

Judgment

dated 16 February 1999 (SK 11/98)

The Constitutional Tribunal sitting with the bench composed of the Chairman Stefan J. Jaworski, Marek Safjan (Reporting Judge) and Marian Zdyb

After reviewing a constitutional complaint at a hearing on 16 February 1999 (...)

(...)

held

1. paragraph 132, section 4 of the regulation issued by the Minister of National Defense dated 19 December 1996 in the matter of the military service of professional soldiers (Journal of Laws, 1997, Number 7, Item 38; 1998, Number 153, Item 1004) contravenes article 32 of the Constitution of the Republic of Poland in that it violates the principle of equal treatment, hindering professional soldiers in the very same situation from dissolving the service relationship.

1. paragraph 132, section 4 regulation issued by the Minister of National Defense dated 19 December 1996 in the matter of the military service of professional soldiers (Journal of Laws, 1997, Number 7, Item 38; 1998, Number 153, Item 1004) contravenes article 80, section 2 of the Military Service by Professional Soldiers Act dated 30 June 1970 (Journal of Laws, 1997, Number 10, Item 55, Number 106, Item 678, Number 107, Item 688, Number 121, Item 770, Number 117, Item 753, Number 141, Item 944; 1998, Number 162, Item 1117; 1999, Number 1, Item 7), and it thereby contravenes article 92, section 1 of the Constitution of the Republic of Poland in that by violating the purpose of the aforementioned statute under which a delegation was granted to issue provisions to regulate the principles and the course for refunding the equivalent costs of room and board and uniforms incurred during the period of studies or education, it was issued in violation of the statutory delegation.

2. Paragraph 132, section 4 regulation issued by the Minister of National Defense dated 19 December 1996 in the matter of the military service of professional soldiers (Journal of Laws, 1997, Number 7, Item 38; 1998, Number 153, Item 1004) does not contravene article 53, sections 1 and 2 of the Constitution of the Republic of Poland.

Reasoning

(...)

III

1. Military service in every case is inseparably linked to certain restrictions on an individual's freedom. These restrictions sometimes concern the basic elements molding the law to make decisions about one's own personal life. At the same time, however, if they fit within the boundaries following from the nature of military service, the necessary (indispensable) rigors, which universally accompany in every system the performance of the function of a professional soldier or a professional service soldier, the allegation of violating an individual's fundamental rights could not find justification. There can be no doubt that the rights of an individual collide in this instance with the expediency of protecting the public interest strictly associated with the protection of state security, and thus with that value which may justify interference in an individual's rights, even his/her fundamental rights in every democratic legal order within the boundaries demarcated by indispensability.

To evaluate the issues in this case it is imperative to determine whether the rigors to which a professional service soldier is subjected in the area of dissolving the service

relationship may justify the claim that an individual's constitutionally protected rights have been violated. When conducting this evaluation one cannot abstract from the goals and the assumptions strictly related to the operation of every army, and thus with its cohesiveness, operability, availability and the necessity of maintaining discipline. Nor can one omit the fully justified need of every modern army which is to avail itself of highly qualified officers comprised to a great degree by persons studying at higher military schools.

At the outset one should note that the solutions adopted in the binding legal regulations defining the legal status of professional service soldiers in terms of the cessation of the service relationship of a soldier who intends to leave the military before the elapse of what is referred to as the obligatory period must most certainly weigh the public interest and the individual's interest. For this reason one could not challenge e.g. the very obligation of performing mandatory service after completing studies at a higher military school; nor could one undermine the obligation of repayment by virtue of the costs incurred by the State in connection with the education, which is sometimes very expensive, of highly qualified officers for the military. For the obligation of refunding costs is fully justified since it is supposed to balance the earlier conclusion of mandatory service; otherwise, certain privileges, totally unjustified, would be created for a given category of entities (studying at higher military schools) with respect to persons studying at higher civilian schools or within the framework of other forms of education, which, as is universally known, entail substantial financial burdens for the students and their parents.

