

# 2003/03/26 - PL. ÚS 42/02: FREEDOM OF CONSCIENCE

## HEADNOTES

If, thanks to the applicable procedures, the interpretation even of the very old criminal law norms is carried out at the present by a court with consequences for adjudging the criminal prosecution of a person, that is with consequences intruding into his or her personal sphere, it may not be carried out without regard to the constitutive values and principles of the democratic law-based state, such as they are expressed in the Czech Republic's currently valid constitutional order. It is only in this restrictive sense, that of value discontinuity, that one may conceive of continuity with „old law“ the application (legality) of which is the subject of contemporary proceedings on a complaint of a violation of the law.

The freedom of conscience is manifested in decisions made by the individual in certain concrete situations, that is, “here and now”, felt as a profoundly experienced duty. Apart from the correlation of the norm and the situation, the structural characteristic of conscience consists also in a personally experienced sense of an unconditional duty.

The freedom of conscience is classified among the absolute fundamental rights which may not be restricted by ordinary statute. In the case of the conflict of a legal norm with a concrete assertion of the freedom of conscience, it is necessary to weigh whether the assertion of the freedom of conscience is not barred by other values or principles contained in the Czech Republic's constitutional order as a whole (constitutionally immanent restriction upon fundamental rights or freedoms).

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

**IN THE NAME OF THE CZECH REPUBLIC**

The Plenum of the Constitutional Court decided on 26 March 2003 in the matter of the constitutional complaint of V.W. (V.) against the 17 October 2002 ruling of the Supreme Court, file no. 15 Tz 47/2002 as follows:

**The 17 October 2002 ruling of the Supreme Court, file no. 15 Tz 47/2002 is quashed due to its conflict with Art. 15 para. 1 of the Charter of Fundamental Rights and Basic Freedoms.**

**REASONING**

I.

By a constitutional complaint delivered to the Constitutional Court on 7 November 2002, the complainant prayed for the annulment of the 17 October 2002 ruling of the Supreme Court, file no. 15 Tz 47/2002, which turned down on the merits the complaint of a violation of the law submitted in the complainant's favor by the Minister of Justice.

By the 7 January 1954 judgment of the former Lower Military Court in Brno PSP 47, file no. T 2/54, the complainant was found guilty, pursuant to § 270 para. 1, lit. b) of Act No. 86/1950 Coll., the Criminal Act, of the criminal offense of evading the service duty. It was alleged that he committed this offense in that on 1 November 1953 he refused to put on his uniform, to accept the arms allocated to him, and to perform military service, all the while alluding to his religious convictions. For his criminal offense he was sentenced to imprisonment for a period of two and a half years and, at the same time, he was declared to have forfeited for a period of three years his honorable rights of citizenship and the rights laid down in § 44 para. 2 of the Criminal Act, No. 86/1950 Coll.

This decision, which became final and enforceable on 7 January 1954, was subsequently contested when the Minister of Justice submitted a complaint of a violation of the law in favor of the complainant. The complaint was argued to the effect that the judgment violated § 2 para. 3 of Act No. 87/1950 Sb, on Criminal Judicial Proceedings (the Criminal Procedure Code), in relation to § 270 para. 1, lit. b) of Act No. 86/1950 Coll., the Criminal Act, on the grounds stated in § 1 paras. 1 and 2 of Act No. 119/1990 Coll., on Judicial Rehabilitation, as subsequently amended.

The competent Supreme Court panel heard the 29 May 2002 complaint of a violation of the law, and, in view of the divergent decisional practice of Supreme Court panels, in its ruling, file no. 11 Tz 205/01, decided to refer the matter to the Grand Senate of the Criminal Collegium. It designated as the decisive question whether the complainant's conduct can be viewed as a criminal offense or whether the complainant was, by these means, merely asserting his religious freedom guaranteed by the Constitution, yet in conflict with his duties towards the state and society, as laid down in the Constitution.

In the reasoning of the contested 17 October 2002 ruling by the Supreme Court Grand Senate, file no. 15 Tz 47/2002, the Grand Senate stated first and foremost that, in a proceeding on a complaint of a violation of the law, it adjudicates the correctness of the contested decision, as well as the correctness of the proceeding leading up to it, *ex tunc*, that is, in accordance with the factual and legal situation prevailing at the time the decision contested in the complaint of a violation of the law was issued.

