankruptcy expenses paid by the petitioner."

VI.

The purpose of the Bankruptcy and Settlement Act, under § 1 of Act No. 328/1991 Coll., as amended by later regulations, is the regulation of the property relationships of a debtor who is bankrupt. A debtor is bankrupt if he has multiple creditors and is not able, over a lengthier period, to meet his obligations when they come due. A natural person, if an entrepreneur, or a legal entity is bankrupt if it is over-indebted. Thus, bankruptcy proceedings are a special procedure, involving a certain public law interference for purposes of regulating the property relationships of all entities affected by the debtor's bankruptcy.

A mandatory component of bankruptcy proceedings is the appointment of a bankruptcy trustee (§ 8 of the Bankruptcy and Settlement Act). The opinions of case law and doctrine agree that the bankruptcy trustee is not a party to the bankruptcy proceedings; however, as a special procedural subject he has an independent status both vis-à-vis the bankrupt and vis-à-vis the creditors, and he can not be considered to be the representative of the creditors or the representative of the bankrupt (see the position of the Supreme Court file no. Cpjn 19/98, published in the Collection of Court Decision. no. 7/1998; K. Eliáš, Bankruptcy. Lawyer, no. 2/1995, p. 123; F. Zoulík, The Bankruptcy and Settlement Act. Commentary. 3rd ed., Prague 1998, p. 63-70; J. Zelenka, J. Maršíková, The Bankruptcy and Settlement Act and Related Regulations. Commentary. Prague 2002, p. 159).

Doctrine categorizes the bankruptcy trustee among special public law bodies, and his task is to ensure the proper conduct of the bankruptcy proceedings (see K. Eliáš, Bankruptcy. Lawyer, no. 2/1995, p. 123; H. Hrstková, R. Tománek, Some Basic Issues of the Bankruptcy and Settlement Act. Law and Business, no. 10/1994, p. 27 et seq.; Fr. Štajgr, Bankruptcy Law. Prague 1947, p. 71).

The Constitutional Court agrees with the doctrinal definition, taking as a starting point the aspects defining the concept of a public law body: They are a public purpose, manner of establishment, and authorization. The public purpose of the institution of the bankruptcy trustee must be seen in the acceptance of limited public interference into resolving property rights which have reached a critical state. The manner of the trustee's appointment is provided by a decision by a state body (court). His powers, which are established in a number of provisions in the Bankruptcy and Settlement Act (§ 14, § 17 to 20, § 24, § 26 to 29), in view of their heteronomous nature (the trustee can not be considered the representative of the creditors or the bankrupt), are an exercise of authority (in contrast to the heteronomous nature of public law acts, private law acts – legal acts – are of an autonomous nature).

The trustee is a natural person or legal entity, registered in the list of trustees, appointed by a court (§ 8 of the Bankruptcy and Settlement Act). A trustee is entitled to remuneration and compensation of cash expenses (§ 8 para. 3 of the Act). These are then part of the bankruptcy expenses. Under § 8 para. 3 of the Bankruptcy and Settlement Act the trustee's claims are satisfied from the bankruptcy estate, and, if that is not sufficient, from the deposit for bankruptcy expenses paid by the petitioner.

The Act establishes an exception to the petitioner's general obligation to pay a deposit for bankruptcy expenses, under which, if the petitioner's claim is based on wage claims, the petitioner is exempt from paying the deposit, with the exception of the debtor's management employees and related persons (§ 5 para. 1 of the Bankruptcy and Settlement Act). The purpose of this exception, as pointed out by the Senate's position, was the need for increased protection for employees' wage claims (which was also reflect in § 32 of the Bankruptcy and Settlement Act). In this regard, the Constitutional Court shares the legislature's conviction, that exemption from paying the deposit for bankruptcy expenses in the cited cases, and the purpose which the legislature pursued with this provision, is not in conflict with the constitutional order, in view of the petitioner's arguments particularly with Art. 9, Art. 26 and Art. 28 of the Charter.

The cited legal construction makes it possible for a situation to arise where no assets from the bankruptcy estate are converted to money and the deposit for bankruptcy expenses was not paid, as the petitioner seeking the opening of bankruptcy proceedings, as a creditor of the bankrupt seeking satisfaction of a wage claim, was exempt from this obligation under § 5 para. 1 of the Bankruptcy and Settlement Act. In these circumstances § 8 para. 3 second sentence of the Act does not establish another alternative source from which the trustee's claims can be satisfied.