The provisions of the binding Military Service by Professional Soldiers Act explicitly indicate that the lawmaker incorporated the values associated with the freedom for professional soldiers to shape their own professional (life) career since the relevant provisions (article 78, section 1 and article 79) envisage the dissolution of the service relationship remaining at the soldier's initiative, since the reasons for termination are not the subject of regulation and are not subject to evaluation by military bodies to any degree whatsoever; they are, therefore, totally indifferent from a legal point of view. The decision to cease the service relationship is thus dependent not upon the reasons of termination but on whether other conditions, primarily associated with the professional service soldier having discharged the duty of certain financial obligations which have been prescribed statutorily, have been fulfilled, namely, the return of the quarters occupied and the costs of education and support. It is worth paying some attention to this element of the binding statutory solutions since it defines the conditions for dissolving the service relationship.

First, the public interest, according to the conditions shaped as hereunder, is not directly involved in retaining a soldier in the ranks of the army at all costs, even against the soldier's own will. It is easy then to discern the difference in relationship to the situation in which military service pertains to a person fulfilling the universal military obligation.

Second, the financial and material nature of the benefits encumbering the soldier should be confronted with the rigors imposed by the military service in this case, and thus with the limitations concerning the sphere of an individual's essential rights, the right to self determination.

On the grounds of the currently binding regulations incorporated in the regulation under grievance there is no doubt that the costs of education and support should be refunded before the ultimate dissolution of the service relationship with the military. The condition of making payment has been formulated very rigorously since the relevant provision (paragraph 132, section 5 of the regulation) explicitly states that if the duty of refunding the aforementioned benefits is not realized then the power of the previously issued decision on the expiration of the service relationship shall be forfeited.

At the same time one must note that the condition of refunding the benefits enumerated in section 1 of article 80 of the statute before the cessation of the service relationship does not concern those persons who bring about the cessation of the service relationship with cause (in the situations specified in article 75, section 1, sub-sections 9, 10, 11 and 12 of the statute, when a professional soldier is released from professional military service as a result of losing or having military rank stripped from him/her, a legally binding decision of a court, the sanction of a ban against performing a profession, the punishment of being expelled from professional military service as adjudicated under disciplinary proceedings, conviction by a court's legally binding judgment of imprisonment – military arrest – for a conscious criminal offence without a conditional suspension of its execution as well as in the situations specified in article 76, section 1, sub-sections 3 and 4 of the statute wherein a professional soldier may be released from military service as the result of conviction by a court's legally binding judgment of imprisonment – military arrest – in instances not enumerated in article 75, section 1, sub-section 12 and a legally-binding punishment inflicted by an organ of the professional self regulatory body with jurisdiction whereby the right to perform the profession is suspended or stripped away). For in these instances the dissolution (cessation) of the service relationship will occur notwithstanding the refund of the benefits, e.g. at the time when the decision mentioned above becomes legally valid. The obligation to make a refund occurs at the time when a soldier's service relationship expires and may be executed according to generally accepted principles in execution proceedings. After all, the same applies to the provisions governing the status of candidates to become professional soldiers. The fact should be emphasized that the 'statute envisages two situations in which a professional soldier released from military service is not at all obliged to refund the equivalent costs, namely, if he/she receives two consecutive, general dissatisfactory evaluations according to service opinions (article 75, section 1, sub-section 4) and if he/she receives a dissatisfactory general evaluation in a service opinion (article 76, section 1, sub-section 2).

In light of the provisions of the regulation issued by the Minister of National Defense, the regulation (contained in the provision under grievance) pertaining to the necessity of making payment of the amount due before the cessation of the service relationship is explicitly referenced only to soldiers who have terminated the service relationship, and who have thereby undertaken at their own initiative the decision to dissolve it.

