Constitutional judgment 3-4-1-19-07

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-4-1-19-07
Date of judgment	2 June 2008
Composition of court	Chairman Märt Rask and members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Petition of the Tartu County Court of 16 November 2007 to declare unconstitutional the absence of provisions in the Penal Code and in the Code of Criminal Procedure serving as a ground for the release of a person from the service of a sentence when the Act providing for the punishment has been amended.
Type of hearing	Written proceeding
DECISION	**1. To dismiss the petition of the Tartu County Court**

FACTS AND COURSE OF PROCEEDING

1. By the judgment of the Jõgeva County Court of 17 November 2004 T. Toompalu was convicted under §§ 263(1) and 274(1) of the Penal Code (hereinafter “the PC”) and he was punished by the imprisonments of 5 months and one year, and eight months, respectively. Under § 64(1) of the PC the aggregate punishment of 2 years’ imprisonment was imposed.

2. By the judgment of the Jõgeva County Court of 31 October 2005 T. Toompalu was convicted under § 199(2)4) and 5) of the PC in two thefts; the value of the stolen things was 181 kroons and 60 cents, and 13 kroons and 80 cents, respectively. T. Toompalu was punished by two months’ imprisonment. Under § 65(2) of the PC the county court added the unserved part of the sentence imposed by the judgment of the same court of 17 November 2004 to the punishment imposed for the new offence, imposing the aggregate

punishment of one year and eight months' imprisonment.

3. By the judgment of the Tartu County Court of 27 February 2006 T. Toompalu was convicted under § 199(2) 4) and 5) of the PC in two thefts; the value of the stolen things was, respectively, 31 kroons and 80 cents, and 302 kroons. T. Toompalu was punished by the imprisonment of one year and six months. Under § 65(2) of the PC the court added the unserved part of the sentence imposed by the judgment of the same court of 31 October 2005 to the punishment imposed for the new offence, imposing on T. Toompalu the aggregate imprisonment of three years and 2 months. The term of commencement of the service of the sentence was calculated from the detention of T. Toompalu on 7 November 2005.

4. On 8 October 2007, on the basis of § 431 of the Code of Criminal Procedure (hereinafter "the CCP") the Tartu Prison submitted an application to the Tartu County Court for the adjudication of the issue of T. Toompalu's release or non-release. It was pointed out in the application that as of 15 March 2007 the thefts in the case of which the value of the stolen things is less than 1000 kroons are decriminalised. The law does not provide for the release of persons convicted before 15 March 2007 for the theft of things with the value of less than 1000 kroons. The judicial practice concerning the necessity of release of such persons is not uniform.

5. The Tartu County Court informed the Lõuna District Prosecutor's Office of the application of the Tartu Prison, pointing out that according to § 1(6) of the Penal Code Implementation Act (hereinafter "the PCIA") a judge shall decide on the release from punishment imposed at the request of the prosecutor, and the courts shall not adjudicate the issue on their own initiative.

6. On 16 October 2007 the Lõuna District Prosecutor's Office submitted a proposal to the county court that it adjudicate, in the interests of unifying the judicial practice, the issue of release or non-release of T. Toompalu pursuant to the procedure provided for in §§ 431 to 432 of the CCP. The prosecutor's office was of the opinion that it could not submit a request under § 1(6) of the PCIA.

7. By the ruling of the Tartu County Court of 16 November 2007 T. Toompalu was released from the service of the rest of the punishment imposed by the judgment of the Tartu County Court of 27 February 2006. At the same time the county court declared unconstitutional the absence of a provision in the Penal Code and in the Code of Criminal Procedure, which would serve as a ground for the release of a person from the service of a sentence when the Act providing for the punishment has been amended. The county court referred the ruling to the Supreme Court, thus initiating a constitutional review proceeding.

8. The Constitutional Review Chamber of the Supreme Court, having heard the petition of the Tartu County Court in the panel of five justices, came to the conclusion that this case related to an issue important from the aspect of fundamental rights and that it may prove necessary to alter the earlier judicial practice of the Supreme Court. On the basis of § 3(3) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA"), by its ruling of 26 February 2008, the Chamber referred the petition of the Tartu County Court to the Supreme Court en banc for hearing.

JUSTIFICATIONS OF THE COUNTY COURT AND THE PARTICIPANTS IN THE PROCEEDING

9. The county court held that the obligation to guarantee rights and freedoms, arising from § 14 of the Constitution, justifies the proceeding of the issue of the release of T. Toompalu pursuant to the procedure provided for in § 431 of the CCP. Proceeding from Chapter 18 of the Code of Criminal Procedure and Chapter 5 of the Penal Code the courts of first instance are entitled, in principle, to decide on the release of a person serving a sentence imposed by a judgment which has entered into force.

