Constitutional judgment 3-1-3-10-02

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-1-3-10-02
Date of judgment	17 March 2003
Composition of court	Chairman Uno Lõhmus, members Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Jaano Odar, Jüri Põld, Hele-Kai Remmel, Harri Salmann and Peeter Vaher
Court case	A charge of Sergei Brusilov under § 139(3)1) of the Criminal Code
Contested judgment	Judgment of the Tallinn City Court of 1 October 1997 and judgment of the Tallinn Circuit Court of 10 December 1997
Complainant and type of appeal	Petition of Sergei Brusilov for correction of court errors
Date of hearing	11 December 2002
Persons participating at hearing	Criminal defence counsel of the accused at trial S. Brusilov, sworn advocate Kaljo Kuusmaa; public prosecutor Marge Püss; representative of the Chancellor of Justice, adviser Madis Ernits; representative of the Minister of Justice Norman Aas

Decision

1. To declare the Penal Code Implementation Act to be in conflict with the second sentence of § 23(2) of the Constitution in conjunction with the first sentence of § 12(2) of the Constitution to the extent that the Act does not provide for a possibility to mitigate the punishment of a person serving imprisonment, imposed under the Criminal Code, up to the maximum rate of imprisonment established by a corresponding section of the Special Part of Penal Code.

2. To release Sergei Brusilov from serving the sentence.

FACTS AND COURSE OF PROCEEDING

1. By its judgment of 1 October 1997 the Tallinn City Court convicted Sergei Brusilov of concealed theft of other person's property on a large scale. On 31 January 1997 S. Brusilov together with N. Romanov broke a door lock and broke into flat no. 67 in Õismäe tee 2, where they stole things with total value of 272 500 kroons. S. Brusilov's act was qualified under § 139(3)1) of the Criminal Code and he was punished by six years' imprisonment. The court regarded 22 September 1997 as the time of commencement of the serving of the sentence.

2. S. Brusilov filed an appeal against the judgment. On 10 December 1997 the Tallinn Circuit Court decided to change neither the qualification of the act nor the punishment imposed on S. Brusilov. The circuit court specified the value of the stolen property and the re-calculated amount was 188,500 EEK and 700 USD.

3. On 30 September 2002 S. Brusilov submitted a petition for the correction of a court error. The petitioner points out that the Penal Code, which entered into force on 1 September 2002, provides for the same act, which should be qualified under § 199(2) of the Code, the maximum rate of punishment of 5 years' imprisonment. S. Brusilov is of the opinion that because of the fact that by 1 September 2002 he had served five years' imprisonment, he should be released from further serving the sentence.

4. At the session of the Criminal Chamber of the Supreme Court of 5 November 2002 the criminal defence counsel of S. Brusilov supported his petition, whereas the public prosecutor considered it unjustified.

5. On 6 November 2002 the Criminal Chamber of Supreme Court issued a ruling referring the criminal case of S. Brusilov to the Supreme Court *en banc* for hearing. The Chamber justifies its ruling by the fact that it is necessary, for the adjudication of the criminal case, to evaluate whether subsections (1) - (3) of § 1 of the Penal Code Implementation Act (hereinafter “the PCIA”) are in conformity with § 23(2) and § 12(1) of the Constitution in their conjunction, to the extent that subsections (1) - (3) of § 1 of the PCIA do not allow to apply the law which mitigates punishments in regard to a person who is serving a sentence or has a criminal record, to whom under the Criminal Code a punishment has been imposed that is more onerous than the maximum rate of punishment provided in a corresponding section of the Special Part of Criminal Code. The Criminal Chamber also considered it necessary that the Supreme Court *en banc* give an interpretation of § 5 of the Penal Code.

The Criminal Chamber admitted that none of the grounds for correction of court errors, established in § 77^7 (1) of the Code of Criminal Court Appeal and Cassation Procedure, are present in S. Brusilov's petition and that the term for correction of court errors had expired. The Chamber is of the opinion that the hearing of the matter is justified by the fundamental rights established in §§ 14 and 15 of the Constitution.

6. Based on the justifications of the Criminal Chamber the Supreme Court *en banc* involved the Riigikogu, the Chancellor of Justice and the Minister of Justice in the proceeding, to hear their opinion on the conformity of subsections (1) - (3) of § 1 of the PCIA to § 23(2) of the Constitution in conjunction with § 12(1).

JUSTIFICATIONS OF PARTICIPANTS

7. The criminal defence counsel of the petitioner is of the opinion that pursuant to § 23(2) of the Constitution the Act, which mitigates punishment after the commission of an act, should also be applied in regard to those persons who have already been convicted and are serving their sentences. If we do not apply the Act mitigating punishments to those persons, we are dividing persons into two groups - convicted persons and persons not yet convicted - and we are not treating them equally.

8. The Legal Affairs Committee, expressing their opinion on behalf of the Riigikogu, points out to the Supreme Court that by granting leave to the petition the Criminal Chamber of the Supreme Court has violated the Constitution and therefore, irrespective of the judgment of the Supreme Court *en banc*, there are doubts as to the legality of the judgment. It is within the competence of the Chancellor of Justice to submit a petition for the review of constitutionality of subsections (1) - (3) of § 1 of the PCIA.