Among the reasons which are defined in the regulation (paragraph 136) to justify the decision to amortize the amount due, instances of resigning from military service on account of religious or world-outlook convictions are not listed. The grounds for amortizing the amount due are the following, namely: particularly justified occurrences of fate not caused by the soldier, a soldier's very difficult family situation, a soldier's transfer to state administration or some other service.

The interpretation of these provisions that has been made, particularly in the collection of the Chief Administrative Court's (NSA's) decisions (see the NSA judgment dated 26 January 1994, file number II S.A. 2328/93, ONSA 1995, number 2, item 60) has aptly shown that those reasons associated with a professional soldier's religious convictions can essentially not be treated as a „random event” justifying in the light of these regulations the amortization of obligations to the State.

Consequently, the following situation takes shape on the basis of the binding provisions. A professional service soldier who on account of his/her religious convictions cannot reconcile the performance of military service duties with the accepted system of values is obliged to refund the amount due if he/she opts for termination. However, he/she may leave the military only after having discharged this duty before the cessation thereof, and thus within being able to postpone its performance, even partially, until after the conclusion of the

service relationship. Paradoxically, then, he/she finds him/herself in a situation which is worse from this point of view than the persons who brought about the expiration of the service relationship with cause by provoking the application of disciplinary sanctions or punishments with their behavior. For these persons will have the opportunity to refund the amount due after leaving the military, which is, after all, understandable on account of the nature of the reasons which led to the cessation of military service. In turn, it is not comprehensible why other reasons, which are not subject to a negative evaluation, and which inclined the soldier to terminate professional service, form an impediment in the realization of such an opportunity.

As was shown above the evaluation of the relations associated with the situation under analysis must take into consideration the weighing of the public interest and the individual's interest. On this plane it is, however, difficult to find persuasive arguments in favor of the rigor of the binding regulations which *de fact* impair persons drawing their income, as a rule, solely from the salary received in conjunction with the service performed in the military, from the dissolution of the service relationship; consequently, they are not capable of collecting the necessary assets to pay the amount due before the cessation of this service.

This rigor, above all, cannot be justified with reasons related to the necessity of protecting the public interest, such as: public safety and the interest of the armed forces. The duty of refunding the amount due mentioned above most certainly realizes the essential principle of justice since the subject is the equivalent amount of the benefits gained free of charge by a soldier and which have, especially nowadays, a very measurable property value. Important reasons associated with respecting accepted obligations are at stake, which certainly is of particularly great importance to the members of the armed forces. Finally, the fiscal interest is at stake, since the funds to cover the costs of education and support in higher military schools are indubitably covered by the state budget.

Without negating the reasons indicated hereunder one must concurrently note that the so-defined public interest may certainly be realized without harm by some other alternative means whereby a soldier could discharge the duty with which he/she is encumbered, which could substantially better reconcile the said interest with the individual's important interest (e.g. by payment in installments realized after the period when military services is ceased, while simultaneously utilizing widely known and fully effective forms of securing pecuniary receivables, e.g. in banking practice such as a blank bill of exchange [*in blanco*], a surety, an assignment of the obligee's future receivables, etc.). Even if one were to accept that collecting the receivables after a soldier resigns from professional service may elicit additional complications for state bodies in certain situations, there is, however, no doubt that these reasons cannot prevail in confrontation with the individual's interest which is worthy of protection to the benefit of solution featuring such basic rigor as is the case on the grounds of the challenged provision. One cannot lose sight of the fact that the legal solution adopted in this area may create situations in which a soldier will be forced to professional service even if the continuation of the service will be at great fundamental odds with the system of values he/she recognizes.

The lack of legal opportunities to leave military service without remitting the entire amount due before the cessation of the service relationship by persons who are pained by an acute internal conflict because of their religious convictions should be confronted with the legal situation of such persons faced with the overall duty of military service.

Membership in a given religion and the moral convictions accepted by a given person in conjunction with this fact may exert an impact on how the universal duty of military service is performed (by way of what is referred to as national service) insofar as it is demonstrated that

the system of values and convictions related to a given religion precludes the ability to perform military service without threatening the person with a basic internal conflict.