The court pointed out that by 16 November 2007 T. Toompalu had served two years and ten days of the imprisonment and there was still the imprisonment of one year, one month and twenty days to serve. Consequently, T. Toompalu had served a term which covers the imprisonment imposed under §§ 263(1) and

274(1) of the PC (one year and six months) and in addition six months and ten days for the thefts for which only a fine or a detention may be imposed as of 15 March 2007. For those thefts T. Toompalu still had the imprisonment of one year, one month and twenty days to serve.

§ 23(2) of the Constitution entitles everyone to a lesser punishment if, subsequent to the commission of an offence, the law provides for a lesser punishment. § 32(2) of the Constitution is extended to all the cases when, subsequent to the commission of an act the punishment provided for the act is alleviated, including to the persons serving their sentences under judgments which have entered into force. If, during the period of serving a sentence, the legislator comes to the conclusion that the punishment corresponding to an act is to be alleviated, the change in the legislator's attitude must affect those serving sentences. Proceeding from §§ 12(1) and 23(2) of the Constitution and § 5(2) of the PC the release of T. Toompalu from the service of the rest of the punishment imposed should be considered right and fair.

At the same time the county court admitted that neither the Penal Code nor the Code of Criminal Procedure contained a provision which would serve as a ground for the court to release a person from the service of the rest of the punishment due to the amendment of the law. In the legislative practice of Estonia such situations have been resolved by the adoption of appropriate implementing legislation. In the present case there are no such implementing provisions. The Penal Code Implementation Act was adopted for a unique situation of implementation of the Act – for the transformation from the implementation of the old Criminal Code to the new Penal Code. Therefore the provisions of the referred Act are not applicable in the present case, and a decision on the release of a person from the service of the rest of the punishment can not be made on the basis of these provisions.

The court argued that the absence of a provision in the Penal Code and in the Code of Criminal Procedure serving as a ground for the release of a person from the service of a sentence in a situation where the Act providing for the punishment has been amended, was not in conformity with §§ 12(1) and 23(2) of the Constitution in their conjunction.

10. The criminal defence counsel of T. Toompalu, sworn advocate Uno Paimets, is of the opinion that the absence of provisions in the Penal Code and in the Code of Criminal Procedure serving as a ground for the release of a person from the service of a sentence when the Act providing for the punishment has been amended, has caused general confusion in different court instances. As it is most likely that there are other persons serving their sentences in a situation similar to that of T. Toompalu, an implementing legislation should be adopted to regulate the issue.

11. The Public Prosecutor's Office is of the opinion that within the Estonian legal order the problem brought forward by the Tartu County Court is solved by the judgment of the full composition of the Criminal Chamber of the Supreme Court of 7 December 2007 in case no 3-1-2-2-07.

12. The Constitutional Review Chamber of the Supreme Court is of the opinion that § 2(4) of the CCP in conjunction with §§ 431 and 432 of the CCP, and the procedure arising from Chapter 15 of the Code of Criminal Procedure ensure sufficiently effective possibility of judicial review of alleged violations of fundamental rights. As the arisen problem can be overcome through systematic interpretation of the provisions of law, there is no need for a specific regulation. That is why the situation does not amount to an unconstitutional one. Nevertheless, it is pointed out that an opinion had been expressed at the hearing of the Constitutional Review Chamber that specific regulation would be necessary for the guarantee of legal certainty.

13. The Riigikogu Legal Affairs Committee is of the opinion that there is no need for a specific provision serving as a ground for the release of a person from the service of a sentence when the Act providing for the punishment has been amended. In regard to amended necessary elements of a criminal offence, decriminalised acts or partly decriminalised acts the legislator did not deem it necessary to provide for a separate implementation mechanism concerning court judgments which have entered into force, instead the legislator proceeded from § 23(2) of the Constitution pursuant to which the retroactive force of an alleviating

Act is applicable only to the time when the criminal procedure took place. At the same time the Legal Affairs Committee of the Riigikogu makes a reference to the Criminal Chamber of the Supreme Court ruling in case no 3-1-2-2-07 of 7 December 2007, which gives rise to the conclusion that the question of whether and how an amendment of penal law alleviating the situation of a person, passed subsequent to rendering of a court judgment, affects the execution of the judgment, can be adjudicated by a court on the basis of § 431 of the CCP.