In this regard we must point to the developments in legal regulation of bankruptcy and settlement, which in the amendment of Act No. 328/1991 Coll., enacted by Act No. 94/1996 Coll., abandoned the finding principle in bankruptcy proceedings in determining the debtor's assets before opening bankruptcy proceedings. According to the explanatory report to § 12a, newly inserted by the amendment "in the future the court will not have the obligation, before opening bankruptcy proceedings, to determine the extent of assets, but shall deny the petition only if there is an evident lack of necessary assets". The purpose of this amendment was not only to speed up bankruptcy proceedings, but in particular to eliminate having the office of bankruptcy trustee filled by the court.

The first question which must be answered in this matter is whether performance of the position of a bankruptcy trustee constitutionally falls within the framework defined in Art. 9 para. 2 of the Charter, or Art. 4 para. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").

If the grounds under Art. 9 para. 2 of the Charter have not been met, under paragraph 1 of the same provision of the Charter no one may be subjected to forced labor or service. Analogously, under Art. 4 para. 2 of the Convention, no one shall be required to perform forced or compulsory labor, and "forced or compulsory labor" are, under Art. 4 para. 3 of the Convention, not considered to be precisely defined areas of labor and services.

The Constitutional Court expressed a position for the interpretation of the provisions concerned, in a matter the subject of which was the issue of determining remuneration and compensation of cash expenses of defense counsel appointed under § 39 of the Criminal Procedure Code, in file no. Pl. US-st.-1/96. It stated that Art. 40 para. 3 of the Charter represents a special constitutional guarantee of the right to defense counsel, and Art. 9 para. 2 let. d) of the Charter enshrines the constitutional mechanism for ensuring it. According to it, the case of conduct imposed by the law to protect the rights of others does not involve forced labor or service. In the case of compulsory defense, there is thus not forced labor, because the grounds for compulsory defense, as well as the procedure for appointing defense counsel in fulfilling them, are provided by law (§ 36 et seq. Criminal Procedure Code), for the protection of the right to a defense (Art. 40 para. 3 of the Charter). Art. 9 para. 2 of the Charter represents an instrument for protection an entire range of very diverse values (for example, an instrument for protecting national defense, removing the consequences of natural disasters, accidents, protection of life, health or property). One can imagine situations under Art. 9 para. 2 of the Charter in which no compensation would be provided (for example, in removing the consequences of natural disasters). Thus, the criterion by which the legislature should be guided in setting compensation for actions under Art. 9 para. 2 of the Charter is not the principle of equivalence, but the principle of proportionality. The decisive aspect from a constitutional viewpoint is whether any inconsistency between the scope of work and services and the compensation affects Art. 9 para. 2 let. d) of the Charter with an intensity that violates the principle of proportionality, i.e. in a manner connecting a disproportionate burden of labor with the level of compensation and compensation of cash expenses. In this regard, the Constitutional Court also pointed to the analogous legal opinion stated by the European Court of Human Rights in the matter of Van der Mussele v. Belgium (1983). Based on the nature of the matter, the Constitutional Court ruled out application of Art. 28 of the Charter to evaluation of the present matter.

In the Constitutional Court's opinion, the legal opinion expressed in file no. Pl. US-st.-1/96 does not apply to the matter of the constitutionality of § 5 para. 1 second sentence and § 8 para. 3 second sentence of the Bankruptcy and Settlement Act. From a constitutional viewpoint, performance of the office of bankruptcy trustee on the basis of court appointment can not be classified as labor or service imposed by law for the protection the rights of others under Art. 9 para. 2 let. d) of the Charter.

Under § 8 para. 1 of the Bankruptcy and Settlement Act, the trustee is chosen from a list of trustees maintained by the court of jurisdiction, and a natural person or company can be entered in the list only if he/it agrees to be listed. A person registered on the list may

refuse appointment as a trustee only if there are important reasons for doing so. In exceptional cases a court may also appoint as trustee a person who is not on the list of trustees, if he/it agrees. This mechanism ensures either the implicit, prior general consent to perform the position of trustee, or specific consent for a given case. For these reasons performance of the position does not meet the element of lack of consent as a condition for performance of labor or services under Art. 9 para. 2 of the Charter, or Art. 4 para. 3 of the Convention.

Performance of the office of bankruptcy trustee is not part of an employment relationship, and thus does not fall within the content, purpose or meaning of Art. 26 of the Charter. It is not the conduct of business or the conduct of other economic activity, and thus, in constitutional terms it can not be classified in the framework defined by Art. 26 of the Charter.

If we take as a starting point the proposition that a bankruptcy trustee can be categorized as a special public law body, then from a constitutional law viewpoint the question of constitutional safeguards of remuneration and compensation of expenses related to the performance of public positions is a key question for the matter.

