



Strasbourg, 28 April 2014

CDL-JU(2014)003

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**“Co-operation of Constitutional Courts in Europe  
Current Situation and Perspectives”**

**Working Document  
for the**

**XVI<sup>th</sup> Congress of the Conference of  
European Constitutional Courts**



## THE BULLETIN

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*The Constitutional Court of Austria, currently holding the Presidency of the Conference of European Constitutional Courts, has asked the Venice Commission to produce a working document on the subject "Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives", chosen by the Conference of European Constitutional Courts for its XV<sup>th</sup> Congress in June 2014.*

*The Conference sub-divided the topic into three sub-topics, which are to show the various forms co-operation between the courts can take: (1) Constitutional Courts between Constitutional Law and European Law, i.e. co-operation between the highest national courts and the two European courts; (2) Interaction between Constitutional Courts, i.e. co-operation between the national courts themselves and (3) Interaction between European Courts i.e. co-operation between the European courts.*

*The subject of the XV<sup>th</sup> Congress is an interesting and topical one. Constitutional courts first appeared in the early twentieth century and have flourished in a great number of countries since. Whether they were introduced as specialised constitutional courts or councils or whether the jurisdiction of existing courts was extended to cover constitutional review, their classic role is to ensure the conformity of legislation with the constitution. This role has been extended over the years to furthering and strengthening human rights.*

*Although each country's constitution and history is different, constitutions generally concur on the principles of democracy, the protection of human rights and the rule of law. Legal arguments based on these principles can be easily transmitted from one jurisdiction to another. Courts increasingly cite judgments of foreign courts, some countries even expressly mandate their courts to consider international and foreign law. The Venice Commission is proud that one of the main goals of the World Conference on Constitutional Justice, that it helped set up, is to facilitate judicial dialogue between constitutional judges on a global scale and thereby encourage the mutual exchange of inspiration, which we refer to as "cross-fertilisation".*

*How does this cross-fertilisation work? Courts co-operate through dialogue. It can either be direct dialogue between the courts or indirect dialogue through other actors. The dialogue can either be bilateral or multilateral, relate to a specific topic of substance or result in a meta-discussion about the dialogue itself, such as the present Congress.*

*Co-operation and dialogue between national courts and the European courts, the first topic of the Congress, may sometimes appear difficult. This is due to the fact that, although sovereign equality and mutual respect are present, there is also an element of hierarchy of norms. The member states of the Council of Europe and the European Union are obliged to follow judgments rendered by the Strasbourg and Luxembourg Courts. But, national courts have ways of making themselves heard in particular during the process of executing these decisions.*

*Notwithstanding the obligation to follow European Law – and as a consequence the judgments of the European courts – it is far from being a one-sided dialogue. Sometimes national courts have a strong impact on the case-law of the European courts. One of the most cited examples is the Solange I case (1974) of the Federal Constitutional Court of Germany. The same is true with respect to judgments of the European Court of Human Rights and the relationship between that Court and national courts.*

*At the annual opening of the judicial year, the European Court of Human Rights itself provides an important forum for dialogue. Such events provide opportunities for judges to come together, whether in Strasbourg or in Luxembourg. Judges from the European courts often participate in conferences organised by national courts held on the anniversaries of their courts or constitutions. All these meetings provide an important occasion, often also during coffee breaks or social side events, to discuss outstanding issues in the relationships between the courts and to come closer and reach a common understanding. Such opportunities to meet and exchange information are even more important when relations are strained.*

*Good relations between national courts, the second topic of the Congress, are becoming increasingly important. The work of the Conference of European Constitutional Courts lies at the centre of a network that provides courts with the opportunity to exchange information on a variety of issues, both of substance and on the institutional setting of the courts. However, as set out above, it also provides a forum for national courts to reach a common ground on their positions in relation to the European courts. In Eastern Europe, the annual meetings of the Conference of Constitutional Control Organs of Countries of New Democracy regularly involve courts from Western Europe. A number of European Courts also participate in non-European regional or linguistic groups (French and Portuguese speaking courts, Ibero-American Courts, Asian Courts, etc.). This multilateral dialogue is complemented by an intense bilateral exchange of information, either occasionally or regularly, often between neighbouring courts. These meetings are useful for discussing issues that are common to almost all countries (e.g. issues such as bioethics), as well as in the relationship with European law.*

*The third topic of the Congress is on the relations between the European Courts, which are evolving substantially through the envisaged accession by the European Union to the European Convention on Human Rights. This is currently being examined by the Luxembourg Court. Since the Solange I case, the European Court of Justice has, de facto, applied the European Convention on Human Rights (Nold v. Commission). The entry into force of the Human Rights Charter has changed the setting because there are now two European catalogues of human rights and the need for co-ordination is more pressing than ever.*

*The Venice Commission tries to facilitate and foster this dialogue between judges in various ways. The Commission was convinced from the outset that it had to support constitutional courts and equivalent bodies in order to strengthen constitutionalism in its member states. Without strong constitutional courts, constitutions would remain mere declarations of intent, with no real value. Since 1993, the Commission has tried, through its Joint Council on Constitutional Justice, to bridge the language barrier between the courts by publishing the Bulletin on Constitutional Case-Law and its database CODICES. The Commission set up a confidential platform in 1997 known as the Venice Forum, where courts can ask questions on current issues to other courts and can quickly obtain information from*

them or from the Commission's Secretariat. The Venice Commission is also increasingly invited by constitutional courts and by the European Court of Human Rights to provide *amicus curiae* briefs, which provide views on comparative and European law, without giving a reply on the issue of constitutionality. The Venice Commission also co-organises and participates in a number of conferences hosted by constitutional courts, contributing to the discussions. All these tools are costly, but the Venice Commission is convinced that they are important in order to enable a substantial dialogue to take place between the courts that will strengthen constitutionalism and, as a result, the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law.

The aim of this working document is to present the case-law of constitutional courts and equivalent bodies on the above-mentioned topics of the XV<sup>th</sup> Congress, following the usual design and layout of the Venice Commission's Bulletin on Constitutional Case-Law.

The co-operation of Constitutional Courts in Europe was the topic of a questionnaire prepared by the Conference of European Constitutional Courts, the answers to which can be found on the web-site of the Conference, ([www.vfgh.gv.at/cms/vfgh-kongress/en/index.html](http://www.vfgh.gv.at/cms/vfgh-kongress/en/index.html)).

This working document contains judgments that have already appeared in regular editions of the Bulletin on Constitutional Case-Law, some of which have been reedited by the constitutional courts' liaison officers for this publication, and it also contains judgments that have not yet been published in the Bulletin but were considered to be relevant by the liaison officers. As with previous working documents, this issue contains contributions from members of the Conference of European Constitutional Courts as well as those from all courts participating in the Joint Council on Constitutional Justice, including non-European members and observers of the Venice Commission.

This working document will be published in the collection of Special Bulletins on Leading Cases, as was done with the working document on freedom of religion and beliefs, requested by the Constitutional Tribunal of Poland for the XI<sup>th</sup> Conference of European Constitutional Courts in Warsaw on 16-20 May 1999, the document on the relations between constitutional courts and other national courts, including the interference in this area of the action of the European courts, requested by the Belgian Court of Arbitration for the XII<sup>th</sup> Conference on 13-16 May 2002, the document on the criteria for the limitation of human rights, requested by the Supreme Court of Cyprus for the XIII<sup>th</sup> Conference on 15-19 May 2005, the document on Legislative Omission requested by the Constitutional Court of Lithuania for the XIV<sup>th</sup> Conference on 3-6 June 2008 and the document on Constitutional Justice: functions and relationships with other public authorities, requested by the Constitutional Court of Romania for the XV<sup>th</sup> Conference on 23-27 May 2011.

This working document will also be incorporated into the Venice Commission's database of constitutional case-law ([www.CODICES.coe.int](http://www.CODICES.coe.int)) which contains all the regular issues and special editions of the Bulletin on Constitutional Case-Law, full texts of decisions, constitutions and laws on the constitutional courts, comprising about 8000 précis and 10000 full texts.

**T. Markert**  
Director, Secretary of the European Commission for Democracy through Law



## **THE VENICE COMMISSION**

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**The European Commission for Democracy through Law**, better known as the **Venice Commission**, has played a leading role in the adoption of constitutions in Central and Eastern Europe that conform to the standards of Europe's constitutional heritage.

Initially conceived as an instrument of emergency constitutional engineering against a background of transition towards democracy, the Commission since has gradually evolved into an internationally recognised independent legal think-tank. It acts in the constitutional field understood in a broad sense, which includes, for example, laws on constitutional courts, laws governing national minorities and electoral law.

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 47 member States of the organisation and working with some other 14 countries from Africa, America, Asia and Europe.

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United Kingdom ..... J. Sorabji  
United States of America ..... P. Krug / C. Vasil  
..... / J. Minear

European Court of Human Rights ..... A. Vilfan Vospernik / L. Pardoe  
Court of Justice of the European Union ..... R. Meyer / S. Hackspiel  
Inter-American Court of Human Rights ..... J. Recinos

Strasbourg, April 2014

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# **CO-OPERATION OF CONSTITUTIONAL COURTS IN EUROPE**



## **CHAPTER I**

### **CONSTITUTIONAL COURTS BETWEEN CONSTITUTIONAL LAW AND EUROPEAN LAW**



# Albania

## Constitutional Court

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### Important decisions

*Identification:* ALB-2002-1-006

a) Albania / b) Constitutional Court / c) / d) 25.04.2002 /  
 e) 76 / f) Dismissal of the General Prosecutor / g)  
*Fletorja Zyrtare* (Official Gazette), 13, 395 / h)  
 CODICES (English).

*Keywords of the systematic thesaurus:*

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State.**

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.18 General Principles – **General interest.**

4.4.3 Institutions – Head of State – **Powers.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.7.4.3.6 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Status.**

5.3.13.9 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public hearings.**

*Keywords of the alphabetical index:*

Constitutional Court, jurisdiction, limits / Decree, president, duty to oversee constitutional mechanisms / Dismissal, proceedings, right to defend oneself / Prosecutor, responsibility.