On the strength of § 2 para. 1 of the Act on Judicial Rehabilitation, judgments of conviction were quashed, *ex lege*, if the convictions were for such acts as were declared to be criminal offenses in conflict with principles of a democratic society respecting civil, political rights and freedoms guaranteed by the Constitution and expressed in international documents and international legal norms. The criminal offense of evading the duty to serve under § 270 para. 1, lit. b) of the Criminal Act, No. 86/1950 Coll., is not listed in § 2 para. 1 of the Act on Judicial Rehabilitation. In view thereof, according to the reasoning of the contested ruling, the Supreme Court Grand Senate could not consider the complainant's conviction unlawful merely due to the fact that, when he committed it, he referred to his religious convictions. If the legislator did not consider it necessary to quash such convictions *ex lege*, then it is not an act, the declaration of which as a criminal offense would, in and of itself, conflict with international documents, international legal norms, and the principles of a democratic society respecting guaranteed civil and political rights and freedoms. Therefore, in the Supreme Court's view, a conviction for the given criminal offense cannot, in and of itself, be considered as incompatible with democratic and legal principles, and such conviction cannot, without more, be seen as a violation of the law.

## II.

In his constitutional complaint the complainant objects primarily to the fact that the Supreme Court did not concern itself with the specific criminal matter, rather it expressed general considerations concerning whether criminal prosecution for evading the service duty was permissible during the given period, that it entirely overlooked the proposition of law expressed by the Constitutional Court, for example, in its judgment in the matter file no. II. ÚS 285/97, and entirely passed over the issue of the special subject, and that the Senate was composed even of judges who should have been excluded from the hearing.

In the complainant's view, the existence of a statutory duty is not, in and of itself, a sufficient reason for restricting religious freedoms. According to the complainant, further prerequisites must be fulfilled, such as, that the military service would have to function to ensure the rights and freedoms of other people and would have to correspond to the just

requirements of morality, public order, and general good in a democratic society. However, military service in a communist regime could not have met these requirements. As the complainant stated, military service could not at all have functioned to ensure the rights and freedoms of other people, rather it was meant to serve for the armed protection of a regime which engaged in the long-term and systematic infringement of human rights, was criminal, illegitimate, and despicable. From this perspective, the complainant's religious freedom was, in his view, excessively restricted not only in the sense of Art. 18 and Art. 29 para. 2 of the Universal Declaration of Human Rights (hereinafter „Declaration“), but also of Art. 9 paras. 1 and 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter „Convention“).

The complainant further considers that it is not decisive for judging his case whether the Minister of Justice has or has not submitted in other cases complaints in favor of persons who behaved in the same manner as he, although from other motives. While the Supreme Court refers in its decision to Art. 1, Art. 2 para. 1 and Art. 3 of the Charter of Fundamental Rights and Basic Freedoms, nonetheless, it was precisely these provisions which, in the complainant's view, it violated by its decision, when it applied them as if the complainant had demanded advantages to the detriment of other persons. The complainant considers that, on the contrary, it is he who has been subjected to discrimination, and in his constitutional complaint he remarks that no international treaty, nor any domestic law, distinguishes as to whether someone has refused military service due to the fact that he does or does not have a certain religious conviction.

The complainant also considers that the Supreme Court has, in the contested decision, infringed his right to fair process guaranteed by Art. 36 para. 1 of the Charter and Art. 6 para. 1 of the Convention. In his view the Grand Senate, to which the matter had been referred for the purpose of unifying the propositions of law espoused by various Supreme Court panels, should have analyzed the legal conclusions in previous similar decisions and not merely „copied“ the previous negative decision of the 5th Panel of the Supreme Court Criminal Collegium.

The complainant further disagrees with the Supreme Court's view that he was not hampered in asserting his right to judicial rehabilitation by the conduct of the Head of the Local Military Court in Brno, who, in response to the question posed by the complainant's legal counsel, gave misleading information concerning judicial rehabilitation. The complainant believes that his then legal counsel did not ask the question informally, rather officially, and that it was the Head's duty to act in accordance with § 52 of the Criminal Procedure Code, that is to conduct himself as is called for by the significance and formative purpose of criminal proceedings. The complainant, thus, acted in good faith that the Head's response was correct and did not submit the proposal for judicial rehabilitation.