The hitherto collection of the decisions made by the Chief Administrative Court and the Supreme Court against the backdrop of the Act dated 21 November 1967 on the Universal Obligation to Defend the Republic of Poland (Journal of Laws, 1992, Number 4, Item 16 with subsequent amendments) allows one to distinguish clearly between a situation in which the exemption from performing the military service duty is given (on account of the status as a priest – see article 47, section 1) and a situation in which there is an opportunity to avail oneself of national service (article 189, section 1). In the jurisprudence this latter instance is linked *inter alia* to a given person's membership to the circle of Jehovah's witnesses since it has been shown that the principles of this religion are unequivocally at odds with the performance of any activities related to the armed forces. It should be recognized that the consequence of this stance should be the creation *a fortiori* of realistic opportunities for desisting from military service in a situation in which the performance of professional functions in the military is a result of a voluntary obligation accepted previously. For in this instance the collision between the public interest and the individual's interest may be drawn less explicitly than with respect to the universal obligation of military service.

The previous considerations lead to the conclusion that the intensity of the limitations placed on an individual's rights following in certain situations from the lack of real opportunities to resign from military service may be deemed to be excessive in confrontation with the public interest at stake and under protection hereunder. These limitations do not correspond to other legal regulations enabling certain categories of persons to desist from performing military service on account of demonstrated membership in religious organizations or groups which grossly conflicts with the essence of military service. One must take note, however, that excessive rigor or restrictiveness, as well as the lack of internal cohesiveness on the part of the adopted solutions do not yet form *per saldo* grounds to lodge the allegation of the challenged provision's unconstitutionality. It is only when this evaluation is compared with an individual's constitutionally guaranteed rights and freedoms that one will be able to formulate a final stance on this issue.

At this point, it is necessary to refer to the constitutional models singled out in the complaint and to consider whether the rights and freedoms indicated, and namely the right to equal treatment by public authorities (article 32 of the Constitution) and the freedom of religion (article 53, sections 1 and 2 of the Constitution) have been violated by the challenged provision of the regulation issued by the Minister of National Defense.

2. In keeping with the already established line of constitutional doctrine and the Constitutional Tribunal's jurisprudence, the essence of equality boils down to the order addressed to the public authority to treat in the same way in a legal sense entities belonging to the same category, that class of entities distinguished by a given trait or criterion considered to be legally consequential (relevant) from the point of view of shaping the contents of a legal relationship and thus the rights and duties related thereto, connecting the distinguished category of entities with the public (Constitutional Tribunal decision dated 9 March 1988, file number U. 7/87, Collection of the Constitutional Tribunal's decisions, 1986-1995, Volume I, Item 1; Constitutional Tribunal decision dated 24 October 1989, file number K. 6/89, Collection of the Constitutional Tribunal's decisions, 1986-1995, Volume II, Item 7; Constitutional Tribunal decision dated 6 March 1990, file number K. 5/89, Collection of the Constitutional Tribunal's decisions, 1986-1995, Volume II, Item 1).

There is no doubt that the sphere of relationships linked to the performance of military service, both basic and professional in nature, belongs to that same sphere of relationships:

individual – public authorities, in which the observance of equal treatment should be subject to particular rigors and should be tied to the most in-depth evaluation possible of the legal relations inherent therein. This is the case, first and foremost, because the performance of military service, in its very essence, necessarily imposes far-reaching limitations on an individual's liberties and autonomy, faced with which they should never exceed what is necessary. In the meantime all actions which differentiate an individual's legal position the indispensable level following from the essence of the principles defining the organization and the operation of military service may expand the scope of these limitations and make them more acute.