The Legal Affairs Committee is of the opinion that the effect of § 23(2) of the Constitution is not extended to persons who are serving their sentences pursuant to judgments which have entered into force. A punishment is applied by imposing a punishment in extra-judicial or judicial proceedings. For a person the legal consequence of a judgment, which has entered into force, is the serving of the sentence, and for the state - the enforcement of a punishment, and no longer the imposition thereof. Implementation of retroactive force of a mitigating criminal law Act indiscriminately and without restrictions may result in arbitrary interpretation of the Constitution.

9. The Chancellor of Justice, too, is of the opinion that § 1 of the PCIA is not in conflict with § 23 and with the first sentence of § 12(1) of the Constitution.

The Chancellor of Justice points out that the second sentence of § 23(2) of the Constitution establishes a privilege which extends beyond the classical *nulla poena* principle. This provision gives everyone the right that a less strict punishment be imposed on him or her, if the law provides for a less onerous punishment after the commission of offence. If we treat fundamental rights as principles, the sphere of protection of the second sentence of § 23(2) of the Constitution covers all the cases when, after the commission of a criminal offence, the punishment provided for that offence is changed to a less onerous one. Thus, the effect of the provision is extended also to those persons who are serving their sentences pursuant to judgments which have entered into force.

The second sentence of § 23(2) of the Constitution does not enumerate the conditions for restricting fundamental rights. In addition to the aim of protecting other fundamental rights a restriction may also be justified by objective constitutional values, such as democracy, principle of rule of law or of a social state. The infringement of the referred fundamental right is justified by the principles of legal certainty and legal clarity. If a branch of law is reformed, the transition provisions must be unambiguous. An infringement of a fundamental right on the basis of the second sentence of § 23(2) of the Constitution is also justified by the general right to equality, established in the first sentence of § 12(2) of the Constitution and by the aim of ensuring the effective functioning of the judicial system.

The Chancellor of Justice is of the opinion that the restriction of the fundamental right is suitable, necessary and proportional in the narrowest sense. The moment in time when the new Act entered into force as a time limit to the application thereof is a possible and reasonable solution. State is under no obligation to review the punishments of persons who are serving sentences pursuant to judgments, which have entered into force.

10. The Minister of Justice, too, is of the opinion that § 1 of the PCIA is in conformity with § 23(2) and § 12(1) of the Constitution in their conjunction. The Minister of Justice is of the opinion that the second sentence of § 23(2) of the Constitution affects only those persons in relation to whom a final judgment has not been rendered. It also proceeds form the principle of legal certainty that this sentence does not impose an obligation to impose a less onerous Act subsequent to imposition of punishment. A reverse view would

create a situation where the judgments arising from penal law would not become final, because each amendment to penal law involves a potential obligation to review these judgments. In the opinion of the Minister of Justice such interpretation of the Constitution is compatible with the generally recognised principles and norms of international law.

The Minister of Justice assures that the aforesaid does not lead to a conclusion that our Constitution does not allow to review judgments, which have become final, at all. In certain cases the state may, through amnesty and pardon or in some other way, release persons from serving their sentences or grant commutation.

11. The opinion of the Chief Public Prosecutor coincides with those of the Riigikogu and the Minister of Justice in that the effect of the second sentence of § 23(2) of the Constitution does not extend to persons who are serving sentences pursuant to judgments which have entered into force.

PERTINENT LAW

12. § 139(3) of the Criminal Code in the wording of 17 April 1996 (RT 1992, 20, 287 and 288; RT I 1996, 31, 631) reads as follows:

"§ 139. Concealed theft
[…]
(3) Concealed theft
1) on a large-scale basis, or
2) by a criminal organisation - is punishable by three to eight years' imprisonment."

13. § 199 of Penal Code (RT I 2001, 61, 364) reads as follows:

"§ 199. Larceny

(1) A person who takes away movable property of another with the intention of illegal appropriation shall be punished by a pecuniary punishment or up to 3 years' imprisonment.

(2) Same act, if:
[…]
6) the act is committed on a large-scale basis,
[…]
is punishable by up to 5 years' imprisonment."

14. § 5(2) of Penal Code (RT I 2001, 61, 364) reads as follows:

"§ 5. Temporal applicability of penal law
[…]
(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.
[…]"

15. § 1 of the Penal Code Implementation Act (RT I 2002, 56, 350) reads as follows:

"§ 1. Release from criminal punishment and expungement of data concerning punishment

(1) A person who has been convicted, pursuant to the Criminal Code (RT 1992, 20, 287 and 288; RT I 2001, 73, 452; 85, 510; 87, 526; 2002, 30, 176; 32, 189; RT III 2002, 11, 108; RT I 2002, 44, 284), of a criminal offence which, pursuant to the Penal Code (RT I 2001, 61, 364; 2002, 44, 284), is no longer punishable as a criminal offence shall be released from punishment.

(2) A person who at the time of commission of a criminal offence is less than 14 years of age shall be

released from punishment.

(3) A person who has been convicted of a criminal offence shall be released from punishment if the necessary elements of the criminal offence correspond to the necessary elements of a misdemeanour pursuant to the Penal Code or another Act.