In view of all the above-stated facts, the complainant considers that, by its decision, the Supreme Court has infringed his constitutionally guaranteed rights under Art. 18 and Art. 29 of the Declaration, Art. 9 paras. 1 and 2 and Art. 6 para. 1 of the Convention, and Art. 36 para. 1 of the Charter.

The complainant supplemented his constitutional complaint in his submission of 17 March 2003, in which he also criticized the Supreme Court for infringing his right to the freedom of conscience under Art. 15 para. 1 of the Charter of Fundamental Rights and Basic Freedoms, on the grounds expanded upon in the reasoning of the 11 March 2003 Constitutional Court judgment, file no. I. ÚS 671/01.

### III.

At the Constitutional Court's request, the Supreme Court, as a party to the proceeding, gave its views on the submitted constitutional complaint. The Chairman of the Grand Senate stated that the complaint of a violation of the law in favor of V.W. (V.) was referred to the Grand Senate for its decision on grounds of unification of the decisional practice of the Criminal Collegium panels. Supreme Court panels had adopted two different views on the question at issue.

According to one view, a conviction, pursuant to § 270 para. 1, lit. b) of the Criminal Act, No. 86/1950 Coll., for the criminal offense of evading the service duty cannot, in and of itself, be considered as incompatible with democratic and legal principles and one cannot, without more, spot in it a violation of the law, even though the original conviction occurred during the period from 25 February 1948 and 1 January 1990 for an act committed after 5 May 1945. According to this view, neither the Declaration nor any international treaty on human rights establishes a right to refuse to fulfill a statutory duty towards the state, including military duty, and such a criminal prosecution is permissible even in democratic states and even in cases where the possibility of alternative service does not exist.

The second view is based on the conviction that, in a situation where no alternative to the performance of basic military service existed for cases when such performance would require a citizen to violate his religious convictions, an act by which he exercised a freedom guaranteed by the constitution and by international conventions cannot be regarded as a criminal offense.

As the Chairman of the Grand Senate further stated, the effort to unify the previously divergent decisional practice of panels ended with the victory of the first view, although this view prevailed in the nine-member Grand Senate by the narrowest possible margin. In his pleading the Chairman of the Grand Senate expressed doubts as to whether the view which prevailed in the contested decision was sufficiently representative, especially in view of the fact that certain panels had more than one judge representing them in the Grand Senate.

### IV.

In his 16 January 2003 pleading, the Minister of Justice, a secondary party to the proceeding on the constitutional complaint, expressed his disagreement with the contested decision. The Minister of Justice considers that in the complainant's case there was a violation of § 2 para. 3 of Act No. 87/1950 Sb, on Criminal Judicial Proceedings (the

Criminal Procedure Code), in relation to § 270 para. 1, lit. b) of the Criminal Act, No. 86/1950 Coll., on the grounds stated in § 1 paras. 1 and 2 of Act No. 119/1990 Coll., on Judicial Rehabilitation.

The Minister of Justice considers that there was an infringement of equality under Art. (correctly §) 1 of the then in force Constitution, for the non-uniformity between recognized rights and imposed duties quite unequivocally placed in an unfavorable position every citizen who actually wished to exercise her constitutionally guaranteed religious freedom, as against those whose convictions lacked spiritual dimensions. Art. (correctly §) 16 para. 1 of the constitutional act in effect at that time,, No. 150/1948 Coll., the „9th of May Constitution“, recognized to each citizen of the state the right to select any religious faith whatsoever; on the other hand, § 34 paras. 1 and 2 laid down the citizens‘ basic duties to the state, among which was also the duty connected with defense of the homeland. Under that state of affairs, the complainant could remain true to his religious convictions only by incurring criminal law consequences, and, as a result of that situation, as a believer, he came into conflict with his duties as a citizen for the defense of the state.

## V.

In view of the fact that the Grand Senate of the Supreme Court’s Criminal Collegium decided this complaint of a violation of the law, in conformity with the Constitutional Court Plenum’s resolution published as Constitutional Court Notice No. 8/2001 Coll., it is the Constitutional Court Plenum which is competent to hear the constitutional complaint against this decision.

