

U-I-172/94  
9.11.1994

## DECISION

At the meeting of 9 November 1994 concerning the proceedings for evaluation of constitutionality of the Act commenced upon the request of the Supreme Court on the basis of Article 156 of the Constitution, the Constitutional Court

made the following decision:

The provision of paragraph 2 of Article 31 of the Radio and Television Slovenia Act (Official Gazette of the Republic of Slovenia, no. 18/94) shall be abrogated.

### Reasons:

#### A.

1. In adjudicating concerning the case under consideration in the framework of administrative proceedings, the Supreme Court considered that the provision of paragraph 2 of Article 31 of the Radio and Television Slovenia Act was not in conformity with Articles 2 and 155 of the Constitution, which is why it stayed the proceedings on the basis of Article 156 of the Constitution and filed the request for evaluation of constitutionality. In its request it states that:

- the concept of "approval" of appointment adds to the ambiguity of the statutory provision by introducing, in addition to the standard and accepted concepts of "appointment and removal from office" also a new concept, and that in doing this it fails completely to prescribe the conditions to be used as the basis by the Council of the Radio and Television organization (hereinafter: "Council") in the process of decision-making, and that it also fails to prescribe the procedure for ascertainment of such conditions,

- taking into considering the status of the Radio and Television Slovenia as that of a public institution, the tasks of the director-general and the composition of the Council, the office of director-general should be classified as a public office, and not a political function exclusively; - the disputed statutory provision is incomplete and does not make it possible for the Supreme Court to check the conformity of the disputed act (that is, of the corresponding resolution of the Council) with statute,

- the principle of the state governed by the rule of law requires that statutory regulation be sufficiently clear and unambiguous, that is, such as will ensure the protection of rights and prevent abuse of statutory provisions,

- the disputed provision encroaches, with retrospective effect, upon the accrues rights relating to the exercise of the office of director-general, who was appointed for a term of office of four years; approval to the appointment was granted by the National Assembly, but the disputed statutory provision leaves the decision on approval or refusal to approve the term of office to the Council, so that the latter may decide on this matter arbitrarily.

2. In its reply to the request, the National Assembly states that the disputed statutory provision is of the nature of temporary provision, and does not prescribe the termination of the term of office of the hitherto director-general ex lege but regulates the institute of "approval" (vote of confidence), which allows the director-general to keep the office in the event of positive results of the vote. Such or other way of regulating this matter, however, falls without any doubt into the domain of the legislator, and cannot be deemed to be controversial from the point of view of the Constitution. In this connection, the National Assembly also states that:

- the approval of appointment of the hitherto director-general is above all a gesture (act) of confidence on the part of the newly constituted Council - the new administrative body of the public institution with

respect to the director-general as a person responsible for the implementation of programme and business policies of the Radio and Television Slovenia as defined by the Council;

- the approval is also necessary for the Council to be able to assess appropriateness of the hitherto director-general in view of new obligations imposed upon him by the Act; - the showing of confidence in the hitherto director-general by the new administrative body is a precondition for normal cooperation between the two parties and for operation of the public institution as a whole;

- the disputed provision is not incomplete and ambiguous: in the event of approval, the term of office of the director-general will continue, while refusal of approval will lead ex lege to the termination of the term of office;

- the Act implicitly also includes conditions for approval or refusal of approval of the term of office: what we are dealing with is the confidence of the Council in the person holding the chief executive and management position, and the assessment of its suitability with respect to new tasks; - the Act does not prescribe any procedure for ascertainment of conditions applying to election, removal from office, approval of or refusal to approve the director-general, but leaves the matter to be regulated by the statutes or, as is the case with the disputed temporary provision, to be decided by the Council;

- democratic elections in the Council cannot be claimed to be "arbitrary decision-making" in conflict with the

constitutional system of the Republic of Slovenia; - the Act does not have retrospective effect: all consequences relating to the injured party occurred subsequent to the coming into force of the Act; neither does the disputed provision encroach, with retrospective effect, upon the accrued rights of the former director-general arising from employment relation;

- such "accrued rights" as derive from a public office or management post are not recognised by the Constitution or statute: early removal from office is a possibility which is common and in accordance with statute, and is accepted by any person who consents to or applies for a public office or management position.

#### B. - I.

1. The Radio and Television Slovenia Act (Official Gazette of the Republic of Slovenia, no. 18/94, hereinafter: "RTSA") regulates the status, activities, financing, management, operation and supervision of the Radio and Television Slovenia as a public institution. Due to the above content, the Act is one referring to the establishing of a public institution on the basis of paragraph 1 of Article 45 of the Public Media Act (Official Gazette of the Republic of Slovenia, no. 18/94), and in accordance with Article 3 of the Institutions Act (Official Gazette of the Republic of Slovenia, no. 12/91, hereinafter: "IA"). But it should also be taken into consideration that the Radio and Television Slovenia had existed as a public institution already prior to the coming into force of the RTSA. In accordance with the provision of Article 62 of the IA, used in conjunction with Article 64 of the same, on 1 April 1991 the Radio and Television Slovenia (until then a work organization for the area of non-productive economic activities) continued with its work as a public institution.