(4) If a punishment is imposed on a person for several criminal offences or by several court judgments and the person should be released from the punishment for any of the criminal offences on the grounds provided for in subsections (1)-(3) of this section, a new aggregate punishment shall be formed pursuant to the Penal Code, without aggravating the person’s punishment.

(5) Data concerning the punishment of a person specified in subsections (1)-(3) of this section shall be expunged from the punishment register and, in the cases specified in subsection (4) of this section, data concerning the punishment of a person shall be amended in the punishment register.

(6) A judge of the county or city court of the location of the conviction sitting alone shall decide, at the request of the prosecutor, on the release from punishment imposed for a criminal offence by a ruling in a written proceeding, without summoning the participants in the proceedings."

OPINION OF THE SUPREME COURT *EN BANC*

I.

16. Because of the reproach of the Riigikogu that by granting leave to appeal of S. Brusilov the Criminal Chamber has violated the provisions of the Constitution and norms of the Code of Criminal Court Appeal and Cassation Procedure, the Supreme Court *en banc* shall first examine whether the Supreme Court is competent to adjudicate the petition.

The Riigikogu points out the fact that the one year term for submitting petitions for correction of court errors, established in § 77^7 of Code of Criminal Court Appeal and Cassation Procedure (hereinafter CCCACP) had expired. The Supreme Court is of the opinion that what is important is not the term but the grounds for submitting a petition. S. Brusilov availed himself of the possibility, established by procedural norms, to contest the judgments of the Tallinn City Court and the Tallinn Circuit Court, rendered in his criminal case. On 28 January 1998 the Supreme Court had decided not to hear his complaint in cassation, as it was manifestly ill-founded. The Supreme Court decided the same way in regard to B. Brusilov's petition for the correction of court errors.

In his petition to the Supreme Court, dated 2 October 2002, B. Brusilov does not contest the correctness of judgments against him. His petition was motivated by a wish to be released from further serving the sentence, because he had spent in prison longer than prescribed by way of punishment for the same act by the Penal Code which entered into force on 1 September 2002. Thus, it is true that pursuant to the Code of Criminal Court Appeal and Cassation Procedure there is no ground for hearing S. Brusilov's petition. S. Brusilov's petition can not be considered a petition for review or a petition for the correction of court errors. His petition contains a wish that his punishment be mitigated, because the penal law reform which took place when he was serving his sentence decreased the minimum and maximum rates of imprisonment for larceny.

17. The Supreme Court *en banc* points out in the first place that under the Constitutional Review Court Procedure Act the possibilities to submit individual complaints directly to the Supreme Court are limited. Thus, a person, whose rights are violated by a resolution of the Riigikogu, the Board of the Riigikogu or the President of the Republic, may contest the resolution directly in the Supreme Court. A complaint against a decision or activity of an electoral committee may be submitted by a political party, election coalition or an individual.

At the same time the fact that § 15 of the Constitution recognises everyone's right of recourse to the courts, if

his or her rights and freedoms are violated, must not be ignored. S. Brusilov's petition concerns the rights referred to in the Constitution, as he raises the question of retroactive force of an Act, providing for a less onerous punishment for a commission of an act, whish is referred to in § 23 of the Constitution. On the basis of § 15 of the Constitution the Supreme Court may refuse to hear S. Brusilov's petition only if S. Brusilov has other effective ways to obtain judicial protection of the right established in this provision.

The Supreme Court *en banc* reminds that in its ruling no. 3-3-1-38-00 of 22 December 2000 it has also emphasised the importance of gapless protection of the right of recourse to the courts. On the basis of the practice of the European Convention for the Protection of Fundamental Rights and Freedoms the Supreme Court *en banc* has also asserted that the right to an effective remedy proceeds from §§ 13, 14 and 15 of the Constitution (*see RT III 2001, 2, 14, paragraphs 15, 19*). Thus, the right of recourse to the courts must ensure as effective protection of constitutional rights as possible.

18. This is why the Supreme Court *en banc* shall examine S. Brusilov's possibilities of recourse to the courts for the control of possible violation of a fundamental right. The Penal Code Implementation Act establishes that a judge of the county or city court of the location of the conviction sitting alone shall decide, at the request of the prosecutor, on the release from punishment imposed for a criminal offence by a ruling in a written proceeding (§ 1(6)).Thus, a prosecutor shall submit a request to a court if circumstances for the release from punishment, referred to in subsections (1) - (3) of § 1, arise. If a prosecutor, within four months as of the entering into force of the Penal Code, does not submit a request for release from punishment to a court, the convicted person may, within one month, lodge a complaint with the prosecutor, who shall transfer it to a county or city court for decision (§ 9). An appeal against a ruling releasing a person from criminal punishment or denying a person release from criminal punishment, which is made by a county or city judge, may be filed with the Supreme Court (§ 10(1)). Such a regulation leads to the conclusions that firstly, until 1 January 2003, a convicted person had no possibility to request a decision on release from punishment and secondly, that as of the referred date it is possible to request release from punishment only upon the existence of the grounds referred to subsections (1) - (3) of § 1 of the PCIA. S. Brusilov does not belong to the circle of persons referred to in these subsections and thus the prosecutor has the right not to refer his complaint to a court. The Code of Administrative Court Procedure establishes a possibility to contest in an administrative court the fact that a prosecutor did not transfer a complaint, but an administrative court is not competent to decide on the release of a person from punishment. The Supreme Court *en banc* has a reason to believe that the hearing of complaints in an administrative court and county and city courts would take so long that the clarity as to the violation of the complainants right would be achieved only after S. Brusilov has served the sentence imposed on him in full.