*Headnotes:*

The President of the Republic is the competent body charged by the Constitution to perform a verification from the constitutional viewpoint, of the grounds and procedures followed by Parliament for the dismissal of the General Prosecutor.

However, each body exercising public power is obliged to respect the generally accepted democratic standards guaranteed by the Constitution. The dismissal of the General Prosecutor from office is unconstitutional insofar it has been carried out in contradiction to the constitutional principle of due process of law. The Parliament considered all the accusations directed against the appellant as true, relying only on the discussions of the deputies, without giving arguments for concrete violations, without properly notifying the appellant of the content of the material containing charges against him, and without giving him the necessary time to prepare his defence and the chance to be heard.

*Summary:*

The Constitutional Court was petitioned by the General Prosecutor, who claimed that the decision of the Assembly and the decree of the President of the Republic for his dismissal from office were based on unconstitutional grounds. The appellant claimed the decision of the Assembly and the decree of the President of the Republic had been adopted as a consequence of an unfair court trial.

From the very beginning, the Constitutional Court expressed its legitimacy to review the case arguing that it is within its authority to review the application of the General Prosecutor, who, after being discharged from duty, presents himself as an individual. The Constitutional Court noted that it exercises constitutional control only over the implementation of the fundamental principle of the due process of law. The interested subject's claimed that not all legal remedies have been exhausted, which is a fundamental condition for the review of the case by the Constitutional Court, this was rejected by the Court since the decree of the President is indissolubly linked with parliamentary procedures. Thus, the dismissal is not a simple administrative act that can be reviewed by the ordinary courts.

The Constitutional Court noted that Parliament, during the procedure followed for the dismissal of the General Prosecutor from office, failed to comply with the democratic standards guaranteed by the Constitution. The Court underlined that Parliament was not hindered from adopting constitutional or legal rules establishing a procedure which respects the constitutional principle of due process for the dismissal from office of the General Prosecutor. Even the President of the Republic concurred with these violations because he signed the decree of the decision of dismissal. His duty as the representative of the people is to oversee the normal functioning of constitutional mechanisms, intervening to eliminate deficiencies in this respect.

The Decree of the President and the decision of the Assembly are limited to each other as an indivisible process. The Constitutional Court ascertained the alleged unconstitutionality of the discharging procedures, and asked Parliament to re-examine the case in conformity with the constitutional principles of due process of law.

Justice K. P. did not agree with the majority opinion for the following reasons: the office of the prosecutor is not a part of the judicial system. The Constitution has regulated its functioning, and has made the distinction between the method of dismissal of a judge and that of a prosecutor. The General Prosecutor enjoys a special protection as compared to the other bodies and the Constitutional Court should not equate the procedures of his dismissal to those relating to the judges of the Constitutional or Supreme Court. Furthermore, according to Articles 128 and 140 of the Constitution, the Constitutional Court makes a "fundamental judgment" deciding on the dismissal or maintenance in office of some senior functionaries whereas for the General Prosecutor the decision of the Assembly is not examined by the Constitutional Court, but by the President of the Republic. That is why the Constitutional Court cannot investigate whether the grounds exist or not, as this does not fall under its authority. Finally, the public post is not a constitutional right and the appellant's claims about non-observance of the principle of due process cannot be treated as such by the Constitutional Court, because the dismissal from the public posts does not infringe the constitutional rights foreseen by Article 131.f of the Constitution. In conclusion, Justice K. P. was convinced that the verification of procedures of dismissal of the General Prosecutor did not fall under the authority of the Constitutional Court, since there was not an unfair court trial from the constitutional point of view.

Justice P. P. did not agree with the majority opinion holding that the application should not have been reviewed by the Constitutional Court for the following reasons: the position of prosecutors differs from that of judges, and thus the method of their dismissal from office too. In the case of dismissal of the General Prosecutor, contrary to the dismissal of the judges of the Constitutional or Supreme Court, there is no possibility of an appeal against the procedures of dismissal to the Constitutional Court. In practice, the application was submitted by an official, since he requested his return to office. That is why it could not be reviewed in the context of due process, which is guaranteed only to individuals.

The rights that fall under the protection of due process are of a substantial nature and not of a procedural one. For this, the affected person should address himself to the Court of first instance. With regard to such cases, it

has been noted by the European Court of Human Rights in the *Pellegrin v. France* case, that the only disputes exempted from the sphere of activity of Article 6.1 ECHR are those raised by public officials as far as they act as a public authority protecting the general state interest or other public authorities' interests. From this point of view, the application of General Prosecutor should not be treated according to Article 42 of the Constitution, which guarantees the respect for due process.

#### *Supplementary information:*

See information related to decision *Bulletin* 2002/1 [ALB-2002-1-005].

#### *Cross-references:*

European Court of Human Rights:

- *Pellegrin v. France*, no. 28541/95, 08.12.1999, *Reports of Judgments and Decisions* 1999; *Bulletin* 1999/3 [ECH-1999-3-009].

#### *Languages:*

Albanian, English (translation by the Court).



# Argentina

## Supreme Court of Justice of the Nation

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### Important decisions

*Identification:* ARG-1998-2-010

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 13.08.1998 / **e)** C.1292.XXVIII / **f)** Cauchi, Augusto s/ extradición / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), Volume 321 / **h)**.

*Keywords of the systematic thesaurus:*

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

*Keywords of the alphabetical index:*

Extradition / Trial *in absentia* / International public order / American Convention on Human Rights.

*Headnotes:*

Argentinian international public policy, fortified by the principles set forth in the constitutional treaties on human rights, refuses to accept applications for the extradition of defendants who have been convicted *in absentia* in another State in cases where: a. the individuals prosecuted were not notified of the charges and had no opportunity to attend or to be publicly heard at the trial; b. the applicant State has given a final decision *in absentia* which, owing to the exceptional nature of the decision and the limited possibilities for review, fails to ensure the right to a

fair retrial, at which the accused would be present and his or her rights protected.

*Summary:*

Italy had applied for the extradition of an individual convicted *in absentia*.

The Court held that the individual in question had left Italy before being notified of the charges and that there was no evidence that these charges had been communicated to him.

The Court further ruled that according to the usual practice accepted by Italy and Argentina, failure to appear for trial had been excluded from the extradition treaty dating from the late nineteenth century, and that the new treaty does not stipulate otherwise.

During the deliberations, the decision was adopted by a majority of five judges – one of whom submitted a separate opinion; three judges submitted dissenting opinions on the ground that, according to the evidence produced, the individual concerned was responsible for his failure to appear; one of the judges, whilst concurring with the opinion of the majority, held that the case ought to be adjourned in order that Italy might send all the documents required in order to render the extradition application compliant with the conditions specified in point b. of the headnotes above.

*Supplementary information:*

The American Convention on Human Rights and the International Covenant on Civil and Political Rights of 1966 rank alongside the Constitution in the hierarchy of legal rules (Article 75.22 of the Constitution).

*Cross-references:*

- N.1.XXI. *Nardelli, Pietro Antonio s/ extradición*, of 05.11.1996, where it cited Article 14.3.d of the International Covenant on Civil and Political Rights of 1966;
- Article 8.1, American Convention on Human Rights;
- Report no. 2/92, Case 10.289, of 04.02.1992 of the Inter-American Commission on Human Rights.

*European Court of Human Rights:*

- *Colozza v. Italy*, 12.02.1985, on Article 6 ECHR, *Special Bulletin – Leading cases ECHR* [ECH-1985-S-001];

**Languages:**

Spanish.



**Identification:** ARG-2000-3-010

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 19.09.2000 / **e)** G.653.XXXIII / **f)** González de Delgado, Cristina y otros c. Universidad National de Córdoba s/ amparo / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 323, 2659 / **h)** CODICES (Spanish).

**Keywords of the systematic thesaurus:**

2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law**.

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities**.

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

**Keywords of the alphabetical index:**

Education, policy / School, choice.

**Headnotes:**

The right to learn recognised by the Argentine Constitution does not entitle parents to demand the continued provision of separate schools for male and female pupils.

**Summary:**

A group of parents of regular pupils at a secondary school attached to a national university brought an *acción de amparo*, seeking to stop the board from turning the school, which traditionally admitted boys only, into a co-educational establishment. Among other arguments, they claimed that teaching geared to boys was the kind best suited to their sons' natures and

personalities, and that the contested change would radically alter this situation. The application was rejected at first and second instance, and the parents finally brought an extraordinary appeal in the Supreme Court, which also dismissed it.

The Supreme Court found, first, that there was nothing in the relevant legislation to prevent the authorities from taking what they regarded as legitimate decisions on education policy, even where these affected a school's internal regime. It then pointed out that, under Article 75.19 of the Constitution, the universities were self-governing.

Second, it was not for the courts to consider the expediency or merits of administrative decisions which lay with the government and the self-governing universities; they could merely review the lawfulness of such decisions.

Parents had a natural and primary role in their children's education, and so had a legal right to choose a school consistent with their philosophical, ethical or religious beliefs; as members of the educational community, they were also entitled to participate in that school's activities. However, they were not entitled to determine the educational policy of schools, which was solely a matter for those responsible for running them.

Nor did the constitutional right to learn cover the pupils' interest in having an unchangeable curriculum.

Five judges gave separate concurring opinions, in which they referred to the principle of equality and to the status of women, and also to the Universal Declaration of Human Rights of 1948, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights of 1969, the International Covenant on Civil and Political Rights of 1966, the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child of 1989. One of these opinions referred to Article 14 ECHR, the Judgment given by the European Court of Human Rights in the *Abdulaziz, Cabales and Balkandali* case on 28 May 1985 (*Special Bulletin – Leading cases ECHR* [ECH-1985-S-002]) and leading cases of the Supreme Court of the United States.