Equality is closely connected to the principle expressing the prohibition against all forms of discrimination in political, social or economic life for any reasons whatsoever. When mutual relationships appear between these principles they are not identical in terms of their content (e.g. equal treatment does not always signify a lack of discrimination, consequently in certain situations the variegation of the legal situation of entities from the point of view of a specific, discrete criterion may constitute an instrument enabling one to avoid discrimination).

In the matter under analysis an essential problem is incorporated in the question whether the difference in the property standing of professional soldiers may lead to a differentiation in the position of soldiers from the point of view of the dissolution of their service relationship ahead of schedule (in comparison with the original obligation, i.e. at the time when the service was commenced).

The circle of persons to whom equal treatment should be applied encompasses all professional soldiers leaving the military before the elapse of the period of mandatory military service and upon whom the duty of refunding an amount due is incumbent by virtue thereof (prior departure from service). In this situation equal treatment should therefore rest upon creating the same opportunities for every person belonging to the discrete class of entities to realize this duty, and thus upon applying in this area the same principles and criteria. In respect to persons terminating their service relationship this would imply the creation of real opportunities to leave military service. In the meantime, as demonstrated above, the realization of this duty (and even its very existence) is subject to basic differentiation in light of the binding provisions, depending upon the reasons for the discontinuance of the service relationship (with or without cause). The reason for the dissolution of the service relationship cannot, however, be recognized as a legally consequential criterion of differentiating the manner of refunding the amount due, and it should most certainly not lead to the treatment of the persons terminating the service relationship according to more rigorous and less favorable principles than persons who have induced their prior departure from military service by their own faulty behavior.

Emphasis must be placed here that the currently accepted legal solution, in terms of the manner whereby the duty of refunding the amount due is discharged, which treats the persons terminating the service relationship with more rigor leads to a further factual differentiation of these persons, since only persons with the relevant assets will have real opportunities to remit the amount due before the cessation of the service relationship. It is beyond all doubt that the differentiation of the situation of citizens on account of their property standing, *inter alia* from the point of view of relations with the public authorities, may not be recognized as a source of discrimination in and of itself (a different stance would then have to undermine e.g. the fundamental structures of fiscal law). But there are certainly areas of social life in which the differentiation of an individual's position on account of its property status could lead to an allegation of discrimination, e.g. in the area of medical benefits, if access to benefits organized via the health insurance funds [*kasy chorych*] were to be variegated on account of some absolute amount of contribution to be remitted by every employee (and not defined as a

percentage). This could lead to the conclusion that in certain situations on account of the protected constitutional values, the adoption of legal solutions which may, albeit not directly but via their consequences, differentiate the situation of an individual from the point of view of its property status, at least to the extent to which it cannot be justified with essential reasons of public interest, is also covered by the prohibition against discrimination and it may concurrently violate the principle of equal treatment.

It has already been shown above that the public interest would not suffer any harm if the permissibility of some other way to realize this payment were to be constructed (and thus in part or in full after the cessation of the service relationship). One cannot lose from sight the fact that the consequences of equal treatment of professional service soldiers, on the foundation of the binding legal regulations, are very acute for an individual's personal interests. The argumentation presented above leads to the conclusion that the challenged provision violates the constitutionally protected principle of equal treatment of professional soldiers by the public authority and it thereby differentiates their legal situation with respect to the realization of military service-related duties.

3. Moving on then to the evaluation of the conformity between the provision under grievance with the second constitutional model pointed out in the complaint (article 53, sections 1 and 2 of the Constitution), the Constitutional Tribunal has given heed to the fact that the freedom of religion is captured in the constitutional norm very broadly; for it encompasses all religions and membership in all religious organizations, and thus it is not limited to participation in religious communities forming a formal, discrete organizational structure and registered in the relevant registries maintained by the public authorities. Without doubt the so-defined freedom of religion also encompasses followers of the circle of Jehovah's witnesses. The broad extent for understanding the freedom of religion and the freedom of conscience is also accepted in the jurisprudence made by the Human Rights Tribunal in light of article 9 of the European Human Rights Convention.