14. The Chancellor of Justice is of the opinion that the failure to pass legislation of general application which would contain a substantive ground for review of punishments in a situation where a criminal offence for which persons are serving prison sentences is decriminalised, is not in conformity with (the importance of) the principle that restrictions on rights and freedoms be imposed solely by the parliament and with the principle of legal clarity, as established in §§ 3(1) and 13(2) of the Constitution, and that it disproportionately restricts the fundamental rights of the referred persons established in §§ 23(2) and 12(1) of the Constitution.

The Chancellor of Justice is of the opinion that the valid law lacks a norm, worded with sufficient clarity, serving as a sufficient substantive ground for those who implement law to decide on the continuance of the service of a sentence in a situation where the Penal Code has become more favourable in regard to a person and has changed an act which used to be punishable as a criminal offence into a misdemeanour. § 5(2) of the Penal Code can not be considered a sufficiently specific substantive law basis for the resolution of the issue of continuance of the service of a sentence imposed on a person by a judgment which has attained the force of law. Also, the sphere of application of § 5(2) of the PC is narrower than the sphere of protection of the second sentence of § 23(2) of the Constitution, covering only judgments on conviction. Without forming an opinion on whether § 431 of the CCP provides for a sufficient procedure for the review of a punishment imposed on a person when the Penal Code is amended, the Chancellor of Justice argues that § 431 of the CCP does not include necessary substantive law grounds. According to § 2(4) of the Code of Criminal Procedure decisions of the Supreme Court in issues which are not regulated by other sources of criminal procedural law but which arise in the application of law constitute a source of criminal procedural law. § 2(4) of the CCP does not give the Supreme Court the competence to create the missing substantive law rules for the release of a person from the service of a sentence.

Proceeding from §§ 3(1) and 13(2) of the Constitution the state is under the obligation to regulate, on the level of law and with sufficient concreteness and precision, the issues concerning fundamental rights. In the present case, upon the adoption of the amendments to the Penal Code, the Riigikogu has failed to provide for a ground for the review of punishments of the persons who are serving imprisonments, convicted on the basis of the provisions which have been decriminalised. This has resulted in a situation where not only an ordinary man but also a qualified expert of law – a judge – has not understood in each concrete case whether and to what extent a person’s punishment is to be reviewed.

On the basis of the established practice of the Supreme Court concerning the evaluation of infringements of the second sentence of § 23(2) of the Constitution and on the basis of the facts of this concrete case the Chancellor of Justice argues that by failing to provide for concrete legal bases for the review of punishments of persons who are serving imprisonments for criminal offences that have been decriminalised, the legislator has created a situation for the persons serving such imprisonments wherein their fundamental right, established in the second sentence of § 23(2) of the Constitution, has been disproportionately restricted. The extensiveness of the infringement of the fundamental rights of persons because of the lack of regulatory provisions can not be justified by the legitimate aim allegedly serving as the basis for the infringement.

The Chancellor of Justice is of the opinion that the failure to pass a sufficiently clear Act is also in conflict with the general requirement of equality. In the present case the groups of persons treated unequally are those, who had been convicted for repeated criminal offences against property of small value on the basis of the wording of the Penal Code in force before 15 March 2007, and those persons who have been convicted under the wording of the Penal Code in force since 15 March 2007 for a misdemeanour against property of small value. The inequality consisting in the difference of punishments imposed can not be deemed

reasonable.

15. The Minister of Justice is of the opinion that the lack of the provision in the Penal Code and the Code of Criminal Procedure, referred to by the county court, is not in conflict with the Constitution. The retroactive force of law is not applicable in regard to those persons in regard to whom a court judgment has entered into force. In a situation where a court has rendered a judgment on the basis of a valid Act, has imposed a punishment on the person, and the judgment has entered into force, it is not reasonable to review the judgments which have entered into force and are being executed. The issues related to execution of judgments are covered by § 431 of the CCP.

RELEVANT PROVISIONS

16. The Penal Code (RT I 2001, 61, 364; 2008, 13, 87) provides as follows:

"[…]

§ 5. Temporal applicability of penal law

(1) A punishment shall be imposed pursuant to the law in force at the time of commission of the act.

(2) An Act which precludes the punishability of an act, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect.

(3) An Act which declares an act as punishable, aggravates a punishment or otherwise exacerbates the situation of a person shall not have retroactive effect.

(4) Offences against humanity and war crimes shall be punishable regardless of the time of commission of the offence.

[…]"

The Code of Criminal Procedure (RT I 2003, 27, 166; 2007, 66, 408) provides as follows:

"[…]

§ 431. Settlement of issues arising in execution of court decisions

Issues not regulated by §§ 424–428 and 430 of this Code and other doubts and ambiguities arising in the execution of a court decision shall be settled by a ruling of the court which made the decision or the judge in charge of execution of court judgments at the county court enforcing the decision.