**Supplementary information:**

An *acción de amparo* is an application for judicial protection in respect of blatantly arbitrary or unlawful acts or failures to act which may, at the time or in the near future, infringe, restrict, alter or jeopardise rights recognised in the Constitution, a treaty or a law (see also *Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social, Estado National s/ amparo, Bulletin 2000/3* [ARG-2000-3-008]).

**Languages:**

Spanish.



**Identification:** ARG-2006-3-002

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 21.11.2006 / **e)** A. 2036. XL / **f)** Asociación Lucha por la Identidad Travesti – Transexual v. Inspección General de Justicia / **g)** *Fallos de la Corte Suprema de Justicia de la Nation* (Official Digest), 329 / **h)** CODICES (Spanish).

**Keywords of the systematic thesaurus:**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.22 General Principles – **Prohibition of arbitrariness.**

5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law.**

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

**Keywords of the alphabetical index:**

Association, registration, refusal / Transsexual, recognition / Association, common benefit.

**Headnotes:**

The phrase “useful purposes” mentioned in the Constitution in the context of the exercise of the right of association applies to any voluntary group seeking, by peaceful means and without incitement to violence, to pursue any objectives and claims which, in keeping with the principles of the democratic system, neither offend against public order and morality nor cause definite and tangible harm to the property or interests of third parties.

Norms which rank below constitutional level must be interpreted in the light of the Constitution.

“Common benefit” is not an abstract, impersonal term. It does not imply a distinct collective spirit or less still whatever the majority deems common, to the exclusion of minorities. It simply means benefit common to all persons, often with divergent interests, especially in modern society, which is of necessity pluralistic, that is, composed of persons with very different preferences, world views, interests and projects.

**Summary:**

The Court of Appeal, ruling in a civil case, had dismissed an appeal brought by the Association for the Defence of the Identity of Transvestite Transsexuals against an administrative decision which withheld the authorisation it required to function as a legal entity under the terms of Article 33 of the Civil Code. The association had filed an extraordinary appeal before the Supreme Court, which set aside the impugned judgment.

The Court held firstly that this judgment had prejudiced the association. It could operate at the level of an ordinary civil association, but it was deprived of the rights which accrue to authorised associations (for example the capacity to receive inheritances, legacies or gifts).

The Court also found that if limits are placed on the exercise of the right of association, there is a risk that certain social groups, particularly those whose effective integration into the community proves difficult, may be denied reasonable means of resolving conflicts, means which the State must preserve and encourage. Thus the way in which freedom of association is upheld by the legislation, and especially practised by the authorities, is one of the surest signs of democracy’s institutional soundness.

The Court stressed that Article 14 of the Constitution secures to “all inhabitants of the Nation” the right “to associate for useful purposes”. At the very core of constitutional rights is respect for human dignity and freedom, and the structural rule of a democratic lifestyle is founded on a society’s ability to resolve its conflicts by having ideas debated in public. Consequently, the “useful purposes” mentioned in the Constitution are ascribed to any voluntary group seeking, by peaceful means and without incitement to violence, to pursue any objectives and claims which, in keeping with the principles of the democratic system, neither offend against public order and morality, nor cause definite, tangible harm to the interests and property of third parties. The extent of pluralism, tolerance and understanding prompts the argument that any right of association is constitutionally expedient, in so far as this enhances respect for the opinions of others, even opinions which one finds repugnant or with which one

disagrees. This concept of expediency relates to a lawful and harmless social goal.

Norms ranking below constitutional level are to be interpreted in the light of the Constitution. The foregoing will, accordingly, have an impact on the validity of the interpretation of Article 33 of the Civil Code which requires associations to have the “common benefit” as their principal objective, if the status of legal person is to be conferred. This means that associations cannot be excluded on the basis of pursuing a benefit peculiar to their members or to those who share their ideas. There are few associations of which this is not true.

“Common benefit” is not an abstract, impersonal term. It does not imply a distinct collective spirit or less still whatever the majority deems common, to the exclusion of minorities. It simply means benefit common to all persons, often with divergent interests, especially in modern society, which is of necessity pluralistic, that is, composed of persons with very different preferences, world views, interests and projects.

The Argentine Republic has not been unacquainted in the past with the prejudices that exist towards sexual minorities – based on racist ideologies and false assertions, the universal historical precedents for which have had well-known and terrible consequences, including genocide, and indeed the type of persecution now taking place in widespread parts of the world, giving rise to the development of movements claiming rights linked with human dignity and with basic respect for freedom of conscience.

Furthermore, it is virtually impossible to misconstrue the goal of common benefit so as to exclude an association which aims to extricate a group of people from an existence on the margins of society, fostering improvement of their quality of life and their standards of physical and mental health, while avoiding the spread of infectious diseases, thus improving their life expectancy and access to medical and social facilities.

In short, the administrative decision increased the requirements to be met before the status of legal personality could be conferred, by requiring the appellants to prove that this was necessary to achieve their aims, plain utility or convenience being deemed insufficient. Moreover, the Court of Appeal held that defence or assistance of persons on the grounds of their transvestism or transsexualism corresponded to no more than a self-seeking benefit. Both decisions placed restrictions on common benefit to the disadvantage of the appellant association which was denied legal personality, not because its aim was to improve the situation of a certain group in need of assistance (an aim shared by numerous legal entities), but because the assistance was directed at the

transvestite transsexual group. In other words, the sexual orientation of the social group to which the members of the association belonged had carried decisive weight in the decision to withhold the legal personality requested.

The Court recalled the previous decision relating to the principle of equality before the law under Article 24 ACHR (American Convention on Human Rights). The Inter-American Court of Human Rights held:

“The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterise a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.” (Advisory Opinion OC- 4/84, of 19 January 1984, paragraph 55).

Under Articles 16, 75.22 and 23 of the Constitution and Article 24 ACHR, differentiated treatment for any one organisation cannot be justified solely by what is deemed fitting by administrative officers, since at the very least a reasonable connection between a given State purpose and the measure in question is required (Article 30 ACHR). This requirement was not fulfilled in the present case, for the reasons set out above.

#### *Supplementary information:*

In the last paragraph of the summary, the Court abandoned the opposite stance, which it had earlier adopted by majority, which had been taken by other courts in a 1979 precedent. The Court also relied on the Judgment in the case of *Gorzelik and others v. Poland*, Reports of Judgments and Decisions 2004-I of the European Court of Human Rights of 17 February 2004 (paragraphs 89/92); Bulletin 2004/1 [ECH-2004-1-001].

#### *Languages:*

Spanish.



# Armenia

## Constitutional Court

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### Important decisions

*Identification:* ARM-2004-3-005

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 17.09.2004 / **e)** DCC-508 / **f)** On the conformity with the Constitution of obligations set out in the Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

5.2 Fundamental Rights – **Equality.**

*Keywords of the alphabetical index:*

ECHR, Protocol no. 12, conformity with the Constitution / Discrimination, definition.

*Headnotes:*

The obligations assumed by Armenia upon ratification of Protocol no. 12 ECHR are compatible with the Constitution, as the Protocol established an international legal mechanism for the realisation of the principle of equality and non-discrimination as enshrined in Articles 15 and 16 of the Constitution, as well as for the realisation of the implementation of the guarantee set out in Article 4 of the Constitution.

*Summary:*

An application was lodged by the President of the Republic requesting the Constitutional Court to consider whether the obligations set out in Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms were in conformity with the Constitution.

Article 14 ECHR provides for a general rule prohibiting discrimination. Article 1 Protocol 12 ECHR guarantees additional protection against discrimination. The Protocol requires the Contracting Parties to secure without any discrimination the enjoyment of not only the rights and freedoms set forth in the Convention, but also those provided for by their national legislation. By virtue of Article 1.2 of Protocol 12, everyone is

protected against any form of discriminatory treatment by any public authority.

By ratifying Protocol no. 12, Armenia assumed an obligation to secure the enjoyment of the rights and freedoms determined by its national legislation, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Armenia is also obliged to secure that no public authority will treat anyone in a discriminatory manner.

The Constitutional Court considered it necessary to mention in its decision, that the content of the concept "discrimination" had been determined and interpreted in the case-law of the European Court of Human Rights. According to the European Court of Human Rights, not every distinction or difference of treatment amounts to discrimination. Particularly, in its judgment of 28 May 1985 on the case *Abdulaziz, Cabales and Bakandali v. the United Kingdom*, the European Court stated: "a difference of treatment is discrimination if it has no objective and reasonable justification, that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the measure employed and the aim sought to be realised'".

*Cross-references:*

European Court of Human Rights:

- *Abdulaziz, Cabales and Bakandali v. the United Kingdom, Special Bulletin – Leading cases ECHR [ECH-1985-S-002]*, Vol. 94, Series A.

*Languages:*

Armenian.



*Identification:* ARM-2009-2-004

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 30.06.2009 / **e)** DCC-810 / **f)** On the conformity with the Constitution of Articles 12 and 14 of the Law on Rules of Procedure of the National Assembly / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

**Keywords of the systematic thesaurus:**

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**

4.5.3.4.3 Institutions – Legislative bodies – Composition – Term of office of members – **End.**

**Keywords of the alphabetical index:**

Election, proportional representation.

**Headnotes:**

In the type of proportional electoral system where electors vote for a political power on the basis of the agenda and programme outlined in its public manifesto, without expressing a separate view on the persons proposed by the proportional voting lists, the political entity is the bearer of the political power delegated by the people. Within this type of electoral system, the people's confidence is based on the political entity and the manifesto it has put forward rather than personalities.

Any alteration of the proportion of political power in Parliament in pursuit of concrete interests and the political balance established in the legislative body by declaration of the will of the people is inconsistent with fundamental principles of democracy and cannot therefore be deemed lawful.