Once the Constitutional Court had ascertained that the constitutional complaint met all formal requirements and that it has been timely submitted, it proceeded to the consideration of the matter on the merits.

## VI.

### 1.

The constitutional complaint contests the above-designated decision of the Supreme Court in which the Supreme Court proceeded from the thesis, according to which, in a proceeding on a complaint of a violation of the law, it adjudicates the „correctness“ (correct legality) of the contested decision as well as the „correctness“ (correct legality) of the proceeding leading up to it ex tunc, that is, in accordance with the factual situation and state of the law at the time in which the contested decision was issued, or when the proceeding which led up to the decision was held; new facts and evidence are not admissible.

In the Constitutional Court’s view, this starting thesis may not be applied without reservation. If, thanks to the applicable procedures, the interpretation even of the very old criminal law norms is carried out at the present by a court with consequences for adjudging the criminal prosecution of a person, that is with consequences intruding into his

or her personal sphere, it may not be carried out without regard to the constitutive values and principles of the democratic law-based state, such as they are expressed in the Czech Republic's currently valid constitutional order. It is only in this restrictive sense, that of value discontinuity, that one may conceive of continuity with „old law“ (see Judgment of the Constitutional Court, Pl.19/93 - Collection of Judgments and Rulings of the Czech Constitutional Court, Vol. 1, No. 1 - published as No. 14/1994 Coll.), the application (legality) of which is the subject of contemporary proceedings on a complaint of a violation of the law.

The European Court of Human Rights also expressed similar views as to the application of „old law“ (judgment in the case of *Streletz, Kessler and Krenz v. Germany* of 22 March 2001), where, among other things, it stated that “the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.” This idea was expanded upon in an even more meaningful manner in the separate opinion of Judge Levits, supplementing the reasoning given in the judgment. He stated: “It shows clearly that interpretation and application of the law depend on the general political order, in which the law functions as a sub-system. (...) The differences in interpretation and application of the law between democratic and socialist systems cover all important elements of the law. (...) That brings us to the question whether, after a change of political order from a socialist to a democratic one, it is legitimate to apply the “old” law (...) according to the approach to interpretation and application of the law which is inherent in the new democratic political order. I would like to stress that in my view there is no room for other solutions. Democratic States can allow their institutions to apply the law - even previous law, originating in a pre-democratic regime - only in a manner which is inherent in the democratic political order (in the sense in which this notion is understood in the traditional democracies). Using any other method of applying the law (which implies reaching different results from the same legal texts) would damage the very core of the ordre public of a democratic State. (...) Consequently, interpretation and application of national or international legal norms according to socialist or other non-democratic methodology (with intolerable results for a democratic system) should from the standpoint of a democratic system be regarded as wrong. (...) In my view, that is a compelling conclusion, which derives from the inherent universality of human rights and democratic values, by which all democratic institutions are bound. At least since the time of the Nuremberg Tribunal, that conception of the democratic order has been well understood in the world and it is therefore foreseeable for everybody.”

The Constitutional Court entirely concurs with the view expressed by Judge Levits.

2.

In view of the fact that what is to be reviewed in the proceeding on the complaint of a violation of the law is the legality of the above-designated proceeding and decision in relation to the condemning decision (also designated above) for the criminal offense of avoidance of the duty to serve, it is necessary to review whether the contested Supreme Court decision did not result in the violation of the complainant's basic rights, including his basic right to the freedom of conscience, contained in Art. 15 para. 1 of the Charter.