§ 432. Procedure for review of issues arising in execution of court decisions

(1) A judge in charge of execution of court judgments shall settle issues relating to the execution of a court decision by a ruling made by way of a written proceeding without summoning the parties to the court proceeding unless otherwise provided for in subsection (3) of this section.

(2) If an issue pertains to the execution of a judgment in the part which concerns the civil action, the judge in charge of execution of court judgments shall inform the victim and defendant of the issue beforehand and they have the right to submit their opinions in writing within the term specified by the court. If an application for amendment of or release from an obligation imposed on the bases provided for in subsection 203^1 (3) of this Code is submitted, the judge in charge of execution of court judgments shall inform the victim of the issue and the victim shall submit his or her opinion in writing by the term determined by the court.

(3) A judge in charge of execution of court judgments shall settle the issues provided for in §§ 425–426 of

this Code and the issues relating to the deprivation of the liberty of a convicted offender in his or her presence. The prosecutor and, at the request of the convicted offender, his or her counsel shall be summoned before the judge and their opinions shall be heard. The health care professional who has rendered an opinion concerning the premature release of a convicted offender from punishment due to his or her illness is required to participate in the settling of the corresponding issue.

(4) A court shall send a copy of a ruling made pursuant to subsection (1) of this section to the participants in the proceeding who are concerned by the ruling.

[…]"

OPINION OF THE SUPREME COURT EN BANC

17. This court case was initiated by the application submitted to the judge in charge of execution of court judgments at the Tartu County Court first by the Tartu Prison and thereafter by the Lõuna District Prosecutor's Office for the adjudication of the matter of release of T. Toompalu from imprisonment. T. Toompalu was serving the third year of the three year and two month's imprisonment imposed as an aggregate punishment by the Tartu County Court judgment of 27 February 2006, of which one year and eight months were punishments imposed under § 199(2) of the PC for the theft of things with the value of less than 1000 kroons. According to § 9(21) of the Penal Code and the Related Acts Amendment Act (RT I 2007, 13, 69), beginning from 15 March 2007, the thefts incriminated in T. Toompalu are punishable only as misdemeanours under § 218 of the PC. Imprisonment can not be imposed for misdemeanours. The county court, when hearing the request under § 431 of the CCP, held that proceeding from the second sentence of § 23(2) and the first sentence of § 12(1) of the Constitution, as well as from § 5(2) of the PC, T. Toompalu was to be released from the service of the rest of the imprisonment. The court also argued that the release of T. Toompalu was barred by the lack of a provision in the Penal Code and in the Code of Criminal Procedure which would serve as a ground for the court to release a person from the service of a sentence imposed by a judgment which has entered into force because of the amendment of the law. The county court declared the absence of such a provision in the Penal Code and in the Code of Criminal Procedure unconstitutional.

18. The Supreme Court en banc concludes from the ruling of the county court that the court declared unconstitutional both the fact that there is no norm serving as a substantive law basis for bringing the situation of a convicted person into conformity with the alleviating penal law which was enacted after the entry into force of the judgment, and the fact that there is no procedure within which a relevant decision could be made. Next, the Supreme Court en banc shall address the petition of the county court separately in regard to substantive law (I) and procedural law (II). Thereafter the Supreme Court shall form a final opinion on the adjudication of this constitutional review case (III).

I.

19. First, it is necessary to answer the question of whether T. Toompalu is entitled, on the basis of the Constitution, to have the Penal Code in the wording which entered into force on 15 March 2007 be retroactively applied in regard to him, and whether the valid penal law allows for this. The county court found that proceeding from the Penal Code and the Related Acts Amendment Act, which entered into force on 15 March 2007, some of the criminal offences for which T. Toompalu was serving the imprisonment imposed by the Tartu County Court judgment of 27 February 2006 are punishable only as misdemeanours. This means that the valid penal law would treat T. Toompalu for the acts he committed more leniently than the law under which he had been convicted.

20. § 23(2) of the Constitution establishes that no one shall have a more severe punishment imposed on him or her than the one that was applicable at the time the offence was committed. If, subsequent to the commission of an offence, the law provides for a lesser punishment, the lesser punishment shall apply. The Supreme Court en banc points out that a law providing for a lesser punishment for the purposes of the

second sentence of § 23(2) of the Constitution is also a law which totally excludes the punishability of an act or replaces a punishment for a criminal offence with a punishment for a misdemeanour. Whereas the term 'punishment' for the purposes of the second sentence of § 23(2) of the Constitution includes also such consequences of penal law, arising from a conviction, that are not stipulated as punishments in the formal penal law, such as disclosure of information concerning punishments in the punishment register.