**Summary:**

Members of Parliament challenged the constitutionality of the provisions of Articles 12 and 14 of the Law "Rules of Procedure the National Assembly" in an appeal submitted to the Constitutional Court. The applicant pointed out that the lack of constitutionality of the above provisions was manifested in the lack of a norm stipulating that if a deputy retired from or was expelled from a particular party, this could be the basis for terminating his or her mandate, gained by election through the proportional electoral system.

The applicant noted that although Article 66 of the Constitution rejected the imperative mandate institute, in cases where the general principle of exercising the people's power through elected officials under Article 2 of the Constitution has been breached, it becomes necessary to stipulate in legislation the circumstance of the retirement of a Deputy from a faction as a basis for the termination of his or her mandate.

The Constitutional Court noted the importance of the concept of a free representative mandate for the establishment of constitutional democracy in the country. However, it noted the existence of another

institute in international practice, which is linked to the imperative mandate institute but has a different legal meaning. This institute is the termination of the mandate as a result of changes to party membership.

The Constitutional Court evaluated the legitimacy of terminating a Deputy's mandate on the basis of changing the membership of the party in the context of a feature of the appropriate electoral system. Having analysed the law pertaining to elections, the Court noted that in the type of proportional electoral system where electors vote for a political power on the basis of the agenda and programme outlined in its public manifesto, without expressing a separate view on the persons proposed by the proportional voting lists, the political entity is the bearer of the political power delegated by the people. Within this type of electoral system, the people's confidence is based on the political entity and the manifesto it has put forward rather than personalities. Analysis of international practice demonstrates that within such electoral systems, the circumstance of leaving the party or changes to party membership pose a serious problem for modern democracies from the perspective of parliamentary stability and adherence to electors' votes. Such a practice leads to situations where voters' decisions are often subject to sweeping changes.

The Constitutional Court stated that the following steps were of relevance to the resolution of the issue:

1. a proper evaluation of the role and place of political parties in the political system of the country;
2. consideration not only of the technical and organisational specifics of majority and proportional electoral systems, but also their role in the establishment of political power and the holding and implementing of political responsibility;
3. emphasis on the need for and the role of the manifestos of political parties and politicians in clarifying the political trends of state development and illuminating electors' views on these matters in the process;
4. facilitation of the proper election of persons to whom voters have delegated the implementation of their rights over state authorities;
5. rejection of further authoritative influence over the parliamentary political proportion established as a result of the free manifestation of the people's political will and prevention of the establishment of a non-elected new proportion in favour with the authorities (especially in transitional countries);

6. consideration of the historical development of the essence and substance of termination of the mandate as a result of changes to party membership.

The Constitutional Court, in the light of the above, held that any changes to the proportion of political powers in parliament pursuing concrete interests and to the political balance established in the legislative body by the declaration of people's will is inconsistent with fundamental principles of democracy and cannot therefore be perceived as lawful.

The Constitutional Court found that within the framework of the electoral system in the Republic of Armenia, a Deputy who has attained his or her mandate due to voting for the party but whose name was not included in the ballot-paper and about whom voters have expressed no political will can only leave the parliamentary faction after voluntary vacation of his or her seat. Otherwise, he or she will facilitate the alteration of the proportion of political power in parliament, which changes the political balance established in the legislative body by the free manifestation of the political will of the people and runs counter to the fundamental constitutional principles of a democratic state under the rule of law.

The Constitutional Court declared the provision of Article 14.3 of the Law on the Rules of procedure of the National Assembly, allowing a Deputy to quit a faction by giving written notice to the head of the corresponding faction, to be inconsistent with the provisions of Articles 1, 2 and 7 of the Constitution and null and void in respect of Deputies who were not listed as candidates on the ballot papers to the extent that it facilitates the alteration of political balance established in the National Assembly by the free manifestation of the political will of the people.

#### *Languages:*

Armenian.



*Identification:* ARM-2011-2-002

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 12.07.2011 / **e)** DCC-983 / **f)** On the conformity with the Constitution of Article 55.4 of the Criminal Code / **g)** Tegekagir (Official Gazette) / **h)**.

#### *Keywords of the systematic thesaurus:*

4.8 Institutions – **Federalism, regionalism and local self-government.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

#### *Keywords of the alphabetical index:*

Crime victims / Confiscation of a property.

#### *Headnotes:*

As a corollary of the State's positive obligation to protect private property against others' illegal acts, the State is required to provide for an effective mechanism to compensate damage caused to victims by the commission of a crime.

#### *Summary:*

The applicants contended that the mechanism for the confiscation of property obtained through the commission of a crime, set forth in Article 55.4 of the Criminal Code, is not compatible with the Constitution as it neglects the legal interests of crime victims and does not provide a guarantee for the compensation of victims' damage as regards the confiscated property obtained through the commission of the crime.

The Constitutional Court considered the issue within the context of the state's positive obligation to protect private property against others' illegal acts, as well as the international obligations of the Republic of Armenia. Within that context, the Constitutional Court noted that the principle of inviolability of property not only supposes the owner's right to demand others not to violate his or her right to property, but also presumes the State's obligation to protect that property from others' illegal acts. In the context of this obligation the State is obliged to guarantee an effective mechanism for the protection of the property rights of the victims of crime and restoration of their damage.

At the hearing, the Constitutional Court emphasised the necessity to delineate the constitutional-legal content of both mechanisms: "the confiscation of property"; and "the confiscation of property obtained through the commission of a crime". Following systematic analysis of the legislation the Constitutional Court emphasised that these mechanisms differ fundamentally in that each institution has a different nature, purpose and objectives.

The "confiscation of property" is a type of alternative punishment, the application of which is within the discretion of the court. Where the "confiscation of

property" is imposed as a punishment, the object of the confiscation is the property legally owned by the convicted person. By contrast, the "confiscation of the property obtained through the commission of a crime" is a mandatory measure and is applied irrespective of the court's discretion, and its object is property that has been obtained as a result of a crime: as a rule that property belongs to the victims of the crime. The purpose of the first mechanism is to restrict the defendant's right to property, as a punishment, whereas the second mechanism aims to return the property obtained illegally and to restore the violated proprietary rights of victims. Taking into consideration these differences, the Constitutional Court stated that it is inadmissible to identify the mechanism of confiscation of property with the mechanism of confiscation of the property obtained through the commission of a crime; otherwise, the measure of confiscation illegally restricts the victim's right to property. The Constitutional Court also noted that the parallel application of these two mechanisms may not lead to legal collision or to priority of their application as they have different objects.

Within the State's positive obligations and the State's international obligations the Constitutional Court highlighted the necessity to ascertain whether the legislation stipulates any guarantee for the compensation of damages caused to victims by crime while enforcing the measure of confiscation of property obtained through the commission of a crime. Analysis of the legislation confirmed the existence of such guarantees: in particular such guarantees are set forth in Articles 119, 61, 59 of the Code of Criminal Procedure. However, the application of these guarantees in the law-enforcement practice has been prevented because of the absence of any condition in the challenged article concerning the recovery of the violated proprietary rights of victims in accordance with the said guarantees.

The Constitutional Court declared the challenged provision of Article 55.4 of the Criminal Code, in the interpretation given to it in the law-enforcement practice, unconstitutional and null and void, as it does not guarantee protection of the proprietary interests and property rights of victims of crime in the process provided for the confiscation of property obtained through the commission of a crime.

#### *Languages:*

Armenian.



#### *Identification: ARM-2011-3-003*

**a) Armenia / b) Constitutional Court / c) / d) 15.11.2011 / e) DCC-997 / f) On the conformity with the Constitution of Article 1087.1 of the RA Civil Code / g) Tegekagir (Official Gazette) / h) CODICES (English).**

#### *Keywords of the systematic thesaurus:*

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

#### *Keywords of the alphabetical index:*

Human dignity, insult, defamation / Compensation.

#### *Headnotes:*

Human dignity has primary importance to the free and guaranteed enforcement of a person's basic rights and freedoms. Legal restrictions on the implementation of these rights and freedoms should be proportional and emanate from the nature of democratic principles of international law and national legislation, which should not endanger basic human rights.

#### *Summary:*

I. The Human Rights Defender challenged the constitutionality of Article 1087.1 of the Civil Code, which concerns civil liability for insult and defamation. According to the applicant, provisions within the challenged Article caused legal uncertainty. Because the provisions did not clarify important regulatory terms, the ambiguity created conditions that may result in arbitrary and broad interpretation as well as application of the Article. The applicant posits that the Article fails to sufficiently specify the purpose of the compensation and the principles of the compensation application.

II. In this case, the Constitutional Court analysed the constitutionality of the challenged norms, respective international documents, legal positions of the European Court of Human Rights, and relevant legal and judicial practice of foreign countries. Based on the analysis, the Constitutional Court determined that the challenged provisions should be interpreted and implemented in the following:

- Any restriction of the right to freedom of expression must be defined by law, aim to protect legitimate interest and be necessary for ensuring the given interest.