a) The freedom of conscience has constitutive significance for the democratic law-based state which respects the liberal idea of the primacy of responsible and dignified human beings before the State - that is, the idea of esteem (respect and protection) by the state for the rights of persons and citizens [Art. 1 para. 1 of the Czech Constitution (hereinafter, "Constitution")]. In contrast, it is characteristic of a totalitarian political regime that it does not respect the autonomy of the individual conscience, as it attempts, even with the aid of a repressive criminal policy, to suppress the freedom of conscience of the individual, and by this means to compel her to accept the will of the ruling elite, which claims recognition for its decisions as the sole good decisions and, in that sense, the sole ethical decisions. This pattern can be seen even at the Czechoslovak, or Czech, constitutional plain. Thus the Constitutional Charter, No. 121/1920 Coll., just as the current Charter, does not provide for the possibility that freedom of conscience, which both expressly lay down, could be restricted by statute. While § 15 of the Constitution of 9 May 1950, No. 150/1948 Coll., declared the freedom of conscience, it negated it at the same time by laying down that the freedom of conscience does not provide grounds for the refusal to fulfill civic duties as laid down in ordinary law. The Constitution of the Czechoslovak Socialist Republic, No. 100/1960 Coll., did not even make reference to the freedom of conscience.

The freedom of conscience is manifested in decisions made by the individual in certain concrete situations, that is, "here and now", felt as a profoundly experienced duty. It is not a matter of the individual's attitude toward abstract problems, valid once and for all and in all situations. In the case of decisions dictated by conscience, it is the fusion for the individual of binding moral norms with the situation as evaluated by her. It is the integration of recognized norms with an assessment of the factual situation. A decision dictated by consciences is based on the existence of the conscience itself, and not on specific religious or ideological conceptions. Apart from the correlation of the norm and the situation, the structural characteristic of conscience consists also in a personally experienced sense of an unconditional duty.

It follows from this that the freedom of conscience cannot be conflated either with the freedom of faith or with the freedom of religion. In contrast to these two freedoms, a decision dictated by conscience is always concrete, as the subject thereof is concrete conduct in a concrete situation. It is only the reasons or maxims which co-create the norm which the conscience accepts in a given moment that can be abstract, general or absolute. A decision dictated by conscience can find in them its normative justification, which applies when resolving the conflict between such principle or maxim and the legal norm binding one to the opposite conduct. Of course, the situation is always individualized by time, place, and concrete circumstances. What is fundamental is that it concerns a solemn moral decision oriented toward the category of good and evil [compare, for example, the judgment of the FRG Constitutional Court in BverfGE 12, 45(55)], which the individual experiences as a binding duty or an unconditional order to behave in a certain fashion.

The distinction between it and a decision made solely in reference to a political or ideological motivation (which is an external quantity not penetrating into the internal moral sphere) or to a psychological condition (which exists without the necessity to engage in moral judgment), consists in its specific moral character and its relationship to the



personal moral truthfulness or earnestness which lends to the decision its sense of unconditionality.

b) The freedom of conscience is classified among the absolute fundamental rights, that is, those which may not be restricted by ordinary statute, the purpose of which would be to restrict such an absolute fundamental right, in this case the freedom of conscience. Each statute expresses, on the one hand, the public interest and, on the other, formulates the moral convictions of the parliamentary majority, thanks to which it was adopted, and in this manner formulates the moral conviction of a majority of society, which the composition of Parliament reflects. If a certain legal norm is in conflict with an individual conscience, certainly this fact cannot lead to the consequence that such legal norm is non-binding, even if only in relation to the person whose conscience directs him not to respect the specific legal norm. The freedom of conscience can, however, have an effect on the applicability or enforceability of such legal norm in relation to those persons to whose conscience it is repugnant. In weighing whether, in the case of such a conflict of a legal norm with a concrete assertion of the freedom of conscience, the freedom of conscience ultimately wins out, it is necessary to weigh whether such a decision would encroach upon the fundamental rights of third persons or whether assertion of the freedom of conscience is not barred by other values or principles contained in the Czech Republic's constitutional order as a whole (constitutionally immanent restriction upon fundamental rights or freedoms).

## VII.

In principle it is a matter for the Supreme Court to judge whether the law was violated by the decision contested in a complaint of a violation of the law. It is the task of the Constitutional Court to adjudge whether the interpretation of statutory provisions selected by the Supreme Court infringes any of the complainant's fundamental rights and freedoms, or to adjudge whether an interpretation of the applied statutory provisions can be found which would not infringe any of the complainant's fundamental rights and freedoms.

The constitutional complaint is well-founded as the Supreme Court, in the contested decision, did not take sufficiently into account the complainant's fundamental right, arising from Art. 15 para. 1 of the Charter, to freedom of conscience as understood in the above-stated sense and extent. Although the complainant referred to his religious convictions, the refusal (evading) of service (military) duty was in fact a manifestation of his personal decision dictated by conscience, in which maxims flowing from the complainant's faith or religious convictions merely had played a part.