The Supreme Court *en banc* is of the opinion that there is no effective remedy for S. Brusilov for the protection of his fundamental right. Taking into account this fact, the fundamental rights at stake, and the duration of the sentence served, the Supreme Court *en banc* can find no justification to refuse to hear S. Brusilov's petition on merits. The Supreme Court *en banc* also bears in mind the need to give the courts clear guidelines on how to solve similar cases.

II.

19. The Criminal Chamber who had heard the matter, referred it to the Supreme Court *en banc* because the Chamber is of the opinion that in order to adjudicate the petition it is necessary to evaluate the conformity of the Penal Code Implementation Act to § 23(2) and § 12(1) of the Constitution in their conjunction. Pursuant to the second sentence of § 23(2) of the Constitution a lesser punishment shall apply if, subsequent to the commission of an offence the law provides for a lesser punishment. And the first sentence of § 12(1) of the Constitution establishes the general fundamental right of equality.

20. Thus, in order to proceed with the examination of the petition on its merits, it is first necessary to decide whether the fundamental right established in the second sentence of § 23(2) of the Constitution extends to persons who are serving sentences pursuant to judgments. Participants in the proceeding had different opinions concerning this. The Riigikogu, the Minister of Justice and the Chief Public Prosecutor expressed

the opinion that the effect of an Act mitigating punishments extends up to rendering of a final judgment. They argue that application of a punishment for an offence means imposition of a punishment in extra-judicial or judicial proceedings. The criminal defence counsel of the defendant and the Chancellor of Justice, on the other hand, argued that the effect of the second sentence of § 23(2) of the Constitution extends also to persons who are serving sentences pursuant to judgments which have entered into force.

21. Article 7 of the European Convention for the Protection of Fundamental Rights and Freedoms establishes two essential principles of punishing persons: 1) a person may be held guilty and punished for an act only if the act constituted a criminal offence under national or international law at the time when it was committed (*nullum crimen sine lege*); 2) in the case of a violation of a legal norm a heavier penalty than the one that was applicable at the time the criminal offence was committed must not be imposed (*nulla poena sine lege*). The Human Rights Court has also referred to a third principle: the prohibition of use of analogy in penal law. Today neither the Convention nor the application practice thereof ensure the right of a person who has committed a criminal offence to the retroactive force of a lesser punishment established by law.

The Constitution was worded on the model of Article 15(1) of the UN International Covenant on Civil and Political Rights, the wording of which coincides with that of § 23 of the Constitution. The European Union Charter of Fundamental Rights establishes a principle that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

22. Some countries have further specified or established the principle of retroactive force of a lesser punishment in their Penal Codes. For example, the 1997 Criminal Code of Poland establishes that if for an offence, for which a new law establishes a maximum punishment which is lower than the sentence already passed, a judgment has already been rendered, then length of the sentence shall be decreased up to the maximum punishment established by the new law (§ 4(2)). The 1995 Penal Code of Spain stipulates that a law which alleviates the situation of a person shall have retroactive force, even if a sentence has been pronounced and enforced (§ 282)). The same principle has been adopted in the 1999 Criminal Code of Latvia (§ 5(2)) and 1996 Criminal Code of the Russian Federation (§ 10(5)). These examples allow to draw a conclusion that the Penal Codes of several European countries extend the effect of criminal laws alleviating the situation of a person also to the time of serving the sentence.

23. The more general wording of § 5(2) of Penal Code -- "an Act which precludes the punishability of an act, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect" -- is not sufficiently informative as to the extent of the retroactive effect of the Act.

The discussions during the legislative proceeding of the Penal Code Implementation Act in the Riigikogu shed light on the formation of the will of the legislator. The initial wording of § 2(1)1) of the draft initiated by the Legal Affairs Committee on 19 April 2001 was the following: "If the term of imprisonment imposed on a person under the Criminal Code exceeds the time of imprisonment established in the pertinent provision of the Special Part of Penal Code, the time of imprisonment of the person shall be decreased to the limits established in pertinent provision of the Special Part of Penal Code or the person shall be released from serving the punishment, if the already served punishment exceeds the maximum limit of punishment." This provision was abandoned during the legislative proceeding of the draft. At the second reading of the draft the chairman of the Legal Affairs Committee gave the following explanation to the Riigikogu: "I must say that at the last meeting of the committee quite a few issues of principally new approach arose […] This basic change lies in the fact that pursuant to the opinion of the Legal Affairs Committee not all administrative and criminal law punishments, which had entered into force by 1 September 2002, shall be revised through this Act. […] The Committee also looked at our Constitution, and § 23 of our Constitution does not establish a direct obligation to revise judgments which have entered into force. […] From this the Committee concluded that application of a lesser punishment proves possible only at the time of imposition of punishment and not after the court has rendered its judgment. Then it is no longer possible. We also studied how these issues have been solved abroad. We found that in many respects the penal law of Germany has served as a model for drafting our Penal Code. The commentary of the German Penal Code concerning penal law states clearly that the principle of retroactive force of a law applying lesser punishment shall not mean the obligation to

render a new judgment retroactively. […] Thus, we can assert that neither international law nor our Constitution give rise to a general obligation to review punishments imposed by court judgments that have entered into force."