- A person's honour, dignity or business reputation is protected from other persons' defamatory actions merely by civil regulation, and the expression "person" does not include state bodies as legal entities.
- The terms "defamation" and "insult" must be considered in the context of the existence of intention and an aim to defame a person.
- Material compensation cannot be defined for value judgments, which will restrict the fundamental right to freedom of speech in an unnecessary and disproportionate way because the media's role is more than reporting just facts: the media is obliged to interpret facts and events to inform society and promote discussions on issues important to it.
- The circumstance that media representatives are respondents cannot be considered as a factor to determine more severe responsibility.
- Domestic bodies' decision must be based on acceptable assessment of facts important to the case.
- One must apply an approach with particular reservation while applying material compensation for insult, considering that the European Court of Human Rights has repeatedly mentioned that tolerance and widely-diverse views are the basis of democracy and the right to freedom of expression protects not only generally acceptable speech but also expressions that may be viewed as thrilling, offensive and shocking.
- Regarding material compensation, its restriction on the freedom of expression should be properly considered, as well as possibility of legitimate protection of reputation through other available means.
- Non-material compensation shall be applied as a priority for the damage caused by defamatory expressions (actions). Material compensation must be restricted by reimbursing the immediate damage caused to a defamed person's honour, dignity or business reputation, and should be applied when non-material compensation is not enough to reimburse the damage.
- While deciding the legitimacy of compensation, the respondent's limited measures should be considered as a factor, his or her income should be taken into consideration, a disproportionate heavy financial burden that will make a crucial negative financial influence on his or her activity, should not be defined for the respondent.
- An applicant requiring material compensation for non-material damage should prove the existence of that damage.
- The maximum amount of compensation defined by law is applicable only in cases of existence of more serious and solid bases.
- Critical assessment of facts without factual context, the falseness of which is possible to prove, cannot be a ground for a compensation requirement. If a person's good reputation is violated, even if the incorrect information has been a value judgment, non-material compensation may be defined.
- While defining compensation, such factors should be taken into consideration as damage caused to feelings, absence of readiness of apologising.
- The circumstance of invoking the right to not discover a journalist's confidential sources of information deemed a public interest cannot be interpreted to the detriment of respondent while deciding the amount of compensation.
- Regarding politicians and people who hold public positions, publications regarding matters of public interest receive maximum protection; and regarding the amount of compensation, the applicant's status cannot be interpreted to the detriment of the respondent.
- It should be taken into consideration, whether extrajudicial forms of compensation, including volunteer or self-regulating mechanisms, have been supplicated and used to mitigate the damage caused to the applicant's honour and reputation.
- The parties should be granted a compulsory offer to come to peace and a contribution. While estimating the damage, the decision of conciliation should be observed as a mitigating circumstance.
- The right to protect the truth, the right to protect the opinion and the right to transmit other persons' speech should be publicly recognised.

The Constitutional Court decided that Article 1087.1 complied with the Constitution within the constitutional-legal content emanating from the legal positions expressed in the decision and international commitments undertaken by the Republic of Armenia.

#### *Languages:*

Armenian.



*Identification: ARM-2011-C-001*

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 15.07.2011 / **e)** / **f)** On challenging the decision N-62-U of the Central Electoral Commission of 25 February 2013 on electing the President / **g)** Tegekagir (Official Gazette) / **h).**

*Keywords of the systematic thesaurus:*

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**

4.7.2 Institutions – Judicial bodies – **Procedure.**

4.7.3 Institutions – Judicial bodies – **Decisions.**

*Keywords of the alphabetical index:*

Constitutional Court, decision, ordinary court, new circumstance, proceedings, reopening / Court, decision, reopening, grounds / Court, decision, legal basis, absence, reopening, grounds.

*Headnotes:*

New circumstances are a necessary and sufficient ground to start review proceedings. As a result of such proceedings the Court shall annul any judgment based on an unconstitutional norm and shall remove the legal consequences of the enforcement of norms recognised to be unconstitutional.

*Summary:*

I. The applicants challenged Article 426.9.1 of the Criminal Procedure Code, Article 204.33.1 and 204.38 of the Civil Procedure Code.

The applicants claimed that the disputed Articles let courts reject appeals as a result of the proceedings brought on the basis of new circumstances, thereby keeping in force judgment based on laws recognised to be unconstitutional. Besides, the challenged Articles do not recognise as a new circumstance the cases where the law had been enforced in contravention to the legal arguments expressed in prior decisions of Constitutional Court. The applicants also noted that, in practice, the statement "has been recognised unconstitutional" in Article 204.33.1 of the Civil Procedure Code only referred to those norms which lost their legal force from the moment the relevant decisions of Constitutional Court entered into force.

II. Investigating the practice of challenged norms and analysing the content and essence of the review proceedings of judgments on the basis of new circumstances, the Constitutional Court noted that a practice had developed, which contradicted the legal reasoning, which the Constitutional Court had expressed in its earlier decisions.

Incorrect enforcement of the disputed provisions was also based on a misunderstanding of the notions "proceeding of review" and "review of judicial acts". Highlighting the content of these notions and analysing the relevant principles of international law (e.g.

*restitution in integrum*), the Constitutional Court stressed when new circumstance arise, courts have a constitutional obligation to start review proceedings, aimed at restoring the persons rights.

The Constitutional Court also noted that the content of the notion "review of judgments" is equivalent to the content of the notion "repairing the case" or "reopening the case", and can be an effective measure for the protection of human rights purely if the case is being reviewed. Therefore, the Constitutional Court concluded that review of judgments based on law found to be contrary to the Constitution, shall lead to the reversal of those judgments.

On the issue of the courts' powers during the review proceedings, the Constitutional Court stated that the Court shall either reverse the act itself if the confirmed circumstances allow the new decision to be made without holding a new trial, or send the case to an inferior court for a new trial.

The Constitutional Court also discussed the content of the challenged clause that "has been recognised as unconstitutional" and noted that it certainly includes the cases where the norms found to be in breach of to the Constitution lose their legal force following the entry into force of the relevant decisions of the Constitutional Court.

Considering whether the enforcement of laws interpreted contrary to the relevant legal opinion of the Constitutional Court shall be treated as a new circumstance, the Constitutional Court recalled its prior legal opinion on this issue which are set out in Decision DCC-943. The Constitutional Court noted that those arguments also refer to the present case.

On the basis of the aforementioned legal arguments, the Constitutional Court found Article 204.33.1 of the Civil Procedure Code to be contrary to the Constitution and invalid. Article 204.38 of the Civil Procedure Code and Article 426.9.1 of the Criminal Procedure Code were found to be in compliance with the Constitution if interpreted in accordance with the reasoning of the Constitutional Court.

*Cross-references:*

European Court of Human Rights:

- *Papamichalopoulos v. Greece*, no. 14556/89, 24.06.1993;
- *Xheraj v. Albania*, no. 37959/02, 29.07.2008.

*Languages:*

Armenian.



*Identification:* ARM-2012-1-001

**a) Armenia / b) Constitutional Court / c) / d) 06.03.2012 / e) / f)** On the conformity with the Constitution of the provisions of the Law on State and Official Secret / **g) Tegekagir (Official Gazette) / h).**

*Keywords of the systematic thesaurus:*

**4.6 Institutions – Executive bodies.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

*Keywords of the alphabetical index:*

Right to information, exception / Secret, state / Secret, state, access to court.

*Headnotes:*

The right to freedom of expression includes, *inter alia*, the right to seek and receive information. The accessibility of public information is a vital prerequisite for democracy and for the transparency of state government accountable before the public. Simultaneously, this constitutional right is not absolute and is subject to restrictions under the Constitution. The correlation of this constitutional value with other constitutional values, particularly with state security, defines the nature of its possible restrictions. Meanwhile, the legal grounds for limitation of the respective freedom must satisfy the requirements of accessibility and preventability.

*Summary:*

I. The applicant stated that the challenged provisions of the Law on State and Official Secrets (hereinafter, the "Law") permit the definition of information as a state or official secret to be regulated by departmental acts of executive bodies. The challenged provisions authorise the executive bodies to compose and confirm extended departmental lists of the information that is subject to secrecy. The said departmental lists are also secret and

may not be published; thus the secret information is defined by a legal act which is also secret. The applicant claimed that as a result of such regulation this sphere of action of the public bodies remains beyond civil supervision, which contradicts the principles of the rule of law and of democratic society.

II. In its consideration of the constitutional debate the Constitutional Court emphasised the importance of the following legal issues:

- a. whether the realisation of the power of the executive bodies to define information as a state or official secret presumes a limitation of the freedom of information and whether the departmental lists of the information subject to secrecy are, *per se*, limitations of this freedom,
- b. whether the secrecy and non-public nature of the extended departmental lists of the information subject to secrecy are legitimate.

Based on a systemic analysis of the relevant legislation, the Constitutional Court held that the challenged Law precisely defines the notion "state secret". The Law sets down the scope of the information which may be defined as a state secret. The Law also stipulates the principles for defining information as a state secret. All these regulations enable to define the framework of limitation to the freedom of information. Accordingly, the Constitutional Court considered that the realisation of the constitutional principle that rights may be limited solely by law is guaranteed, as for the by-laws their function is to ensure the realisation of the requirements set forth in the law.

The Law enables the government to compose lists of information which is defined as a state secret by certain fields. These lists are ratified by the President and are public. The same Law allows the executive bodies to define the information as a state secret within their powers by means of departmental lists. These are called "extended departmental lists". The information which is to be included in these lists should be derived from the requirements of the Law. On this basis the Constitutional Court found that the detailed departmental lists of secret information composed in the manner prescribed by the Law, *per se*, may not limit the right to freedom of information. The limitations to the right are stipulated by the Law, and by setting down the power provided by the challenged provisions the legislature has not delegated its exclusive authority to define limitations to rights to the executive bodies, but authorises them to realise the limitations set forth in the Law.

As for the legitimacy of the non-public nature of the extended departmental lists the Constitutional Court held that according to the general logic of the Law the

limitations may be executed only as regards the information the dissemination of which may harm state security, whilst the extended departmental lists merely itemise the fields prescribed by the Law.

The Constitutional Court also stated that the secrecy of the departmental lists of the information subject to secrecy may lead to difficulties for people to predict the legal consequences of their actions, taking into account criminal liability for the dissemination of state and official secrets.

In connection with the nature of these lists the Constitutional Court considered just one exception, especially when the name of a particular item of information in the list, *per se*, may inevitably constitute a state secret by the fact of its engagement in the list, it may be defined as information the dissemination of which can lead to harmful consequences for state security and be defined as a state secret.

Based on the legal positions expressed in its decision the Constitutional Court recognised the debated provision which stipulates the secret and non-public nature of the extended departmental lists of the information subject to secrecy to be inconsistent with the Constitution and void, in so far as it does not refer to certain information subject to secrecy.

#### *Languages:*

Armenian.



*Identification:* ARM-2012-3-004

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 18.12.2012 / **e)** / **f)** On the conformity with the Constitution of the provisions of Judicial Code / **g)** Tegekagir (Official Gazette) / **h)**.