These safeguareds are given by the substance of laws arising from the constitutional principle of equality (Art. 1 and Art. 3 para. 1 of the Charter). In interpreting the constitutional principle of equality the Constitutional Court agreed (particularly in judgments in matters under file nos. Pl. US 16/93, Pl. US 36/93, Pl. US 5/95 and Pl. US 9/95) with the interpretation of the constitutional principle of equality as it was expressed by the Constitutional Court of the CSFR (R 11, 1992): “It is a matter for the state to decide, in the interest of securing its functions, that it will provide fewer advantages to a particular group than to another. Even here, however, it may not proceed arbitrarily. ... If the law determines the success of one group and thereby simultaneously imposes disproportionate obligations on another, this may happen only with reference to public values.” The Constitutional Court thereby rejected an absolute interpretation of the principle of equality, and further stated: “the equality of citizens can not be understood as an abstract category, but as relative equality, as all modern constitutions understand it” (Pl. US 36/93). Thus, it shifted the substance of the principle of equality into the area of constitutional admissibility of ground for differentiating subjects of law and rights. It thus sees the first ground in ruling out arbitrariness. The second ground arises from the legal opinion expressing in the judgment in the matter under file no. Pl. US 4/95: “inequality in social relationships, if it is to affect fundamental human rights, must reach an intensity which casts doubt upon, at least in a particular aspect, the very substance of equality. As a rule, this happens when the violation of equality is connected to the violation of another fundamental right, e.g. the right to own property under Art. 11 of the Charter, one of the political rights under Art. 17 et seq. of the Charter, and so on.” (likewise Pl. US 5/95). The second ground in evaluating the unconstitutionality of a legal regulation which establishes inequality is whether it affects one of the fundamental rights and freedoms. In other words, in its case law the Constitutional Court interprets the constitutional principle of equality in the sense of accessory and non-accessory equality.

In view of the diversity of purposes of public offices, no safeguards automatically arise from the constitutional order concerning the source of remuneration and compensation of

expenses related to their performance, nor do safeguards, concerning their structure and amount. (e.g. under § 108 of the Notarial Code, in connection with § 11 to 14 of Decree no. 106/2001 Coll., on Remuneration and Compensation of Notaries and Estate Administrators, as amended by later regulations, the remuneration of a notary, as a court commissioner, is paid by the person who requests the performance of a notarial act; the state does so exceptionally, in cases of death). Nonetheless, the maxim of proportionality arises for remuneration and compensation of expenses related to the performance of public offices from the constitutional principle of non-accessory equality, whose function is ruling out arbitrariness on the part of the legislature in differentiating subjects of law and rights.

Insofar as there is a constitutional purpose for the legal regulation permitting bankruptcy proceedings in a case where no assets from the bankruptcy estate are converted to money in the proceedings and the deposit for bankruptcy expenses has not been paid, because the petitioner seeking bankruptcy proceedings was exempt from that obligation, then the situation which this creates in the legal regulation of compensation of cash expenses and remuneration for the trustee must be considered to be violation of the constitutional principle of non-accessory equality. In comparison with cases where, in bankruptcy proceedings, assets were converted to money or the deposit for bankruptcy expenses was paid and the funds used to pay trustees' cash expenses and remuneration, the trustee's claims (compensation of cash expenses and remuneration), in cases of an insolvent bankrupt and a petitioner exempt from the obligation to pay the deposit for bankruptcy expenses, will not be satisfied, as the assets in the bankruptcy estate are not sufficient to pay the bankruptcy expenses. The resulting inequality in remuneration and compensation of expenses related to the performance of a public office is an inequality which is, for one thing, extreme (as it permits the non-payment of remuneration and compensation of cash expenses for one group) and, for another, an inequality which lacks and purpose (here, we must distinguish from a purpose justifying inequality of subjects of law and rights the causes of such inequality). Only as obiter dictum we can state here that, similarly as in comparable matters (§ 23 of Act No. 85/1996 Coll., on Attorneys, as amended by later regulations), in these cases payment of the trustee's remuneration and cash expenses by the state would be appropriate.

If, in view of the cited reasons, § 5 para. 1 second sentence and § 8 para. 3 second sentence of the Bankruptcy and Settlement Act are in conflict with Art. 1 and Art. 3 para. 1 of the Charter and with Art. 26 of the International Covenant on Civil and Political Rights (the "Covenant"), it is not due to their text, but to the gap in the law which they create. What is unconstitutional is the legislature's omission, which results in a constitutionally inadmissible inequality (on the doctrinal interpretation of the concept of legislative omission see V. Šimíček, Legislative Omission as Violation of Fundamental Rights. In: Ten Years of the Charter of Fundamental Rights and Freedoms in the Legal Order of the Czech Republic and Slovak Republic. Eds. B. Dančák, V. Šimíček, Brno 2001, pp. 144-159).