The fundamental issue connected to the evaluation of the provision under examination is first linked to the question about the mutual relationship between the constitutional guarantee of freedom of religion and the provisions governing the principles for the performance of military service, including ones which define how professional soldiers may dissolve their service relationship. The most recent provisions do not indubitably make the issue of the freedom of religion the direct subject of regulation although the legal regulations pertaining to the performance of military service, including the principles of the internal organization of life in the military, the hierarchical subordination or finally the soldier's availability which is necessary in every army have a certain reflection in the area covered by the constitutional guarantee expressed in article 53, sections 1 and 2 of the Constitution.

The bond between the constitutional guarantee of freedom of religion and the provision under analysis has been, however, too weakly sketched for the evaluation made in this plane to be justified. The challenged provision does not make the question of freedom of religion and conscience the purpose of regulation, nor does it refer to any degree at all to the criterion of religion and confession as a condition affecting the specification of a soldier's legal situation in the area under examination. The rigors and limitations concerning the dissolution of the service relationship have, of course, from their very nature, practical significance for a soldier's personal situation in various spheres of his/her life. One may easily demonstrate that these rigors will affect private life and the freedom to decide about one's own life, family life (article 47 of the Constitution), the freedom of movement in the territory of the Republic of Poland and the right of domicile (article 52 of the Constitution), the freedom to choose one's profession (article 65 of the Constitution), or finally the freedom of expression and the right to obtain and disseminate information (article 54 of the Constitution). The opportunity to refer to

many constitutional models simultaneously by specifying a certain type of reflection about the regulations under analysis, on the indirect or further consequences following therefrom, allows one to formulate the opinion that in the normative area under consideration there is a lack of those sorts of elements which would permit one to consider the issue on the plane of the freedom of religion. The limitations introduced by the challenged provision in conjunction with the specified manner of realizing the amount due in favor of the State affect every professional service soldier in the same situation and the trait distinguishing this category of persons are not religious convictions. The idea, after all, is not to create a particular legal status or a particular privilege for persons belonging to a specific religion and to differentiate according to this criterion the ways for dissolving military service (this is not what the complainant is demanding, as one should understand it).

One may speak sensibly about the violation of a constitutionally protected value (the freedom of religion in this case) if the remedy of the normative impediment to the realization of this freedom were to occur precisely on account of the traits and values associated with that freedom. In the situation under analysis in the case at hand, ensuring the respect of equal treatment for all the entities in this same situation on account of discrete traits would be sufficient to achieve the intended aim which is to abolish those barriers which groundlessly prevent departure from the military. The essence of an individual's protection is therefore lodged in another plane besides the protection of the freedom of religion.

As an aside to these considerations, one should assert that the freedom of religion cannot be fully realized in military service conditions. It is not absolute in nature; for the Constitution itself points to the opportunity for limitations to exist in this area provided that they meet the requirements prescribed by section 5 article 53 of the Constitution, and thus that they were introduced by statute and that, moreover, they are necessary to protect the State's interest, public order, health, morality or the freedoms and rights of other persons. Concurrently, it is necessary to note that this provision does not exclude the application of proportionality expressed in article 31, section 3 of the Constitution, at least to the extent to which the normative contents of both provisions do not overlap; this refers above all to the basic specification of the boundaries of permissible limitations for this issue the criterion for making reference to the essence of freedoms and rights. The Constitutional Tribunal expressed a similar opinion in its decision dated 12 January 1999, file number P. 2/98, in evaluating the relationship of article 64, section 3 to article 31, section 3 of the Constitution: „In the opinion of the Constitutional Tribunal the separate regulation of the issue of curtailing property by indicating in article 64, section 3 of the Constitution the conditions permitting this type of action does not signify the exclusion of the application with respect to this right of the general principle expressed in article 31, section 3 of the Constitution. The role of the latter provision demarcated by its place in the systematic structure of chapter II of the fundamental statute („General Principles”) and the function which this provision discharges in regulating an individual's rights and freedoms settles this issue.”