#### *Keywords of the systematic thesaurus:*

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.

#### *Keywords of the alphabetical index:*

Protection, judicial / Appeal / Proper response / Judicial power, Council of Justice.

#### *Headnotes:*

In legal practice, receiving a proper response within reasonable time is a constitutional right. Any ground that justifies the circumvention of this requirement, even if established by law, is without base, as the third part of Article 3 stipulates that the state is limited by the fundamental rights and freedoms of a human being and citizen as directly acting rights.

#### *Summary:*

I. The applicant challenged the sixth point of Article 111 and the first point of Article 158 of the Judicial Code. In accordance with Article 111, the decisions of the Council of Justice are not subject to appeal. For the applicant, the right to appeal is one of the elements of the right to access the court and the right to judicial protection. The Administrative Court, however, refused to admit the lawsuit concerning the decision of the Council of Justice. The applicant challenged the regulation, which allows the decisions of the disciplinary commission of the Council of Justice on refusal to initiate disciplinary proceeding to not be challenged. The applicant also noted that the Council of Justice is not included in the system of judicial bodies described by the Constitution; consequently, it is not endowed with the power to perform justice.

II. The Constitutional Court stated that the constitutionally defined notion of “proper response” not only assumes the form of the response or presence of it in general. It also means that the response shall be legitimate and with necessary justifications. In a legal state, this requirement may neither be circumvented by public officials, nor by state or self-government bodies, including the Disciplinary Commission of the Council of Justice.

Concerned with the constitutional status of the Council of Justice, the Court stressed that it is considered an independently acting subsystem, which has its definite constitutional functions in the sphere of guaranteeing the functional effectiveness of the judicial power. The Court also stated that the functions of the Council of Justice do not go beyond the realisation of the constitutional function of assessing the performance of the official obligations of the judges and the official usefulness of the judges.

As for the argument of the applicant, concerned with the expression of Article 158, which defines the Council of Justice as "acting as a court", the Constitutional Court found that this definition relates to the form of the activity of the Council, not to its functional role as a court performing justice.

Taking into account the prohibition of appealing the decisions of the Council of Justice, the Constitutional Court recognised that it is necessary to determine whether there are enough guarantees within the regulation for it to be considered legitimate. The Court stressed the presence of such guarantees, which are the following: the Council of Justice has a constitutional basis, the concrete scope of the authorities of the Council of Justice is stipulated by the Constitution, independence and impartiality are the principles of the activity of the Council of Justice, and the Council of Justice performs just, public consideration of the case in reasonable time.

Based on the aforementioned, the Constitutional Court recognised the expression "acts as a court" to be constitutional. The regulation on prohibition of appeal of the decisions of the Council of Justice was recognised to be constitutional within the constitutional content expressed in this decision. In accordance with it, the Disciplinary Commission of the Council of Justice is obliged to provide reasons for the refusal to initiate proceedings in case it rejects the applicants application.

#### *Languages:*

Armenian.



*Identification:* ARM-2012-C-001

**a) Armenia / b) Constitutional Court / c) / d) 16.10.2012 / e) / f) On the conformity with the Constitution of the provisions of Criminal Procedure Code / g) Tegekagir (Official Gazette) / h).**

#### *Keywords of the systematic thesaurus:*

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

#### *Keywords of the alphabetical index:*

Appeal, right / Appeal, time-limit.

#### *Headnotes:*

The Constitutional Court noted that the realisation of the right to an effective remedy through the appeal of a judgment from inferior courts depended on whether the interested person has access to the judgment in question, and on the length of time available to the interested person to bring an appeal. In this regard, the Court stated that the appellant should have access to the judgment in order to be able to ground the breach of material or procedural law and its effect on the outcome of the case.

#### *Summary:*

I. The appellant argued that the regulation on which the calculation of a time-limit for an appeal begins "from the moment of announcement" enshrined in the Criminal Procedure Code is not satisfactory. To the appellant, the Court legitimately announces only the final part of the judgment, but the calculation of the time-limit for any appeal starts from the moment it is pronounced. As a result, the time-limit begins to run when the appellant does not yet have the substantive part of the judgment, which includes the necessary data to make an appeal. This means that the appellant does not benefit from an effective right to appeal. The appellant also argued that the regulation according to which the application for an appeal of the decision on the rejection of the recognition of the time-limit for an appeal having been respected, shall be presented to the judge who made the decision.

II. The Constitutional Court considered whether the guarantee for the protection of the right to an effective remedy, enshrined in Article 380 of the Criminal Procedure Code concerning the consideration of whether the time-limit was respected, completely ensures this constitutional right. The Court stated that the legislator has endowed the courts with a broad discretion to determine whether the time-limit was respected or not. In this regard, the Court stated that the regulation does not ensure the realisation of the right to an effective remedy, as it leads to uncertainty. The Court also stated that in all those cases where the omission of a time-limit for an appeal is caused by reasons outside the appellants control, the courts shall recognise the time-limit as having been respected.

In connection with the constitutionality of the first and second parts of Article 380 of the Criminal Procedure Code, the Constitutional Court found that the legislative regulation, in accordance with which the application for

the appeal of the decision on the rejection of the recognition of the time-limit for an appeal being respected, shall be presented to the judge who made the decision, is within the discretion of the legislator. The Constitutional Court considered that the right to appeal the decision to be an essential guarantee of the regulation. In this regard, the Constitutional Court stated that the time-limit to bring an appeal against the decision on the rejection of the recognition of the time-limit being respected, shall begin at the moment the appellant received the judgment or from the moment the judgment is available to the addressee under the law.

The Constitutional Court noted that the calculation of a time-limit for an appeal from the moment of the pronouncement of the judgment, *per se*, is acceptable. Within this regulation the Article 402 of the Criminal Procedure Code, in accordance with which the judgment shall be sent to the participants of the procedure, is in systemic correlation with challenged norms, and the notion "is sent" shall be interpreted and implemented as "is handed".

#### *Cross-references:*

European Court of Human Rights:

- *Mamikonyan v. Armenia*, no. 25083/05, 16.03.2010.

#### *Languages:*

Armenian.



## Austria Constitutional Court

### Important decisions

*Identification:* AUT-1999-1-001

- a)** Austria / **b)** Constitutional Court / **c)** / **d)** 11.03.1999 / **e)** B 1159/98 et al. / **f)** / **g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

2.3.1 Sources – Techniques of review – **Concept of manifest error in assessing evidence or exercising discretion**.

3.22 General Principles – **Prohibition of arbitrariness**.

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.2 Fundamental Rights – **Equality**.

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**.

#### *Keywords of the alphabetical index:*

Detention, international zone / Movement, restriction / Immigration, unlawful.

#### *Headnotes:*

Departing from its earlier precedent the Court followed the legal arguments of the European Court of Human Rights, namely that in order to determine whether an individual has been "deprived of his liberty" within the

meaning of Article 5 ECHR, it is necessary to examine the actual situation and to take into account a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is merely one of degree or intensity, and not one of nature and substance.

Holding aliens in the international zone involves a restriction of liberty, but one which is not in every respect comparable to that experienced in centers for the detention of aliens who are to be deported. Such confinement, accompanied by suitable safeguards for persons concerned, is acceptable only in order to enable States to prevent unlawful immigration. Such detention should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty into a deprivation of liberty (see the *Amuur v. France* Judgment of 25.06.1996, *Reports of Judgments and Decisions* 1996-III, *Bulletin* 1996/2 [ECH-1996-2-011]).

The failure to ascertain the facts in a decisive question of (administrative) proceedings concerning aliens violates the right of equal treatment of aliens among themselves.

### *Summary:*

Three Indian citizens were refused leave to enter Austrian territory at Vienna airport as they could not present travel documents. According to Article 33.1 of the Alien Act (*Fremdengesetz*) they were requested to stay in the airport's transit area until the continuation of their journey. They had to stay 22 days in the airport's transit area and 6 days in a separate transit area (*Sondertransitraum*) which is actually a container-construction outside the airport building and – due to its exposed site close to hangar, runways and airplanes – under strict and constant surveillance.

Complaints were filed with the Court maintaining that amongst the violations of other constitutionally guaranteed rights, holding the complainants in the transit area had violated their right not to be deprived of their liberty (Article 5 ECHR).

Referring to earlier case-law the Court adhered to its legal opinion that the complainants were neither restricted in their freedom of movement nor deprived of other constitutionally guaranteed rights when being held in the airport's transit area. Their stay there was not based on the intention to restrict the complainants' liberty but on the intention to hinder them from entering Austria. The complainants were at all times free to leave Austria and to organise the continuation of their journey.

As for the complainants' stay in the separate transit area the Court stated that the authority had failed to ascertain any of those facts essential to determine whether the complainants had been deprived of their liberty according to the European Court of Human Rights' case-law quoted above. This neglect constitutes such a defect of proceedings that it encroaches on the right of equal treatment of aliens among themselves. The Court therefore overruled the impugned administrative decision.

### *Cross-references:*

Legal norms referred to:

- Article 5 ECHR.

### *Languages:*

German.



*Identification:* AUT-2003-2-002

- a)** Austria / **b)** Constitutional Court / **c)** / **d)** 28.06.2003 /  
**e)** G 78/00 / **f)** / **g)** / **h)** CODICES (German).

### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.19 General Principles – **Margin of appreciation.**

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**

### *Keywords of the alphabetical index:*

Child, born in wedlock, presumption / Presumption, legal, rebuttable / Paternity, right to establish, child / Family, definition, life, / Parentage, interest of the child.

**Headnotes:**

A child born during a marriage or before 302 days following the dissolution or annulment of a marriage is presumed to be a child born in wedlock. This presumption can only be rebutted by a court's decision declaring that a child does not descend from its mother's husband (§ 138.1 Austrian Civil Code; *Allgemeines Bürgerliches Gesetzbuch*).

