

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Claudia Priewasser

Interference in a public-law contract by the legislator without justification – a violation of the principle of equality

Austrian Constitutional Court
Judgement of October 4th, 2004
B 953/03 ua, VfSlg. 17.313

Facts of the case

The two complainants held courses at the University of Vienna in the winter term 2000/2001 on the basis of teaching contracts (without having a permanent contract with the Federal state; "externe Lehrbeauftragte") and applied for the payment of compensation for examining some 300 candidates, each according to Section 4 of the Federal Act on the Remuneration for Teaching and Examining at Universities ("Bundesgesetz über die Abgeltung von Lehr- und Prüfungstätigkeiten an Hochschulen" hereinafter ALPG), in the version that was in force until 28 February 2001. At the end of January 2001 they were informed that Article 4 of the Act had been amended by the Finance Act 2001; therefore the remuneration system was to be changed so that in the future there would be no legal title to compensation for examining but that only particular services or particular stresses and strains were to be remunerated in the form of a premium. The complainants received a general remuneration for holding the courses according to Section 2 ALPG as well as special incentive premiums for examinations under the amended Section 4 ALPG which, as they argued before the Constitutional Court, were considerably lower than the remuneration under the previous provision would have been. The complainants' applications for payment of compensation for examining under the previous provision were eventually rejected by the Head of the University of Vienna as the competent administrative authority; their appeals were dismissed by the Senate of the University.

In their complaints to the Constitutional Court the complainants argued that the Senate of the University had failed to interpret the relevant legal provisions in accordance with the Austrian Constitution in applying the amended Act to their respective teaching contracts, thereby violating their constitutionally guaranteed right to equal treatment of all Austrian citizens. They claimed they had been obliged to examine candidates under the teaching contract without receiving adequate payment at a moment when they were in no position anymore to reduce the number of participants of their courses. In their view Section 2 ALPG could not be interpreted as serving a basis for remuneration for examinations,

since the text of the provision only referred to remunerations for holding courses, nor would such an interpretation meet the requirements of the principle of equality since the time and effort involved in examining were left unconsidered. The complainants also saw a violation of the constitutionally guaranteed prohibition of forced labour and of their right to inviolability of property.

Relevant provisions

Federal Constitutional Law ("Bundes-Verfassungsgesetz", hereinafter B-VG)

Article 7 Para 1 reads:

"All nationals (Austrian citizens) are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability. The Republic (Federation, Laender and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of every-day life."

Federal Act on the Remuneration for Teaching and Examining at Universities ("Bundesgesetz über die Abgeltung von Lehr- und Prüfungstätigkeiten an Hochschulen" hereinafter ALPG), as in force until start of summer term 2001

Section 2 Para 1 reads:

"Compensation for examining.

Persons holding compulsory examinations as laid down in study regulations [...] and presiding in examining boards [...] are entitled to compensation."

Federal Act on the Remuneration for Teaching and Examining at Universities ("Bundesgesetz über die Abgeltung von Lehr- und Prüfungstätigkeiten an Hochschulen" hereinafter ALPG), as amended by Finance Act 2001 ("Budgetbegleitgesetz 2001", BGBl. I Nr. 142/2000, in force as of summer term 2001)

Section 2 Para 1 reads:

"Remuneration for teaching assignments.

Persons holding courses at a University, at the Academy of Fine Arts in Vienna or at an Art School on the basis of a remunerated teaching assignment [...] are entitled to remuneration. [...]"

Section 4 reads:

"Special incentive premiums.

The head of a University or an Art School may at the suggestion of the competent dean of studies accord a special incentive premium which shall be revocable at any time to university teachers having performed particular services in the course of their teaching or examining in a term or an academic year or having been exposed to particular stresses and strains in teaching or examining. Results of evaluation are to be considered in doing so".

Section 9 Para 8 reads:

"Sections 4 and 7 Para 5 as amended by Federal Act BGBl. I Nr. 142/2000 as well as the abrogation of Article 6 enter into force at the start of the summer term 2001."

The Ruling of the Austrian Constitutional Court

The Constitutional Court rescinded the decision of the Senate of the University of Vienna stating a violation of the principle of equality. It held that the authorities had wrongly assumed the amended version of the ALPG to be applicable to the examinations in dispute. The Constitutional Court acknowledged that from the moment the teaching assignments were awarded to the complainants they were obliged not only to give lectures but also to hold examinations for the participants of their courses and that this obligation inevitably extended beyond the term during which the courses were held. From the Court's point of view the complainants rightfully trusted that they were entitled to remuneration for teaching and in addition to compensation for examining in the amount laid down by law. The Finance Act was published on December 29th, 2000, so that the complainants could neither modify their courses with a view to reducing the number of participants nor conclude all examinations before the entry into force of the Act at the start of the summer term 2001.

The Constitutional Court abstained from determining the exact point in time when such interference in the conditions of the teaching assignment would exceed the limitations set by the principle of equality. The Court deemed the core of the unconstitutionality to be rooted in the mere fact that the complainants' legally established rights to remuneration had been eliminated without legally equivalent substitution while they were not in a position to align their services accordingly and that reasonable grounds of justification for this restriction could not be established. Therefore the fact that the complainants had received special incentive premiums to remunerate examinations conducted after the start of the summer term 2001 was without relevance for the case.

The Constitutional Court held that in the present case the relevant provisions of the ALPG in the version of the Finance Act 2001 were amenable to the interpretation that they did not apply to examinations which demonstrably pertained to courses held before the start of the summer term 2001. By applying the amended legal provisions to the teaching contract concluded between the University and the complainants in the previous winter term the University authority had therefore violated the principle of equality.

Assessment

This judgment is in line with the established jurisdiction of the Constitutional Court which deducts from the principle of equality that differentiations must be founded on reasonable grounds of justification. Both the administration and the legislature are equally bound by it. Although the legislator has a wide margin of discretion in defining political aims, any measures taken must adequately balance

the conflicting interests of the parties involved and allow for the protection of legitimate expectations. This applies particularly when interfering in an existing contractual relation whose conditions are regulated by law. In the present case, the legitimate aim to allow for a more flexible regulation of remunerations for examining could not justify the unilateral cutting of remunerations the complainants were to expect.

The Finance Act 2001 did not contain any provisions explicitly declaring it applicable or not to existing contracts. Accordingly, the Constitutional Court did not raise the question of constitutionality of the legal amendment as such, but found a violation of the principle of equality in so far as it was applied to the contractual relation in dispute between the University and the complainants by the administrative authorities.

- *Claudia Priewasser is scientific assistant at the Austrian Constitutional Court and is currently on maternity leave. For comments please write to claudia.priewasser@sbg.ac.at.*