According to the provision of Article 28 of the RTSA, legal continuity and identity of legal status exists between the Radio and Television Slovenia (hereinafter: "RTV Slovenia") established on the basis of the said Act and the RTV Slovenia established as a public institution under the IA.

At the time of coming into force of the RTSA, then, the public institution of the RTV Slovenia was already in existence, and at its head was the director-general, who was appointed in accordance with the provisions of the RTV Slovenia Act (Official Gazette of the Republic of Slovenia, nos. 14/90, 24/90 and 43/90), which had applied until that time. This also follows from the provision of paragraph 1 of Article 31 of the RTSA, on the basis of which in the period after the coming into force of the said Act the office of director-general of the RTV Slovenia shall continue to be held by the director-general who has held the office until that time.

2. The position of director-general of the RTV Slovenia at the time of the coming into force of the RTSA is regulated by the disputed transitional provision of Article 31. Otherwise, status issues of institutions are regulated by the IA, being the general law applying to all institutions (public institutions included), whose Article 6 expressly provides for its subsidiary applicability: its provisions are to be applied whenever specific matters are not regulated in a different manner by a special law. In reference with the legal status of the director-general of the public institution RTV Slovenia this means, in accordance with Article 18, paragraphs 1 and 8 of Article 20, Article 21 and Article 26 of the RTSA, as well as with provisions of Articles 31 through 39 of the IA, that: - he is appointed and removed from office by the Council of the RTV Slovenia,

- approval for appointment and removal from office must be granted by the National Assembly,

- he is appointed for the term of office of four years, and - he may be dismissed prior to the expiry of the term of office for reasons listed in paragraph 2 of Article 38 of the IA, or for such other reasons as may be specified in advance in the statutes, in accordance with such procedure as has been prescribed in advance.

3. The appointment of a director of a public institution for a definite term of office, together with specified reasons and acts which may lead to the termination of the term of office prior to such definite term, ensure relative stability and thus independence of the office of director-general. Such stability allows to the director to discharge his public office in accordance with public interests. Uncertainty of his position, which would result if the administrator were allowed, without stating any reasons for it, and on the basis of such procedure as would not ensure procedural rights of the injured party, to freely decide on early termination of the term of office, would prevent the director of the public institution from independent and creative engagement in activities to be performed by him in the public interest.

Early termination of the term of office in accordance with the IA would also affect the integrity of the person who holds such office. What is involved is the enforcement of status-related responsibility of the managing body. Removal from office in accordance with the IA comprises elements of punishment, and, consequently, cannot be left entirely to the discretion of the administrators of a public institution.

Management is characterized both by elements of profession and of an office. It is accessible to the interested parties on the basis of public competitions and should accordingly be under continuous protection, because it requires long-term and planned conduct from holders of such office. During the term of office, the holders of office are also entitled to adequate social and economic standing.

Naturally, the reasons which dictate such regulation in the Institutions Act are not given in the case of industrial corporations, which are not established with a view to performing such activities as are in the public interest, but to make profit. This is why the manner of regulating the term of office and the reasons and procedures for early removal from office or of negative vote of confidence in reference with administration and management bodies of industrial corporations, as included in the Industrial Corporations Act, cannot be applied, *mutatis mutandis*, in connection with these issues to directors of public institutions. The same is true of provisions concerning the vote of confidence with respect to holders of political functions.

4. The disputed provision of paragraph 2 of Article 31 of the RTSA introduces a legally undefined concept of "approval of appointment" of the managing body. It is true, as is claimed by the National Assembly, that the legislator - in our case also the founder of the public institution - has legitimate right to decide on how in the process of modifying the law to regulate a transitional regime, which should ensure continuity of work of a public institution and its bodies. But in this connection the legislator cannot be granted absolute freedom.

In addition to special requirements set before the legislator, on the basis of specific nature of radio and television activities, by the need to observe the principle of democracy and freedom of the press, the legislator must in every instance observe the principle of the state governed by the rule of law (Article 2 of the Constitution).

The principle of the state governed by the rule of law demands that statutory solutions be general and abstract. In connection with statutory provisions which refer, due to the nature of the matter which they regulate, to a preselected circle of persons, or to a single person even, it is so much more important that their effect on the position of such persons be limited and, consequently, measurable and foreseeable. The aim of a statutory provision must be clearly evident, and the measures should be specified in detail. The legislator must adopt clear standards and prescribe their content: it is inadmissible for the legislator to leave the definition of the content of a standard to another body.