24. The Supreme Court *en banc* is of the opinion that although German penal law has essentially influenced the wording of our Penal Code, it can not be used to interpret the second sentence of § 23(2) of the Constitution. Firstly, the Basic Law of the Federal Republic of Germany does not establish a principle that a law providing for a lesser punishment shall have retroactive force. Secondly, the German Penal Code establishes clearly that if the statute as it appeared at the completion of the crime is amended prior to the judgment in the case, the most lenient statute shall be applied (§ 2(3)).

25. When delimiting the sphere of protection of the second sentence of § 23(2) of the Constitution the Supreme Court *en banc* considers it important to bear in mind that because of historical reasons and greater level of abstraction the content of a concept used in the Constitution may differ from the contents of the same concept in specific branches of law. Although in penal law the words "application of a punishment" are understood as imposition of a punishment in extra-judicial or judicial proceedings, the same words used in the Constitution need not necessarily have the same meaning. Often, the terms of the Constitution have independent meaning.

26. The Supreme Court *en banc* is of the opinion that the second sentence of § 23(2) of the Constitution should be interpreted so that the sphere of protection thereof extends to the period of serving a sentence. The justifications of such an interpretation are the following. 1) The Supreme Court *en banc* is of the opinion that upon delimiting the sphere of protection a broader approach should be preferred, which enables to ensure the protection of fundamental rights without gaps and to weigh different constitutional values. 2) The wording of § 5(2) of the Penal Code - "an Act which precludes the punishability of an act, mitigates a punishment or otherwise alleviates the situation of a person shall have retroactive effect" - does not set any limits to the sphere of protection. 3) In the Penal Code Implementation Act the legislator provided for the release from punishment of some groups of persons. These are the persons whose acts are no longer punishable, who at the time of commission of a criminal offence were less than 14 years of age, and if the necessary elements of the criminal offence correspond to the necessary elements of a misdemeanour under the new Act. Thus, the legislator extended the effect of lesser punishment to persons in regard of whom a convicting judgment had been rendered and who were already serving their sentences. 4) The Supreme Court *en banc* also takes into consideration other fundamental rights at stake. Right to liberty is an essential constitutional value, which has to be taken into consideration upon delimiting the sphere of protection of the second sentence of § 23(2) of the Constitution. 5) This interpretation is consistent with the penal law norms of several European states (see above paragraph 22).

III.

27. The constitutional right to mitigation of punishment of S. Brusilov, who is serving the sixth years of his prison sentence for a theft, is restricted by the Penal Code Implementation Act, because this Act does not provide for the release from serving a sentence for those persons, whose term of punishment imposed under the Criminal Code exceeds the term of imprisonment established in the corresponding section of the Penal Code.

The Penal Code Implementation Act establishes that from punishment shall be released a person who has been convicted, pursuant to the Criminal Code, of a criminal offence which, pursuant to the Penal Code, is no longer punishable as a criminal offence. Also, a person who at the time of commission of a criminal offence was less than 14 years of age (subsections (1) - (3) of § 1). To some of the persons serving their sentences a lesser punishment shall apply. Whereas to some persons, who are serving sentences (including S. Brusilov) longer than those established by the Penal Code for the same act, the Act establishing a lesser punishment is not applied. Consequently, the right to equal treatment has been infringed, too.

As the fundamental rights established in the first sentence of § 12(1) and in the second sentence of § 23(2) of the Constitution are not absolute, it is necessary to evaluate the constitutionality of the infringement.

28. The referred articles of the Constitution do not enumerate the conditions for the restriction of the fundamental rights. That is why the Supreme Court *en banc* can consider only other fundamental rights or constitutional values as justifications of a restriction of a fundamental right. The Supreme Court shall primarily consider the values referred to during the legislative proceeding of the draft of the Penal Code Implementation Act in the Riigikogu. From the shorthand notes of the sitting of the Riigikogu of 12 June 2002 one can read the considerations of the Legal Affairs Committee of the Riigikogu, rendered to the Riigikogu by the chairman of the Committee: "The Committee found that the aim of the implementation of penal law reform can not be the release from serving of sentences of offenders convicted before the entry into force of the Penal Code or the general mitigation of imposed punishments. To our opinion such approach is compatible neither with the general sense of justice of the society nor with legitimate expectations. Neither is it expedient nor economical to impose an obligation on the state to review all administrative and criminal punishments that have been imposed."

The Supreme Court *en banc* is of the opinion that the general sense of justice of the society and effective functioning of judicial system are the values that can be used to justify the infringement of fundamental rights. The fact that the state of Estonia is founded on justice is emphasised in the Preamble of the Constitution, effective functioning of judicial system is an essential value, especially during a reform of a branch of law.

29. During the proceeding the participants did not contest the fact that in comparison to the Criminal Code, which was in force until 1 September 2002, the Penal Code mitigates the punishment applicable for concealed theft.

IV.