The problem concerning the guarantees of freedom of religion in military service conditions has been expressed first and foremost in the provisions of the Act dated 21 November 1967 on the Universal Duty to Protect the Republic of Poland (Journal of Laws, 1992, Number 4, Item 16 with subsequent amendments) and the Act dated 17 May 1998 on the Guarantees of the Freedom of Conscience and Religion (Journal of Laws, 1989, Number 29, Item 155 with subsequent amendments) which fully confirm the soldiers' freedom to externalize religion to the limits to which this does not collide with the duties following from military service.

There can be no doubt that departures by professional soldiers from the army, including those which are motivated by essential religious causes, must be subject to strict rigors – just

as in all other instances, since the public interest associated with the operation of every state's armed forces demands it. Thus even in the situation of the complainant when the nature of the religion confessed precludes the performance of military service, since this religion's values stand in clear opposition to the very essence of a professional soldier's tasks – one cannot expect that the binding regulations will create an automatic mechanism and liberty to leave military service. Such a solution would in turn stand in opposition to an important public interest associated with state security. The problem of the collision of interests should be, however, as was previously demonstrated, adjudicated on another plane besides the protection of the freedom of religion. Equal treatment of all soldiers in the same legal circumstances comes to the foreground, notwithstanding the concrete motives which are decisive in the intent to leave the military. It is thus only in such a context, and not in connection with the question about the boundaries of religious freedom, that the public interest at stake may be properly evaluated as the basis for possible limitations and differentiation in the situations of individual categories of soldiers. This evaluation was presented above.

4. The subject of evaluation in the given case is paragraph 132, section 4 of the regulation issued by the Minister of National Defense dated 19 December 1996 in the matter of the military service of professional soldiers which was issued on the grounds of a delegation incorporated in article 80, section 2 of the Military Service by Professional Soldiers Act. The statutory delegation was formulated very broadly, authorizing the Minister of National Defense not only to specify the equivalent costs subject to refund, including the principles and the course for their refund but also to specify the instances in which a professional soldier is totally exempted from the duty of making a refund.

An important question must be decided upon whether the sub-statutory regulation was totally determined by the statutory regulation in terms of its shape and contents to the extent challenged by the complainant (article 132, section 4), and in particular by article 79, section 2 of the statute, which explicitly appears to make the exemption from professional service dependent upon meeting the condition of transferring the occupied quarters and the refund of the soldier's costs of education and support.

It is not possible to concur with the stance adopted in the Prosecutor General's statement that in essence the complainant's allegation should have been targeted at statutory provisions and not the regulation incorporated in the regulation.

First, it would be erroneous to narrow the statute's formulation „provided that the equivalent costs are refunded” to situations in which the effective repayment of the amount due would take place before the expiration of the soldier's service relationship. One should note that the statutory regulations pertaining to the termination of the service relationship and refunding the equivalent costs are not fully harmonious. The contents of article 79, section 2 could suggest that the lawmaker forejudged this issue in that the release of a professional soldier as the result of termination shall take place provided *inter alia* that the equivalent costs are refunded, while article 80, section 1 explicitly says that the person obliged to make the refund is a „professional soldier released from professional military service.” Since the contents of these two provisions cannot be reconciled in a reasonable fashion, one must assume that the lawmaker has not forejudged the deadline for refunding the costs mentioned above. The explicit delegation in article 80, section 2 points to this by defining the principles and the course for refunding them in a regulation. In the context of the provisions of the statute one must understand that all situations are at stake in which the legal duty of the soldier terminating the service relationship to refund the amount due has been made updated if even a portion or the entirety of this amount due were to be repaid effectively at a later date.