Statutory provisions that entitle only the mother's husband to deny his paternity (by contesting the legal presumption of a child's legitimacy) or the public prosecutor where the mother's husband has died or his whereabouts are unknown contradict Article 8 ECHR.

Article 8 ECHR requires that at least the child concerned should be able to challenge this legal presumption and institute legal proceedings to have the parentage of its natural father determined.

**Summary:**

The mother of two children brought an action in a district court, challenging the legal presumption of her children's legitimacy. She had – while keeping her Austrian nationality – married a national of the Dominican Republic in 1994, given birth to her first child in November 1995 and to her second one in May 1999 (both born in Austria), and she had started divorce proceedings (which were not yet terminated). In her action, she maintained that it was not her husband – with whom she had had no contact since the beginning of 1995 and of whose whereabouts she had no knowledge – who was the father of her children, but another man whom she named.

The district court rejected the action for the formal reason that the plaintiff was not entitled to deny her husband's paternity or challenge the legitimacy of her children. On the basis of the mother's appeal, the Innsbruck Regional Court (*Landesgericht Innsbruck*) asked the Court to review the statutory provisions of the Austrian Civil Code that grant the right to bring an action (*locus standi*) challenging the legal presumption of a child's legitimacy exclusively to the (legal) father and the public prosecutor.

The Innsbruck Regional Court argued that such statutory provisions were not in conformity with Article 8 ECHR since they obstructed the legal recognition of an effective family life. In that respect, Austrian law would contradict Article 8 ECHR in a way similar to the way Dutch law did in the Judgment of the European Court of Human Rights in the Case of *Kroon and others v. the Netherlands* of 27 October 1994.

The Court first referred to the relevant case-law of the European Court of Human Rights, according to which the notion of "family life" in Article 8 ECHR is not restricted to relationships based on marriage but comprises also other *de facto* family ties (*Keegan v. Ireland*, Judgment of 26 May 1994 and the above-mentioned *Kroon Judgment*).

Due to the fundamental message of that case-law, a family unit exists between a child and its biological father from the moment of the child's birth. Thus, the State is obliged to act in a manner that this family tie can be developed and legal safeguards must be established which enable a child's integration into its family from the moment of its birth or as soon as possible thereafter. "Respect for family life" additionally requires that biological and social reality take priority over a legal presumption.

The Court noted that on the other hand the legal opinion of the European Court of Human Rights does not mean that *de facto* family ties between a child, its mother and her husband (the man legally presumed to be the father) enjoy a minor protection under Article 8 ECHR insofar as the State would have to allow a legal action (recognition of paternity) for a man regarding himself as the child's natural father, and thus enable him to enter existing family ties against the wish and to the disadvantage of everyone concerned (*Nylund v. Finland*, Judgment of 29 June 1999). Legal certainty, security of family and especially the interests of the child can justify interference within the meaning of Article 8.2 ECHR and even require under certain circumstances that such legal proceedings are not open to everyone.

Finally, the Court concluded that the priority of the legal presumption – in the case of non-existing family ties between the legal father, the child and the mother – over proven facts of existing ties between the child, the mother and the (alleged) natural father would fly in the face of the wishes of those concerned without actually benefiting anyone.

Where a protected family life under Article 8 ECHR cannot be disturbed, the respect for the existing family life under Article 8 ECHR requires that at least the child should be able to initiate legal proceedings by which the paternity of its biological (as opposed to the legal) father is determined in a legally binding way. The possibility of paternity proceedings being instituted by the public prosecutor cannot act as a substitute for this requirement. The fact itself that the child, who is the one who is most affected by this status-relationship, cannot deny the paternity of its mother's husband contradicts Article 8 ECHR. The Court therefore annulled all relevant provisions (§§ 156 to 158; parts of § 159) of the Austrian Civil Code and set a time-limit for their amendment.

### Cross-references:

#### European Court of Human Rights:

- *Keegan v. Ireland*, 26.05.1994, Series A, no. 290; *Bulletin* 1994/2 [ECH-1994-2-008];
- *Kroon and others v. the Netherlands*, 27.10.1994, Series A, no. 297-C; *Bulletin* 1994/3 [ECH-1994-3-016];
- *Nylund v. Finland*, no. 29121/95, 29.06.1999, *Reports of Judgments and Decisions* 1999-VI.

#### Languages:

German.



#### Identification: AUT-2003-3-005

- a) Austria / b) Constitutional Court / c) / d)** 03.12.2003 /  
**e) W I-14/99 / f) / g) / h)** CODICES (German).

#### Keywords of the systematic thesaurus:

2.2.1.6.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and domestic non-constitutional instruments**.

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

#### Keywords of the alphabetical index:

Worker, representative bodies, election / Election, candidate, foreigner.

#### Headnotes:

The striking of the names of five Turkish nationals from a list of candidates drawn up for an election to the general assembly of the chamber of workers for the *Land* of Vorarlberg in 1999 is contrary to the principle of non-discrimination on the grounds of nationality and thus unconstitutional.

Moreover, the composition of an electoral group's list might be of absolute relevance for the election results.

#### Summary:

The electoral group (*Wählergruppe Gemeinsam*) challenged the lawfulness of the elections on the ground that the names of five Turkish nationals had been struck from the list of candidates because they were not Austrian nationals. The electoral group alleged that the exclusion of the Turkish workers from eligibility violated the right not to be discriminated against as laid down in Article 10.1 of Decision no. 1/80 of the EU-Turkey Association Council.

It was under those circumstances that the Court made a reference for a preliminary ruling on the interpretation and the applicability of the Article 10.1 of Decision no. 1/80 to the European Court of Justice (hereinafter, the "ECJ") and on the compliance of the national law applied with Community law (see *Bulletin* 2001/1 [AUT-2001-1-001]).

In its Judgment of 8 May 2003, C-171/01, the ECJ ruled that the relevant Article 10.1 of Decision no. 1/80 established "a clear and unconditional principle" in the field of working conditions and remuneration that is "sufficiently practicable to be applied by national courts". Thus the article had direct effect, and the Turkish nationals concerned were entitled to rely on it.

Furthermore, the ECJ held that there was no reason to regard Article 10.1 of that Decision, which was drafted in terms almost identical to those of Article 48.2 of the Treaty, as having a scope other than that given by the ECJ to Article 48.2 in its Judgments ASTI I and ASTI II. In those two cases, the ECJ had ruled that the denial of the right to stand as a candidate for election to a body representing and defending the interest of workers, to which workers were compulsorily affiliated, was contrary to the fundamental principle of non-discrimination on the grounds of nationality. The ECJ concluded that national legislation excluding Turkish workers duly registered from eligibility for the relevant election was not to be applied.

Being bound by that ruling, the Court stated that the contested election was clearly unlawful. Thus, the only question left was whether the illegality had an effect on the election results. The Court affirmed that that was so. Consequently, the Court annulled the election as a whole.

**Supplementary information:**

The election of 1999 was, however, not repeated because the next election to the general assembly of the chamber of workers for the *Land* of Vorarlberg was scheduled for March 2004.

**Cross-references:**

Court of Justice of the European Communities:

- C-213/90 *ASTI* [1991] *European Court Reports* I-3507 (*ASTI I*);
- C-118/92 *Commission v. Luxembourg* [1994] *European Court Reports* I-1891 (*ASTI II*).

**Languages:**

German.

**Identification:** AUT-2005-3-001

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 30.09.2005 /  
**e)** B 1741/03 / **f)** / **g)** / **h)** CODICES (German).

**Keywords of the systematic thesaurus:**

1.5.6.2 Constitutional Justice – Decisions – Delivery and publication – **Time limit**.

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law**.

4.6.9 Institutions – Executive bodies – **The civil service**.

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

**Keywords of the alphabetical index:**

Civil servant, claim, pecuniary, civil right / Civil right, inner core.

**Headnotes:**

Disputes raised by public servants should not be classified as cases belonging to the inner core of civil rights but as cases that touch upon civil rights only in the effects they have. Article 6.1 ECHR is, however, applicable, insofar as such a dispute must be decided within a reasonable time.

**Summary:**

I. The claimant was head of clinic at the Krems public hospital. On 5 August 1991, he applied for pecuniary compensation in respect of those days when he was supposed to be on leave but ended up at work.

The Krems municipal authority rejected his claim on 30 September 1991. His appeal against this decision was dismissed by the Krems Municipal Council on 7 July 1993. The Administrative Court overruled parts of this decision on 29 June 1994. On February 1997 the Municipal Council of Krems once again dismissed the claimant's case. The Council's decision was overturned by the Administrative Court on 27 October 1999.

The matter was referred to the Municipal Council of Krems which eventually rejected the claim on 3 November 2003. The claimant then filed a complaint with the Constitutional Court, alleging infringement of his rights of equality, property and a fair trial, all of which are guaranteed under the Constitution. He pointed out that the proceedings commenced on 5 August 1991 and were still not finished, and argued that such a length of time was incompatible with the right enshrined in Article 6 ECHR to a hearing within a reasonable time. In his opinion, the case was not that difficult to determine and the delay was only caused by the administrative authorities.

II. The Court referred to previous jurisprudence to the effect that rights and obligations arising from public service are not to be regarded as rights and obligations within the meaning of Article 6.1 ECHR. The Court also cited more recent case-law from the European Court of Human Rights with a bearing on this legal question.

The European Court of Human Rights, in its judgment in *Pellegrin v. France* on 8 December 1999, *Bulletin* 1999/3 [ECH-1999-3-009], held that disputes raised by civil servants fall within the scope of Article 6.1 ECHR unless they are raised by public servants whose duties typify the specific activities of the public service insofar as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed

forces and the police. The European Court of Human Rights stated that it would henceforth seek to ascertain in each case whether an applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. In so doing, the Court would have regard, for guidance, to the categories of activities and posts listed by the European Commission in its communication of 18 March 1988 (published in *Official Journal of the European Communities* no. 72) and by the European Court of Justice (Judgment of 2 July 1996, C-473/93).