21. In the judgments no 3-1-3-10-02 of 17 March 2003 (RT III 2003, 10, 95, paragraph 26) and no-3-3-1-69-03 of 28 April 2004 (RT III 2004, 12, 143, paragraph 26) the Supreme Court en banc held that the second sentence of § 23(2) of the Constitution must be interpreted to the effect that the sphere of protection thereof also includes the time of serving a sentence. The Supreme Court can see no reason for changing this opinion. The interpretation that the sphere of protection of the second sentence of the § 23(2) of the Constitution includes, in addition to the suspects and the accused, the convicted persons serving sentences, is inter alia supported by the interpretation of the fundamental right under discussion in conjunction with the principle of equality before the law, arising from the first sentence of § 12(1) of the Constitution. If the lesser punishment were to be retroactively applied only in regard to those persons who have not yet been convicted, it would result in a situation where, from among the persons who have committed the same act at the same time, those would be in a more favourable situation who are punished – e.g. because the offender has absconded proceedings or the body conducting proceedings has a bigger workload – when the more lenient penal law is already in force. Consequently, the service of the more severe punishment during the time of validity of a law providing for a lesser punishment results also in the infringement of the fundamental right of equality (see also the Supreme Court en banc judgment of 17 March 2003 in case no 3-1-3-10-02, paragraphs 35 to 39; and ruling of 28 April 2004 in case no 3-3-1-69-03, paragraph 27).

22. At the same time the Supreme Court en banc is of the opinion that the sphere of protection of the second sentence of § 23(2) of the Constitution does not include those convicted persons who have served their sentences and whose criminal record has been expunged from the register. In other words, the second sentence of § 23(2) of the Constitution does not give rise to the right of a convicted person to have a punishment, which has been executed, alleviated; this provision gives rise only to the right to have a punishment, which is being served, brought into conformity with the law which has been enacted after the entry into force of a court judgment.

23. The Supreme Court en banc has explained before that the fundamental rights established in the first sentence of § 12(1) and in the second sentence of § 23(2) of the Constitution are not unlimited (see the Supreme Court en banc judgment of 17 March 2003 in case no 3-1-3-10-02, paragraph 28; and ruling of 28 April 2004 in case no 3-3-1-69-03, paragraphs 28 to 29). These are fundamental rights not subject to the requirement that restrictions be imposed solely by Acts; restrictions of these rights could also be justified by other considerations, such as other fundamental rights, but also constitutional values, e.g. efficient functioning of the court system, force of law of a decision on punishment, legal certainty and legal peace. In certain cases other constitutional rights or values may partially or completely overbalance the right of a convicted person, arising from the first sentence of § 12(1) or the second sentence of § 23(2) of the Constitution, that his situation be brought into conformity with the more lenient law enacted after the commission of an offence by him. In such cases the legislator is entitled to provide that the more lenient law shall be applied to persons who have already been convicted only to a limited extent or that it shall not be applied to those persons at all, thus restricting the fundamental right of certain categories of convicted persons to enjoy the retroactive force of a more lenient law.

24. The question of when and to what extent the legislator may restrict the right of a convicted person, arising from the first sentence of § 12(1) or the second sentence of § 23(2) of the Constitution, to have more lenient law applied to the person retroactively, is to be answered by balancing the intensity of the infringement of the fundamental rights of a convicted person and the values justifying this infringement (see also the Supreme Court en banc judgment of 17 March 2003 in case no 3-1-3-10-02, paragraph 32; and ruling of 28 April 2004 in case no 3-3-1-69-03, paragraphs 31 to 33). The less intense the infringement of fundamental rights, the greater is the extent to which the values justifying the infringement have to be taken into account. The more important the role of the values justifying the infringement of a fundamental right in

a concrete case, the more justified the retreat of the fundamental right in the face of these values may be. For example, the more difficult it is to compare the legal opinion rendered on a concrete act by different wordings of penal law and the more different the punishment provided for the act, the more justified the restriction of a convicted person's right arising from the first sentence of § 12(1) or the second sentence of § 23(2) of the Constitution may prove in the interest of efficient functioning of the court system (see also the Supreme Court en banc ruling in case no 3-3-1-69-03, paragraphs 30 to 31). Thus, the evaluation of whether a new Act alleviates the situation of a convicted person may prove complex because of the necessity to ascertain new facts, which did not have legal significance under the penal law in force at the time of rendering of court judgment. At the same time, such law amendments do exist in relation to which the ascertainment of facts necessary for finding out the alleviating effect would but insignificantly burden the court system.