Standards should be foreseeable and should allow for their testing. When a standard is not clearly defined, this makes possible different application of statute and leads to arbitrariness on the part of state authorities. A statute is in conformity with the Constitution when grammatical and teleological interpretations yield the content of the legislative measure, and in this way the manner of acting of the bodies responsible for its enforcement is determined.

5. The constitutional provision, according to which Slovenia is a state governed by the rule of law, is very general. This is why abstract assessment of whether a particular regulation is in conflict with this constitutional principle is often uncertain. In the case of evaluation of constitutionality of the disputed provision, however, we are concerned with the evaluation of conformity of a statutory provision which regulates a single specific case. This provision has been consummated by having been applied already by the Council, and by the fact that the Supreme Court has been set with the task of its application. This is why the Constitutional Court could verify its applicability by checking how the bodies to which it was addressed were actually able to use it. In this connection it turned out that the provision in fact lacked clarity. The mode of operation of the two bodies which had to use this provision until now shows that they could not determine its content.

From the minutes of the second meeting of the Council of 14 July 1994 it is evident that, at the meeting at which voting concerning the approval of the term of office finally took place, members of the Council of RTV demanded that the meeting be adjourned, for their failure to understand the content of the provision. It was also proposed for the National Assembly to provide official interpretation. The interpretation accepted at the meeting was that the provision dealt with the "appointment" of the director. But this interpretation fails to take into consideration that appointment is only possible in the event of a vacancy, but the post was at the time of the said meeting of the Council not vacant, as this was expressly provided by paragraph 1 of Article 31 of the RTSA. Also, the appointment can only be effected subsequent to a public competition, but in the case under consideration such competition was neither held nor publicly announced. As a result of such interpretation of the disputed provision, one of the members of the Council at the time of voting about the approval expressed the opinion that the then director of the RTV should have submitted his own "vision of future work of the RTV" (and obviously voted concerning the "appointment" of the director under the assumption that the candidate had failed to satisfy the requirement of submitting such vision).

By such refusal to vote in favour of approval of the appointment, which is one of possible ways of application of the disputed provision, a vote of no confidence was actually passed against the director in advance, and he was found not to fulfil the conditions for the office of director on the basis of the new content the work involved, and this also prejudiced, in violation of the principle of freedom of work of Article 49 of the Constitution, the decision concerning him as a possible candidate at the competition, since in such a case the Council of the RTV would only decide again on a candidate whom it already rejected in a procedure in which all criteria necessary for decision-making were absent and where the candidate had no procedural rights whatsoever.

6. In its request, the Supreme Court stated that it did not know how to use the disputed provision and that it could not examine the legality of the resolution which was passed on the basis of such provision. Such uncertainty concerning the use of the disputed provision is a sufficient proof of its deficiencies, which is why it fails to satisfy the requirements set before the legislator by the principle, according to which Slovenia is as a state governed by the rule of law.

The Constitutional Court joins the Supreme Court in the opinion that the disputed provision does not allow the examination of legality of the procedure and of actual circumstances, and the use of

substantive law which served as the basis for passing the resolution evaluated by the Supreme Court. For the Council had no criteria for its decision, and its decision was consequently arbitrary. The Constitutional Court does not agree with the opinion of the National Assembly, that voting in the Council of the RTV cannot be arbitrary. In its reply, the National Court itself states that the "RTSA does not prescribe any procedure for ascertainment of conditions applying to election, removal from office, approval of or refusal to approve the director-general, but leaves the matter to be regulated by the statutes of the RTV Slovenia (Article 26) or (as is the case with the temporary provision of paragraph 2 of Article 31) to be decided by the Council". Article 26 of the RTSA differs from the said content as summarised by the National Assembly in two respects: a) it leaves it to the statutes to regulate not only "the procedure for ascertainment of conditions" but also the prescribing of conditions for appointment and removal from office of director-general; and b) it only speaks about appointment and removal from office, but not about approval and refusal of approval. The consequences of negative vote with respect to approval are for the hitherto director-general equal to the consequences of removal from office. This is why the Constitutional Court agrees with the opinion of the National Assembly that the provisions of Article 26 of the RTSA should be applied, *mutatis mutandis*, also in the case of the institute of (refusal of) approval, which means that the conditions for such decision of the Council should be specified in advance and should not be left in the disputed provision to the decision of the Council, as is correctly established by the National Assembly. Because of such arbitrariness of decision-making the minimum procedural standards, which must be ensured by a democratic and law- governed state, were not respected.

7. In this connection the fact, that for a decision on the vote of (no) confidence to be reached a simple majority is prescribed by the disputed provision, cannot be overlooked.