Second, it would be difficult to understand why the regulation could not establish the principles of repayment envisaging that all or a portion of the amount due would be shifted for repayment after leaving the service, insofar as it may do more – for the statutory delegation permits the regulation to specify the cases of total exemption from these costs, and if so, then it could *a fortiori* also define the instances when the refund would occur after the cessation of the service relationship. The broad extent of the delegation under article 80, section 2 speaks out for this. In particular, the delegation for the regulation to specify the principles for refunding the foregoing costs (which should be explicitly distinguished from the course for making the refund referring to technical issues) appears to suggest that nothing stood in the way of the regulation establishing installments to repay the amount due during the period after the dissolution of the service relationship.

Third and finally, one must concur with the complainant's complaint that the so-constructed provision in the regulation contradicts the purpose of the statute; for one cannot create duties which cannot be legally executed for a certain group of professional soldiers.

The violation of a statute's purpose both currently (article 92, section 1 of the Constitution) and under the auspices of the former constitutional principles (article 56, section 3) is consequently tantamount to surpassing the scope of a statutory delegation, to which the Constitutional Tribunal drew attention in its prior decisions. The jurisprudence molded under the auspices of the former constitutional principles should be recognized in this area as fully current (see *inter alia* Constitutional Tribunal decision dated 22 April 1987, file number K.1/87, Collection of the Constitutional Tribunal's decisions, 1986-1995, Volume I, Item 3; Constitutional Tribunal decision dated 22 September 1997, file number K. 25/97, Collection of the Constitutional Tribunal's decisions ZU 1997, Number 3-4, Item 35). The legality of a normative act is thus determined not only by the fact of it being issued on the grounds of a statutory delegation but also by its issuance in order to execute a statute (see Constitutional Tribunal decision dated 22 November 1995, file number K.19/95, Collection of the Constitutional Tribunal's decisions ZU I 1995, Number 3, Item 16). The statute's purpose must be specified on the basis of an analysis of the solutions adopted in the statute; it cannot therefore be reconstructed in a self-existent fashion, arbitrarily and detached from the construction of the act containing the delegation. The inability to establish the so-understood purpose would have to undermine the rectitude of the delegation granted to issue a normative act (see Constitutional Tribunal decision dated 22 September 1997, file number K. 25/97; Constitutional Tribunal judgment dated 5 January 1998, file number P. 2/97, Collection of the Constitutional Tribunal's decisions ZU 1998, Number 1, Item 1). Consequently, executive provisions must retain their content and functional relationship to the statutory solutions since only in this manner may the boundaries be demarcated in which the regulation embodied in the executive provisions should fit. The emphasis of the necessity to take into consideration functional dependence is of great importance, especially in those situations when the delegation may – by its scope – elicit doubts as to interpretation, just as in the case at hand. For in the event that such doubts appear, fundamental significance will be gained by the question what are the necessary means and legal instruments to realize the goals assumed by the lawmaker. This does not, however, imply a departure from the principles of the strictest possible interpretation since, according to the decision-making line taken by the Constitutional Tribunal, the interpretation of the provisions defining norm-giving powers may not be carried out employing expansive and teleological interpretation (see Constitutional Tribunal resolution dated 17 August 1988, file number Uw. 3/87, Collection of the Constitutional Tribunal's decisions, 1988, Item 14; Constitutional Tribunal judgment dated 8 December 1998, file number U. 7/98). The regulations incorporated in the executive provisions cannot therefore lead to challenging the cohesiveness and the internal harmony of

the solutions adopted directly by the statute (see Constitutional Tribunal judgment dated 8 December 1998, file number U. 7/98). It is also more than obvious that a statutory delegation can never be interpreted as granting the delegation to introduce regulations violating higher ranking norms, and thus statutory and constitutional norms. Consequently, when exercising the delegation it is necessary to search out that direction of executive regulation which would facilitate – while respecting the goal to be served – the retention of conformity with higher ranking provisions. Assuming therefore the rectitude of the delegation itself, one must assume that the violation by the challenged provision in the regulation of the constitutional norm guaranteeing equal treatment by the public authority is tantamount to a violation of the goal of the statutory delegation itself. (...)