25. Bearing in mind the above the Constitution enables the legislator to restrict the rights arising from the first sentence of § 12(1) and the second sentence of § 23(2) of the Constitution in regard to certain convicted persons. According to the requirement that restrictions be imposed only by Acts, established in the first sentence of § 3(1) and § 11 of the Constitution, the fundamental rights – including the right of a convicted person to have a more lenient law applied to him retroactively – may be restricted only when there is a legal basis in an Act, providing for the possibility of such a restriction. The Supreme Court en banc has pointed out before that the requirement that restrictions be provided by law derives from the principles of rule of law and democracy, and it means that in regard to issues concerning fundamental rights all decisions essential from the point of view of exercise of fundamental rights must be taken by the legislator. The aim of the constitutional provisions concerning competence and formal requirements is to guarantee the observance of the basic constitutional principles (e.g. legal clarity, legal certainty, separation and balance of powers) and effective protection of fundamental rights. Whereas the restrictions of fundamental rights of certain intensity may be imposed only by laws in the formal sense (see the Supreme Court en banc judgment of 3 December 2007 in case no 3 3 1 41 06 – RT III 2007, 44, 350, paragraphs 21 to 22). It proceeds from the above that from the point of substantive law it is possible not to bring the punishment imposed on a convicted person into conformity with the more lenient law enacted after entry into force of court judgment only when the law provides for a legal basis for this. In the cases when the legislator has not provided for a legal basis for the restriction of the fundamental rights arising from the first sentence of § 12(1) and the second sentence of § 23(2) of the Constitution, the convicted persons whose punishments have not been executed are entitled to have their punishments brought into conformity with the more lenient law enacted after the entry into force of court judgments.

26. There is no norm in the valid law containing a legal basis for restricting, to any extent, the right of persons convicted under the Penal Code, arising from the first sentence of § 12(1) and the second sentence of § 23(2) of the Constitution, to have more lenient law applied retroactively. According to § 5(2) of the PC, regulating the temporal applicability of penal law, an Act which precludes the punishability of an act, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect. The Supreme Court en banc maintains the opinion that § 5(2) of the PC does not restrict the right established in the second sentence of § 23(2) of the Constitution (see the Supreme Court en banc judgment in case no 3 1 3 10 02, paragraph 26), and that instead it establishes, in the general part of the Penal Code, the principle of retroactive force of a more lenient penal law, without providing for any exceptions. § 5(2) of the Penal Code does not discriminate between the persons who have not yet been convicted and the persons already convicted, thus offering a legal basis for retroactive application of a more lenient law in regard to both groups of persons. This means that like the second sentence of § 23(2) of the Constitution, § 5(2) of the PC, too, provides for the retroactive application of a more lenient law both upon imposition of punishment and also when a person has already been convicted and is serving a sentence at the time of entry into force of the new law.

27. A legal basis for the restriction of the rights of certain convicted persons, arising from the first sentence of § 12(1) and the second sentence of § 23(2) of the Constitution, is provided only in §§ 1 and 5 of the PCIA, which can be regarded as specific norms in relation to § 5(2) of the PC (see the Supreme Court en

banc judgment in case no 3-1-3-10-02, paragraph 27; and ruling in case no 3-3-1-69-03, paragraph 22). §§ 1 and 5 of the Penal Code Implementation Act preclude the alleviation of the situation of the persons who were punished before 1 September 2002 for a criminal or administrative offence and who are not referred to in these provisions, on the basis of retroactive force of the regulatory framework of penal law which entered into force on 1 September 2002. The basis for restricting the rights established in the first sentence of § 12(1) and the second sentence of § 23(2) of the Constitution, arising from §§ 1 and 5 of the PCIA, is not applicable to those convicted persons who have been convicted and are serving their sentences according to the Penal Code or whose situation is alleviated by a law amendment enacted after 1 September 2002.

28. As the legislator has not provided for any grounds enabling to restrict the fundamental right of persons serving punishments imposed under the Penal Code to have a more lenient law applied retroactively, it is necessary – proceeding from the second sentence of § 23(2) of the Constitution and § 5(2) of the PC – to bring the punishments of those persons into conformity with the law alleviating their situation, enacted after their conviction. This means that upon entry into force of a new and more lenient law the execution of a sentence imposed by a judgment which has taken effect can be continued solely on the condition and to the extent possible under the new law on the basis of the same facts. In a situation where the legislator has not provided for grounds for the restriction of the rights of convicted persons, established in the first sentence of § 12(1) and the second sentence of § 23(2) of the Constitution, the court, either, can not – proceeding from the principle that restrictions be imposed solely by Acts – restrict the right of a concrete convicted person to have amore lenient law applied retroactively. Consequently, the court lacks a possibility not to bring the situation of a convicted person into conformity with the more lenient law for the reason that the court holds that this would excessively damage other fundamental rights or values, for example legal certainty, legal peace and efficient functioning of the court system. The Supreme Court en banc takes a different view in this regard than the Criminal Chamber in its ruling of 7 December 2007 in case no 3-1-2-2-07 (RT III 2007, 46, 369, paragraph 11) and it is of the opinion that the court has no discretion concerning the question of whether to bring a punishment served by a convicted person into conformity with the new and more lenient penal law.