30. Proceeding to assess whether the restriction of the fundamental right is in conformity with the conditions established in § 11 of the Constitution, the Supreme Court *en banc* shall start from the punishment imposed on S. Brusilov. In other words, the Supreme Court shall seek an answer to the question of whether it is necessary in a democratic society to restrict the right of a person, serving imprisonment, that a lesser punishment, which entered into force during the time when he was serving his sentence, be applied in regard to him.

The principle of proportionality proceeds from the second sentence of § 11 of the Constitution. The Supreme Court *en banc* shall review the conformity of the restriction to the proportionality principle through the three characteristics thereof suitability, necessity and proportionality in the narrowest sense. If a measure is manifestly unsuitable, it is needless to review the necessity and proportionality of it in the narrowest sense. If a measure is suitable but is not necessary, there is no need to check the proportionality of the measure in the strict sense. A measure that fosters the achievement of a goal is suitable. For the purposes of suitability a measure, which in no way fosters the achievement of a goal, is indisputably disproportional. The requirement of suitability is meant to protect a person against unnecessary interference of public power. A measure is necessary if it is not possible to achieve a goal by some other measure which is less burdensome on a person but which is at least as effective as the former. In order to decide on the proportionality of a measure in the narrowest sense the extent and intensity of interference with a fundamental right on the one hand and the importance of the aim on the other hand have to be weighed (*see the judgment of the Constitutional Review Chamber of 6 March 2002 in case no. 3-4-1-1-02 - RT III 2002, 8, 74, paragraph 15*).

31. The Supreme Court *en banc* agrees that reviewing of judgments which have already entered into force burdens the courts and increases the workload of judges, which in turn may result in the extension of time spent on hearing of cases. The reform of the branch of law creates other new legal problems too, that need

solution. Thus, considering the aim of effective functioning of the court system, the measure is suitable and necessary.

32. Nevertheless, the Supreme Court *en banc* does not deem the restriction of the right proportional in the narrower sense. For a theft on a large-scale basis the Criminal Code provided for a punishment of three to eight years' imprisonment, the Penal Code establishes a thirty days' to five years' imprisonment. Thus, the new Act decreased the minimum and maximum imprisonment for theft. The explanatory letter to the draft Penal Code gives no explanations for the mitigation of punishments. That is why it has to be presupposed that the legislator considers that the length of imprisonment imposable for theft is in conformity with the measure of guilt, enables to influence the offender to avoid committing offences in the future, takes into account the interests of the protection of public order (see § 56(1) of the Penal Code) and thus ensures the achievement of the aims of punishment. S. Brusilov has been serving his imprisonment for more than five years and - according to current understanding - the aim of his punishment has been achieved. The failure to alleviate his condition intensively infringes his right that a lesser punishment be applied and also his right to liberty (§ 20 of Constitution). Such a restriction is not proportional to the aim of effective functioning of the court system. The number of persons who are serving prison sentences that are longer than the maximum imprisonment established for the same offence by the Penal Code is not as big as to excessively burden the courts and to be prejudicial to effective functioning of the court system.

33. Neither does the argument of fairness justify the restriction, not in the opinion of the Supreme Court *en banc*. Upon establishing punishments the legislator bears in mind that the punishment prescribed for an offence should be congruous with the danger arising from the act, and that it should be fair. As the legislator has decreased the minimum and maximum imprisonment for theft, it must be concluded that imprisonment exceeding five years for a theft is currently no longer fair.

34. Considering the aforesaid the Supreme Court *en banc* is convinced that the restriction of the rights established in the second sentence of § 23(2) and the first sentence of § 12(1) of the Constitution, in their conjunction, of the persons who are serving sentences and the duration of whose imprisonment imposed under the Criminal Code exceeds the duration of imprisonment established in the corresponding section of the Special Part of Penal Code, does not meet the principle of proportionality established in § 11(2) of the Constitution. The term of punishment of these persons must be decreased to the maximum imprisonment established in the corresponding section of the Special Part of Penal Code, or these persons must be released if the punishment already served exceeds the maximum punishment.

V.

35. In addition to the aforesaid the Supreme Court *en banc* points out that the failure to apply an Act establishing a lesser punishment to those persons who are serving their sentences, the term of imprisonment of whom, imposed under the Criminal Code before 1 September 2002, exceeds the term of imprisonment established in the corresponding section of the Special Part of Penal Code, may result in violation of the general right to equality, established in the first sentence of § 12(1) of the Constitution, taken separately.

36. The Supreme Court *en banc* reminds that the general right to equality, established in the first sentence of § 12(1) of the Constitution, the sphere of protection of which embraces all spheres of life, is infringed in the case of unequal treatment (*see also judgment of Constitutional Review Chamber of the Supreme Court of 6 March 2002 3-4-1-1-02, paragraph 13*). The first sentence of § 12(1) of the Constitution must also be construed in the meaning of equality in legislation. As a rule, the equality in legislation requires that laws in substance treat equally all persons who are in a similar situation. This principle expresses the idea of substantial equality: those, who are equal have to be treated equally and those who are unequal must be treated unequally. But not any unequal treatment of equals amounts to the violation of the right to equality. The prohibition to treat equal persons unequally has been violated if two persons, groups of persons or situations are treated arbitrarily unequally. An unequal treatment can be regarded arbitrary if there is no reasonable cause for that. (*See also Judgment of Constitutional Review Chamber of the Supreme Court of 3 April 2002 no. 3-4-1-2-02 - RT III 2002, 11, 108, paragraph 17; Judgment of the Supreme Court en banc of 14 November 2002 no. 3-1-1-77-02 - RT III 2002, 32, 345, paragraph 22.)*