Previous Constitutional Court decisions relating to the conflict between the duty to report for military service and fundamental rights have concentrated primarily upon the conflict between this duty and the freedom of religious conviction (compare decisions in the cases file no. II. ÚS 285/97, Collection of Judgments and Rulings of the Czech Constitutional Court, Vol. 12, No. 117; and file no. II. ÚS 187/2000, Collection of Judgments and Rulings of the Czech Constitutional Court, Vol. 21, No. 40). Due to the divergence of the freedom of conscience and the freedom of religious conviction expounded above, the Constitutional Court first reviewed the relationship of the contested decision to the freedom of

conscience in the sense of Art. 15 para. 1 of the Charter. The Constitutional Court is of the view that the refusal to report for military service may be made on grounds not related to religious conviction and that the Charter protects even that freedom.

The Supreme Court failed to carry out the duty, which it had for the above-stated reasons, to adjudge the legality of the decision contested in the complaint of a violation of the law, as well as the proceeding leading up to it, in the light of Art. 15 para. 1 of the Charter. The fact that the Constitution of 9 May denied the freedom of conscience its character as an „absolute“ right followed alone from the essence of the political regime enthroned in February, 1948. The new restrictions upon the freedom of conscience breached the continuity of the conception that the freedom of conscience is an absolute right, as it was protected by the Constitutional Charter of 1920. The post-1948 constitutional formulation of the freedom of conscience deviated, in terms of legal philosophy, from the development of fundamental rights which was begun by the Nuremburg Tribunal and continued with the adoption of the Universal Declaration of Human Rights.

For a democratic law-based state, which the Czech Republic should be according to the normative instruction flowing from Art. 1 para. 1 of the Constitution, it is unacceptable for the Supreme Court to interpret § 267 para. 3 of Act No. 141/1961 Coll., on Criminal Judicial Proceedings (the Criminal Procedure Code), as subsequently amended, such that the review of the legality of a contested decision is understood to entail an interpretation of the applicable „old law“ in accord with the then contemporary jurisprudence. For the same reason, when considering the legality of the original decision contested by the complaint of a violation of the law, it could not fail to take into account and weigh the fundamental rights and principles of the Czech constitutional order which the contested decision encroached upon. To overlook these norms of reference and principles does not merely render the Supreme Court's decision defective due to the infringement of the complainant's individual rights. In addition, and the Constitutional Court deems it necessary to make this observation outside of the strict confines of the case before it, it renders the decision incomprehensible for the society, for its legal, even constitutional, consciousness, and contributes to the existing lack of faith in the judiciary in the sense that Czech courts prove incapable of protecting the rights of citizens in relation to state power, when that manifests itself in an excessive manner. In this way, confidence in the substantive conception of the Czech Republic's character as a democratic law-based state is diminished. If the principle of legal continuity is not to have a destructive impact in relation to the Czech Republic's character as a constitutional state, when applying „old law“ the value discontinuity with that law must consistently be insisted upon, and this approach must be reflected in judicial decisions.

The Supreme Court in fact overlooked the operation of Art. 15 para. 1 of the Charter on the interpretation of § 267 para. 3 of the Criminal Procedure Code, in conjunction with § 270 para. 1, lit. b) of Act No. 86/1950 Sb, the Criminal Code, as it restrictively interpreted the mentioned provisions of the Criminal Procedure Code and, moreover, the object of its consideration in relation to the cited provisions of the Criminal Code was solely the right to religious conviction, not the freedom of conscience in its dimension as an absolute right. To the extent it did so, it continued in the encroachment upon the complainant's freedom of conscience which began with the judgment of conviction in 1954. The Supreme

Court did not, by means of its decision, cure this encroachment and, thus, failed to respect the duty, placed upon it by Art. 4 of the Constitution, to accord protection to fundamental rights.

Under the circumstances, it is not necessary to review possible conflicts with other fundamental rights, the infringement of which have been alleged.

**Notice: Constitutional Court decisions may not be appealed.**

Brno, 26 March 2003