29. It proceeds from the aforesaid that the substantive law basis for bringing the situation of a convicted person into conformity with the more lenient law arises from § 5(2) of the PC, the sphere of application of which coincides with the second sentence of § 23(2) of the Constitution. For this reason the Supreme Court en banc does not consent to the conclusion of the county court that the Penal Code does not include a provision enabling the court to release a person from the service of the rest of his sentence because the law has been amended. Consequently, the petition of the county court concerning the application for declaration of unconstitutionality of the absence of a substantive law basis allowing for the release of convicted persons is to be dismissed.

II.

30. The Tartu County Court held that the release of T. Toompalu from the service of the sentence was also barred by the absence of a relevant provision in the Code of Criminal Procedure. The court declared the absence of such provision unconstitutional. At the same time the county court held that it was possible to hear the request for release of T. Toompalu from the service of the sentence on the merits pursuant to the procedure provided for in § 431 of the CCP.

31. § 14(2) of the Constitutional Review Court Procedure Act establishes that upon adjudicating a case on the basis of a court judgment or ruling the Supreme Court is entitled to declare unconstitutional a legislation of general application, an international agreement or a provision thereof, as well as a failure to pass legislation of general application, relevant for the adjudication of the matter. When doing this the Supreme Court does not adjudicate the dispute to be adjudicated pursuant to the provisions applicable in administrative matters, civil matters, criminal or administrative offence matters. The Supreme Court en banc points out that in a situation where the county court, when deciding on the release of T Toompalu from the service of the sentence, observed the procedure provided for in § 431 of the CCP, the absence in the Code of

Criminal Procedure of a provision enabling to adjudicate issues of release of convicted persons from the service of sentences because of entry into force of a more lenient law, can not be deemed relevant for the purposes of the first sentence of § 14(2) of the CRCPA. This is so because it appears from the ruling of the county court that the absence of pertinent norm did not prevent the court from hearing the submitted request. Within this context the Supreme Court en banc can not form an opinion on whether the county court applied § 431 of the CCP correctly, because this would amount to adjudication of a concrete case, which the Supreme Court en banc can not do under the second sentence of § 14(2) of the CRCPA.

32. The absence of the provision in the Code of Criminal Procedure, referred to by the county court, could have been relevant in the present case, had the court found that neither § 431 of the CCP or any other procedure provided for in the law was applicable in the hearing of the request concerning T. Toompalu. In that case the court could have declared the absence of a procedure enabling T. Toompalu to protect his rights unconstitutional and adjudicated the case on the basis of the procedure which in the court's opinion – the Constitution required to be established by the legislator for the solution of such cases.

33. As the absence of the provision referred to by the Tartu County Court in the Code of Criminal Procedure is not relevant, the Supreme Court has no ground to review the constitutionality of the Code of Criminal Procedure and the petition of the county court is to be dismissed in regard to the Code of Criminal Procedure, too.

III.

34. For the above reasons and on the basis of § 15(1)6) of the CRCPA the Supreme Court en banc hereby dismisses the petition of the Tartu County Court for the declaration of unconstitutionality of the absence of a provision in the Penal Code and in the Code of Criminal Procedure which would serve as a ground for the release a person from the service of a sentence when the Act providing for the punishment has been amended.

Dissenting opinion
of justice Eerik Kergandberg
to the Supreme Court en banc judgment
in constitutional review case no 3-4-1-19-07
of 2 June 2008

Upon adjudication of this constitutional review case the Supreme Court en banc, in a somewhat changed composition and after a break of a little more than five years, has continued the examination of the legal issue analysed in the Supreme Court en banc judgment no 3-1-3-10-02 of 17 March 2003, and has now reached a certain logical end result. This is the issue of the extent of the retroactive force of a more lenient penal law established in the second sentence of § 23(2) of the Constitution, as a fundamental right, in other words the issue of what is protected by this right.