37. § 3(3) of the Penal Code Implementation Act establishes that if, after entry into force of the Penal Code, a punishment is imposed for a criminal offence committed prior to entry into force of the Penal Code, the punishment shall be based on the punishment provided for in the corresponding section of the Criminal Code in force at the time of the commission of the offence, in case the referred section prescribes a lesser punishment. The Penal Code Implementation Act does not extend the retroactive force of lesser punishment to those persons, serving their sentences, who also committed their acts when the Criminal Code was in force, but to whom the courts managed to impose punishments prior to entry into force of the Penal Code on 1 September 2002.

The maximum rate of punishment for several criminal offences that the Penal Code provides for is lower than the maximum or even minimum rate of imprisonment provided for in a corresponding section of the Special Part of Criminal Code. Thus, for example, for illegal manufacture or acquisition of small quantities of narcotic drugs or psychotropic substances § 2102(2)1) of Criminal Code provided for three to seven years' imprisonment. For the same act, if committed for a second time or by a group of persons, the possible punishment under the Criminal Code was five to eight years' imprisonment. At the same time § 183 of the Penal Code provides for the same acts a pecuniary punishment or up to one year of imprisonment.

Thus, the law treats unequally persons who had committed the same act at the same time prior to entry into force of the Penal Code, but to whom punishments were imposed not at the same time. The law provided for a much stricter punishment to a person whose case was heard and to whom punishment was imposed before the Penal Code entered into force, than to a person to whom punishment was imposed after the entry into force of the Penal Code. The Penal Code Implementation Act does not provide for bringing the punishment, imposed when the Criminal Code was in force, in line with the maximum imprisonment provided for in the Penal Code for a similar act.

38. Making the different treatment under penal law of persons, who have, at the same time, committed the same act, dependent on the time of rendering a court judgment is unreasonable and may sometimes result in the violation of the prohibition of the arbitrary exercise of state authority (§ 13(2) of the Constitution). The time when a court renders a judgment concerning a person does not always depend on the conduct of the accused, it also depends on the activities or omissions of state authority in criminal proceedings (*see judgment of the Constitutional Review Chamber of the Supreme Court of 3 April 2002 no. 3-4-1-2-02, paragraph 18*), for example on the workload of preliminary investigation authorities and the courts. The speed of work of agencies and officials can not be used as a justification of different treatment of persons (*see judgments of Constitutional Review Chamber of the Supreme Court of 30 September 1998 no. 3-4-1-6-98 - RT I 1998, 86/87, 1434, and of 3 April 2002 no. 3-4-1-2-02*). Besides the speed of work of state agencies the delay in administration of justice may be contingent on the conduct of the accused or the accused at trial. Among other things, on the fact that the latter uses his or her procedural rights in bad faith or absconds criminal proceedings.

39. The Supreme Court *en banc* concludes that failure to extend the retroactive force of the Penal Code as an Act mitigating punishment to those persons, who are serving sentences, whose term of imprisonment, imposed prior to 1 September 2002 under the Criminal Code, exceeds the term of imprisonment provided for in the corresponding section of the Special Part of Penal Code, may result in violation of the general right to equality, established in the first sentence of § 12(1) of the Constitution.

VI.

40. The Supreme Court *en banc* points out that subsections (1) - (3) of § 1 of the Penal Code Implementation Act are not in themselves in conflict with the Constitution. These subsections refer to persons who shall be released from punishment. The Act is in conflict with the Constitution because it does not provide for a mitigation of a punishment of a person serving prison sentence to the maximum rate of imprisonment provided for in the corresponding section of the Special Part of Penal Code.

41. Bearing in mind the aforesaid S. Brusilov must be released from further serving the punishment. Although the petitioner served imprisonment for longer than the maximum rate provided for in the Penal Code for the same act, he shall not acquire the right to compensation under the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act. The Act gives a right to compensation in the case a person's liberty was deprived unjustly. S. Brusilov was deprived of his liberty for a commission of a criminal offence by a court judgment having the force of law. Decreasing the time of imprisonment because of entry into force of mitigating penal law can not be equated with unjust deprivation of liberty.

42. The Supreme Court *en banc* emphasises that it heard S. Brusilov's petition taking into account fundamental rights at stake and the duration of the imprisonment already served by S. Brusilov (see above paragraph 18). Similar cases shall be adjudicated in the future on the basis of the procedure established in § 1(6) and §§ 9 and 10 of the Penal Code Implementation Act. The terms established in § 33 of the Act shall be calculated as of the pronouncement of this judgment.