The present matter concerns an apparent gap, which is the incompleteness of written law (its absence) in comparison with the explicit regulation of analogous cases, i.e. an incompleteness in terms of the principle of equality, or in terms of general legal principles. An illustration of resolving such a gap is the judgment in the matter under file no. Pl. US 48/95, in which the Constitutional Court prescriptively filled the gap created by inequality in legal regulation with the help of a constitutional interpretation of the

relevant legal regulation (the argument a minori ad maius), and denied the petition to annul it because its text was not in conflict with the constitutional order.

That method can not be used in the adjudicated matter. The provision whose absence in the Bankruptcy and Settlement Act establishes an unjustified inequality is the provision of an entity that would pay, or resources from which the trustee's remuneration and cash expenses would be paid in the case of an insolvent bankrupt and a petitioner exempt from paying the deposit for bankruptcy expenses. However, a norm which would be the substance of such a provision cannot be derived by interpretation from the test of the Bankruptcy and Settlement Act.

Based on all the cited reasons, the Constitutional Court concluded that § 5 para. 1 second sentence and § 8 para. 3 second sentence of the Bankruptcy and Settlement Act are in conflict with Art. 1 and Art. 3 para. 1 of the Charter and with Art. 26 of the Covenant, wherefore the Plenum of the Constitutional Court decide to annul them. Under § 70 para. 1 Act No. 182/1993 Coll., as amended by later regulations, the Constitutional Court postponed the effect of this derogative judgment until 31 March 2003, to permit the legislature to remove the existing unconstitutionality.

VII.

The constitutional maxim in Art. 9 para. 2 of the Constitution has consequences not only for the framers of the constitution, but also for the Constitutional Court. The inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can e interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms.

This must be a basis for evaluating the changes brought by the amendment to the Constitution, implemented by constitutional Act No. 395/2001 Coll., in Art. 1 para. 2, Art. 10, Art. 39 para. 4, Art. 49, Art. 87 para. 1 let. a), b) and Art. 95 of the Constitution. The enshrining in the Constitution of a general incorporative norm, and the overcoming thereby of a dualistic concept of the relationship between international and domestic law, can not be interpreted to mean that ratified and promulgated international agreements on human rights and fundamental freedoms are removed as a reference point for purposes of the evaluation of domestic law by the Constitutional Court with derogative results.

Therefore, the scope of the concept of constitutional order can not be interpreted only with regard to § 112 para. 1 of the Constitution, but also in view of Art. 1 para. 2 of the Constitution, and ratified and promulgated international agreements on human rights and fundamental freedoms must be included within it.

This is also indirectly supported by Art. 95 para. 2 of the Constitution, as otherwise it would have to be interpreted to the effect that, in the event a statue is in conflict with a constitutional act, a general court judge is not qualified to evaluate the matter and is required to submit it to the Constitutional Court, in the event of conflict between a statute and an agreement on human rights which is of the same nature and quality in constitutional law, under Art. 10 of the Constitution he is required to proceed according to

the internal agreement. Even if such a decision were taken by a court of any level, in a legal system which does not contain judicial precedent with the quality and binding nature of a source of law it could never have even de facto derogative consequences. The Constitution would thus create an unjustified procedural inequality for two situations identical in their constitutional nature, which, on the basis of the argument reductionis ad absurdum, can not be ascribed to the framers of the constitution as a purpose of a constitutional amendment.

The cited interpretation of Art. 1 para. 2, Art. 10, Art. 87 para. 1 let. a), b), Art. 95 and Art. 112 para. 1 of the Constitution is also supported by the fact that even after passing constitutional Act No. 395/2001 Coll. the legislature did not change § 109 para. 1 let. c) Civil Procedure Code and § 224 para. 5 Criminal Procedure Code, which impose on the general courts the obligation to interrupt proceedings and submit a matter for evaluation to the Constitutional Court not only if a statue or its individual provision is in conflict with a constitutional act, but also if they are in conflict with an international agreement which has precedence over statues.

For these reasons, Art. 95 para. 2 of the Constitution must be interpreted to the effect that a general court has an obligation to submit to the Constitutional Court for evaluation a matter in which it concludes that the statute which is to be used in resolving the matter is in conflict with a ratified and promulgated international agreement on human rights and fundamental freedoms.

Guided by these considerations, in the present matter the Constitutional Court did not limit evaluation of constitutionality of the provisions of the Bankruptcy and Settlement Act contested by the petitioner only to reviewing their consistency with constitutional acts, but also with ratified and promulgated international agreement on human rights and fundamental freedoms.

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

Brno 25 June 2002