The Supreme Court en banc, once again, concluded that the second sentence of § 23(2) of the Constitution must be interpreted to the effect that the sphere of protection of this provision extends to the time of serving a sentence. And, once again, I can not but react to this opinion with a dissenting one.

I continue to hold that the principle established in the second sentence of the Constitution is – to put it briefly – the principle of regular administration of justice, not applicable to those persons in regard to whom a judgment on conviction has entered into force.

I do not consider as convincing the justifications that the sphere of application of the fundamental right established on the second sentence of § 23(2) of the Constitution is unlimited because of the fundamental right to equality established in § 12 of the Constitution. This is a novel approach to the dogmatics of

fundamental rights protection in the sense that, as a rule, the result of a collision of two fundamental rights is the narrowing of the sphere of application of both rights.

In paragraph 22 of the judgment, when developing the fundamental right established in the second sentence of § 23(2) of the Constitution through invoking the argument of the fundamental right to equality, the Supreme Court en banc has not, though, brought this line of thinking to an end; instead it admitted that the principle of retroactive force of a more lenient penal law does not function in regard to those convicted persons who have already served their sentences and whose criminal record has been expunged from the register. An uncompromising fight for the fundamental right of equality should, at some point, induce the question: but why not?

The cardinal change of judicial practice, effected by this judgment of the Supreme Court en banc, is reflected in paragraph 25 of the judgment. According to this paragraph, from the point of substantive law it is possible not to bring the punishment imposed on a convicted person into conformity with the more lenient law enacted after entry into force of court judgment only when the law provides for a legal basis for this. This means, that in the cases when the legislator has not provided for such legal bases the courts must commence new court proceedings in regard to all persons serving sentences to check whether the new law in any way alleviates the situation of the convicted. In evaluating such a situation I confine myself to granting that this amounts to an extremely labour intensive task.

Dissenting opinion of justice Priit Pikamäe

In regard to the Supreme Court en banc judgment no 3-4-1-19-07 of 2 June 2008 I differ in opinion concerning the interpretation of § 23(2) of the Constitution, which is of decisive importance for the adjudication of this case. I argue that the opinion of the Supreme Court en banc that also those persons in regard to whom a judgment on conviction has entered into force must be able to enjoy the retroactive force of a more lenient penal law, fails to take into account other just as important fundamental rights and constitutional values, primarily the principle established in § 23(3) of the Constitution that a judgment rendered in a criminal case has the force of law.

While interpreting § 23(2) of the Constitution to the effect that its sphere of protection extends to persons who are serving sentences on the basis of judgments which have entered into force, the Supreme Court en banc held, at the same time, that proceeding from the first sentence of § 3(1) and from § 11 of the Constitution the legislator is, nevertheless, entitled – under certain conditions to restrict the right of these persons to benefit from the retroactive force of a more lenient penal law. I find that the Supreme Court en banc has failed to set out sufficiently clear and comprehensible criteria on the basis of which the legislator is entitled, in the future, to restrict the referred fundamental right in regard to convicted persons. Anyway, it proceeds from paragraph 24 of the judgment that the legislator has rather wide discretion in resolving the issue. This in turn leads to the conclusion that the opinion of the Supreme Court en banc that the sphere of protection of § 23(2) of the Constitution extends to the convicted serving sentences, while allowing to restrict this right on the basis of law makes the obtaining of the force of law of judgments on conviction rendered in criminal proceedings, when penal law is amended, dependent on unforeseeable circumstances. By the referred interpretation of § 23(2) of the Constitution the Supreme Court en banc has actually created a situation wherein, in the abstract sense, each amendment of penal law in a more lenient direction may annul the force of law of court judgments. This interpretation is most certainly not in conformity with the legal and social values, such as legitimate expectations of victims and the accused, legal peace and legal certainty, meant to be protected by the principle established in § 23(3) of the Constitution that judgments have the force of law.

In this context it must be noted that although the legislator is entitled, under the first sentence of § 3(1) and § 11 of the Constitution, to restrict the right of the convicted to retroactive force of more lenient penal law, it

has no obligation to do so. Thus, for example, the legislator did not deem it necessary to restrict the referred right of the convicted when making extensive amendments to the Penal Code, which entered into force on 15 March 2007 and initiated this constitutional review case and affected, among others, T. Toompalu. Consequently, it can not be excluded that the legislator will not consider it necessary in the future to restrict the right of the convicted to retroactive force of more lenient penal law in relation to such amendments of law in the case of which the application of the alleviating effect to certain convicted persons would require new evaluation of evidence which served as a basis for conviction. The judgment contains no justifications whatsoever concerning this very extensive infringement of ne bis in idem principle – a fundamental right established in § 23(3) of the Constitution.