Dissenting Opinion of Justice Tõnu Anton,
Joined by Justices Harri Salmann and Villu Kõve

To the Judgment of the Supreme Court *en banc* of 17 March 2003, no 3-1-3-10-02

Translated extracts

“I am of the opinion that it is possible to set forth justifications for both interpretations of the Constitution – for that of the Riigikogu as well as the one of the Supreme Court *en banc*. Ultimately, the opinion of the Supreme Court *en banc* would be correct if the interpretation suggested by the Riigikogu were in conflict with generally recognised principles of law or unreasonable or would yield an unconstitutional result. The reasoning of the Supreme Court *en banc* does not allow any of the referred conclusions. In the face of the lack of clear and weighty arguments I am of the opinion that the Supreme Court *en banc* has not sufficiently observed the principle of separate powers. This error is further aggravated by the fact that there was no basis under criminal procedural law for adjudicating the matter in the Supreme Court. [---]

The provision, by a new Act, of a mitigated punishment for the commission of an act can not give rise to the conclusion that the punishment under the previously valid Act was unjust. The Supreme Court has essentially failed to justify why, against the will of the legislator, the mitigation of a punishment which is being served on the basis of a court judgment which has entered into force – should be deemed just. The interpretation of the Supreme Court *en banc* will fetter the legislator in the future, should there be a political will to mitigate punishments. [---]

Therefore the interpretation of the Supreme Court may prove an obstacle to the development of penal law and, in the end, run counter to the objectives that the Supreme Court *en banc* bore in mind."

Dissenting Opinion of Justice Eerik Kergandberg,
Joined by Justices Jaak Luik and Hele-Kai Remmel

To the Judgment of the Supreme Court *en banc* of 17 March 2003, no 3-1-3-10-02

Translated extracts

"[A]mendment of a convicting judgment rendered in a criminal case, which has entered into force and acquired the force of law, may first and foremost violate the legitimate expectations of the victims, and – no doubt – the expectation of the society as a whole to have legal peace."(p 3);

"If we were to hold [---] that a violation of *ne bis in idem* fundamental right can be justified with the fundamental right included in the second sentence of § 23(2) of the Constitution [---], the legislator would inevitably have to create a specific court procedure, within which a mitigating penal law could be applied to the persons who are serving their sentences. [---] [W]hen we accept the retroactive effect of a mitigating penal law as a permissible infringement of *ne bis in idem* fundamental right, we should, in the future, eventually and inevitably accept the recourse of all the persons serving sentences to the courts whenever a penal law [---] is amended. The practically limitless possible number of such recourses can in no way be in conformity with the requirement arising from § 11 of the Constitution, because this would distort the nature of *ne bis in idem* fundamental right and would exclude the possibility of legal peace in criminal proceedings." (p 5)

"The second sentence of § 23(2) of the Constitution can not be understood correctly if read separately from the first sentence" (p 6);

"There is no doubt that the persons who have committed acts which – after the entry into force of the Penal Code – are no longer criminal offences should be released from serving their sentences. Yet, this obligation of the state does not arise from the second sentence of § 23(2) of the Constitution, instead it can be derived from what is provided in § 23(1). The requirement that the state should treat equally those whose acts have been decriminalised and those whose term of punishment has only been changed is not justified and the requirement does not arise from the second sentence of § 23(2) of the Constitution." (p 7);

"within the constitutional review court proceedings an appropriate sphere of protection of the system of fundamental rights should be guaranteed. The attempts to improve and broaden this appropriate sphere of protection create a danger to unjustifiably interfere with the limits of sphere of protection of some other fundamental right" (p 8);

"When analysing, within constitutional review court proceedings, an alleged unconstitutionality of an action of the legislator, especially in the situations where the issue is discussible in principle, it is necessary to try to ascertain whether the legislator has totally ignored the constitutional problems or whether, perhaps, the legal regulation is the result of a conscious and deliberate choice of the legislator. [---] There can be no doubt that it was the will of the legislator to provide for the retroactive application of mitigating punishments only prior to the entering into force of court judgments." (p 9);

"No conclusions concerning the sphere of protection of fundamental rights in a state can be drawn on the basis of the penal code of the state. [---] amnesty is and can be but a right of the state, not an obligation." (p 10);

"Despite of the fact that I dissent with the judgment in regard to the sphere of protection of the fundamental

right included in the second sentence of § 23(2) of the Constitution, I am of the opinion that in accordance with § 15 and § 152(2) of the Constitution the Supreme Court*en banc* as the court of constitutional review was competent to hear the petition of B. Brusilov. S. Brusilov had raised an issue relating to fundamental rights while he was serving a sentence on the basis of a court judgment which had entered into force and acquired the force of law – i.e. in a situation where the adjudication of the issue under dispute is possible only through acceptance of the so called individual constitutional complaint." (p 12)

Dissenting Opinion of justice Jaano Odar

To the Judgment of the Supreme Court *en banc* of 17 March 2003, no 3-1-3-10-02

Translated extracts

"There is no ground to interpret the second sentence of § 23(2) of the Constitution to the effect that it refers to the persons who are already serving sentences on the basis of final court judgments which have entered into force; this provision refers to the persons to whom punishments have not yet been imposed. [---]

The legislator had full liberty, in accordance with § 1(1) to (3) of the PCIA, to retroactively extend the mitigating effect of punishments of the new Penal Code to the persons serving punishments precisely to the extent it deemed necessary, and the Penal Code Implementation Act is not in conflict with § 23 of the Constitution."