There seems to be no reason why in a procedure concerning the refusal to approve the term of office, where no criteria are specified, the Council should decide by a simple majority, while in a meritorious procedure, in which the position of the injured party is precisely defined, decisions on appointment and removal from office are made, in accordance with paragraph 2 of Article 18 of the Act, by a majority of votes of all members. In this connection the Council may make decisions immediately after its constituting, that is, when two thirds of its members have been appointed (paragraph 5 of Article 17 of the Act). The possibility of the Council by secret ballot to pass seven votes of no confidence against the hitherto director-general cannot be deemed to be a suitable means for ascertaining whether "civil society" still has confidence in the director-general of the national television. In this connection the right to the vote of confidence is consummated by enforcement of the disputed provision, because similar voting is not provided for by statute in the event of subsequent changes in the composition of the Council.

#### B.-II.

1. The position and place of director-general of the RTV Slovenia, however, cannot be evaluated solely from the point of view of the regulation of the position of directors of public institutions by statute, but also with respect to special importance which a director-general has and ought to have in ensuring the freedom of the press, which is used herein to designate in a generic way the broader concept of the freedom of public media and, in this context, of electronic media in particular.

Slovenia is a democratic state (Article 1 of the Constitution). In the theory of democracy it is stressed that the efficiency of democratic processes depends in particular on (a) credible elections on all levels, which ensure the establishing of representative bodies of the state and local self-government in accordance with the will of the people, (b) on public control over legislative, judicial and executive powers, and (c) on recognized right to political opposition to those in power at each particular time. One of the key institutional conditions for efficiency of democratic processes is freedom of the press. Free press, which is independent with regard to authorities, helps in the development and formation of the public informed in unbiased way, it is the necessary condition for the ability of the latter to control all branches of power, and ensures efficient operation of political opposition to those in power at each particular time. By its operation, freedom of the press makes possible for political authorities in the State to act in a balanced way, and the control over bodies of state authorities.

In this connection the Constitutional Court points out to the duty of authorities of all branches in a democratic state, and in particular to the duty of the legislator, in the process of development of a democratic state to specially ensure freedom of the press and of each individual journalist. For this purpose it is necessary to ensure freedom of expression of individual persons, as well as the protection of freedom of the press as an institution. The responsibility of the State in ensuring and developing freedom of the press, including of radio and television, is especially important at the time of rebuilding of democratic institutions in the new Slovenian State, which has inherited numerous and strong elements of non-democratic political culture, which formed the constitutional and actual basis for the single-party authorities in the area of former Yugoslavia. This is why feelings of anxiety and fear with regard to authorities may still exist and may in the case of journalists find their expression in (self-)censorship, and in the case of the public in political apathy and alienation.

2. Article 21 of the RTSA prescribes the duties of the director-general of the RTV Slovenia. Among other things, he shall organize and direct the activities and business operations of the RTV, appoint heads of organizational units, coordinate the work of programme managers and heads of organizational units and decide any disputes between them, and shall also perform such other tasks as may be prescribed by the statutes. The director of the RTV must also give prior opinion concerning proposals for appointment of directors of radio and television programmes and programmes for minorities.

This is why the realization of statutory principles, on which the activities of public media are based, and, consequently, the respect for a fundamental constitutional right to freedom of the press, are dependant upon his work. It is for this reason impossible to conceive of freedom of the press and of journalists in the RTV without relative autonomy and professional independence of the director of the RTV in relation to the holders of social, economic and political power and to those in power at each particular time, represented in the Council as the administrative body. The required independence is of course legitimately limited by the way of electing the director of the RTV and by his public responsibility to exercise the public function in the public interest. But his autonomy and independence must be transparent and foreseeable. But such requirements are not fulfilled if the position of the director depends on the composition of the administrative body at any particular time, the distribution of political power in the "founder" of the institution at any particular time, or on formal changes which the latter may adopt at any time concerning the status of the institution.

#### B.- III.

It is not possible to agree with the claim of the proposer that the disputed provision is in conflict with Article 155 of the Constitution. The provision does not have retrospective effect, because it has applied since the date of its coming into force. Also, it does not encroach upon the accrued rights of individual persons. Appointment of a person to a management post, including the specification of the term of office and the possibility, stipulated by statute, of early removal from office, cannot be deemed to constitute an accrued right, which is protected against encroachment of the legislator in paragraph 2 of Article 155 of the Constitution.

#### C.

This Decision was made by the Constitutional Court on the basis of Articles 43 of the Law on the Constitutional Court in the following composition: Dr. Tone Jerovšek, President, and Dr. Peter Jambrek, Matevž Krivic, M.L., Janez Snoj, M.L., Dr. Janez šinkovec, Dr. Lovro šurm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič, the judges. The Decision was reached by six votes in its favour and three votes against it. Votes against were cast by the judges Krivic, šinkovec and Ude, who will prepare separate opinions.

P r e s i d e n t :  
Dr. Tone Jerovšek