Having regard to this case-law – consolidated by the cases of *G. K. v. Austria*, (Decision of 14 March 2000) and *Volkmer v. Germany* (Decision of 22 November 2001) – the Court decided to adopt the legal opinion expounded by the European Court of Human Rights.

Applying this jurisprudence, the Court found that the claimant's work as head of clinic fell within the scope of Article 6.1 ECHR.

The Court turned to the question of the extent of the guarantees granted by Article 6.1 ECHR and its consistent jurisprudence in this area. Starting in 1987 the Court took the view that a tribunal must be established and must decide on their merits all those cases belonging within the inner core of civil rights. The Court also found that cases which are traditionally allocated to the ordinary civil courts may not subsequently be reviewed either by the Constitutional or by the Administrative Court as neither of them can be considered as a tribunal invested with full jurisdiction for the purposes of Article 6.1 ECHR. Cases within the inner core of civil rights might include compensation for damage by deer or damage caused by hunting, decisions on disputes as to the interpretation of contracts by an arbitration committee under the Social Insurance Act, the adequacy of a lease or compensation for expropriation.

The effects of some disputes may have an impact on civil rights even though the disputes themselves do not arise from civil rights. The administrative authorities may well preside over these disputes and they can subsequently be reviewed by the Administrative Court. Examples could be the grant or refusal of a building permit, a construction permit for a street, the cancellation of a pharmacy licence or the refusal of a permit to employ foreigners.

The Court examined all the precedents on this question and concluded that decisions on disputes raised by public servants are not to be classified as cases belonging to the inner core of civil rights. That is already

made evident by the appointment of a public servant through an administrative decree. Service in this context can therefore never be regarded from the point of view of the rights and obligations of citizens as between each other (Article 1 of the Civil Code) but only from that of a single person, the public servant, in relation to the sovereign State.

The Court also drew attention to the fact that Article 21.3 of the Constitution allocates the ultimate responsibility for the public service and its employees to the supreme administrative organs of the Austrian Federation and its member states. It would therefore be unconstitutional if a public servant could not appeal to the appropriate supreme authority.

The Court ruled that Article 6.1 ECHR did apply to this particular case in so far as the claimant was entitled to a decision "within a reasonable time". The Court found that the proceedings were not particularly complex – neither in terms of facts nor in terms of the legal questions which arose – and yet they lasted about twelve years. There was also a considerable period of inactivity after the Administrative Court's ruling, when it took about four years to obtain the decision of the Municipal Council of Krems. Article 6 ECHR had accordingly been breached.

The Court did not, however, overrule the impugned decision as this would cause another delay which would worsen the effect of the infringement, not improve it. The Court accordingly restricted itself to the sentence that the claimant's right to a hearing within a reasonable time was breached.

#### *Languages:*

German.



# Azerbaijan Constitutional Court

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## Important decisions

*Identification:* AZE-2002-2-004

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 11.06.2002 / **e)** 1/7 / **f)** / **g)** Azerbaycan (Official Gazette); Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumatı (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.7.7 Institutions – Judicial bodies – **Supreme court.**

4.7.8.1 Institutions – Judicial bodies – Ordinary courts – **Civil courts.**

4.7.15 Institutions – Judicial bodies – **Legal assistance and representation of parties.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

*Keywords of the alphabetical index:*

Civil procedure, Code / Appeal, right / Cassation, legal representation, compulsory / Citizen, right and guarantee / Legal assistance, free, right.

*Headnotes:*

A provision making legal representation compulsory in order to gain access to the court of cassation is not contrary to the Constitution inasmuch as everyone has the right to obtain qualified legal assistance.

*Summary:*

Taking into account the difficulties encountered in judicial practice with respect to the access of persons participating in civil proceedings to courts of cassation, the Supreme Court petitioned the Constitutional Court to verify the conformity with Articles 60 and 71.2 of the Constitution of Articles 67 and 423 of the Civil

Procedure Code, which state that “the appeal may be lodged by a person participating in the examination of a case with legal representation”.

According to Article 67 of the Civil Procedure Code, in courts of cassation, where an applicant seeks the re-examination of a case based on newly revealed circumstances, the parties to this case shall be entitled to take part in its re-examination only if represented by a lawyer. According to Article 423 of the Code, additional cassation complaints may be submitted by persons participating in the case and represented by a lawyer.

Article 12.1 of the Constitution provides that the highest priority objective of the state is to ensure the rights and liberties of a person and citizen.

According to Article 71.2 of the Constitution, “no one may restrict implementation of rights and liberties of a human being and citizen”.

The state guarantees the protection of the rights and freedoms of all people (Article 26.2 of the Constitution). Among these guarantees is enshrined the guarantee of legal protection of human rights and freedoms.

Article 60 of the Constitution, which secures the legal protection of rights and freedoms of every citizen (paragraph I), also provides for the right to challenge before judicial bodies the decisions and activity (or inactivity) of state authorities and officials (paragraph II).

With a view to achieving these purposes, parliament has laid down the procedural rules governing the verification by higher instance courts of the legality and validity of decisions adopted by the lower instance courts.

Chapter 43 of the Civil Procedure Code deals with the right to challenge a court decision and its examination via the procedure of cassation.

The possibility of challenging court acts in accordance with the procedure laid down in the Civil Procedure Code, and the review of a case by a higher instance court on the basis of an appeal, flow from the meaning of Article 60 of the Constitution as integral elements of the right to legal protection. According to Article 416 of the Civil Procedure Code, the court of cassation shall verify the correct application by lower courts of substantive and procedural norms of law. According to Articles 424 and 433 of the Code, the full bench of the Supreme Court shall examine exceptional cases concerning legal issues, as well as court decisions or rulings that had entered into legal force, on the basis of newly revealed circumstances. In this connection, with a view to ensuring the qualified and thorough protection of the rights of persons involved in a case under Article 67 of the Civil Procedure Code, it is stipulated

that in courts of such an instance persons participating in the case shall act in court only if they are represented by a lawyer. These provisions of the Civil Procedure Code are in accordance with the requirements of Article 61 of the Constitution. According to Article 61.1 of the Constitution everyone shall have the right to obtain qualified legal assistance.

The right to the effective restoration of one's rights by an independent court on the basis of fair trial is enshrined in a number of international instruments, including Article 14 of the International Covenant on Civil and Political Rights, Articles 7, 8 and 10 of the Universal Declaration of Human Rights and Article 6 ECHR.

For instance, according to Article 8 of the Universal Declaration of Human Rights, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law".

According to these provisions, concrete guarantees are given for the implementation *in corpore* of the right to legal protection.

The implementation of the right to fair trial on the basis of the legal equality of parties and the principle of adversarial proceedings is one of the guarantees of civil proceedings enshrined in Article 127 of the Constitution.

The scope of procedural rights enjoyed before the courts of cassation is narrower than the scope of procedural rights enjoyed before courts of first instance. But when determining these rights it must be borne in mind that provisions such as the equality of citizens before the law and before the courts (Article 25 of the Constitution), the guarantee of the protection of rights and freedoms by the courts (Article 60 of the Constitution), the holding of court proceedings on the basis of the equality of parties and of the adversarial principle (Article 127 of the Constitution) are enshrined in the Constitution. This means that at the various stages of civil proceedings, including at the stage of cassation, the parties enjoy equal procedural rights.

Besides other necessary conditions of civil court proceedings, the guarantee of procedural equality also implies the enjoyment of the same rights.

It is not merely by chance that Article 25.3 of the Constitution provides that the state guarantees the equality of rights and freedoms of everyone irrespective of their financial position.

According to Article 61.2 of the Constitution, "in specific cases envisaged by legislation legal assistance shall be

rendered free, at governmental expense" (i.e. such legal assistance shall be publicly funded).

Article 20 of the Law on the Legal Profession, which is based on these provisions of the Constitution, stipulates that publicly funded legal assistance shall be provided to persons accused of committing a criminal offence and other low-income persons seeking legal assistance in court, without any restrictions.

In civil procedural legislation the free participation of a lawyer is not excluded. For instance, according to Article 121.2 of the Civil Procedure Code, where legal assistance to a party in whose favour the case was decided had been provided free of charge, the legal expenses of this party shall be covered by another party, for the benefit of the legal aid office.

At the same time, the amount of publicly funded payment for legal assistance and the procedures for its payment in civil court proceedings have not been clarified. In accordance with the relevant legislation the resolution of this issue falls within the competence of the Cabinet of Ministers.

The principle of legal protection and legal assistance as a part of the right to a fair trial is openly and clearly upheld by international judicial bodies.

As mentioned above, the right to a fair trial is envisaged in Article 6 ECHR. In its Judgment of 9 October 1979 in the case of *Airey v. Ireland*, the European Court on Human Rights noted that "...despite the absence of a similar clause for civil litigation, (Article 6.1 ECHR) may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting states for various types of litigation, or by reason of the complexity of the procedure or of the case".

In the cases specified in the relevant legislation, the right to free legal assistance shall be first of all connected with the interests of a fair trial. This relates mainly to the guarantee of the principle of equality of the parties.

Where it is required in the interests of a fair trial, the right of low-income persons to free legal assistance amounts to a right to freely defend their opinion that cannot be altered. Where legal problems emerge on any issue that requires certain professional skills for its defence, the state should ensure not only the constitutional right to obtain qualified legal assistance but it should also ensure that such a right is implemented with respect to low-income persons in real situations.

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In accordance with the above reasoning, when applying the provision of Articles 67 and 423 of the Civil Procedure Code according to which “the appeal may be lodged by a person with legal representation participating in the examination of a case”, one should take into account the provisions of Articles 25, 60 and 61 of the Constitution and of Article 20 of the Law on the Legal Profession. At the request of a person who is deprived of financial means, participating in the examination of a case and seeking the assistance of a lawyer, the court should consider the question of providing this person with a lawyer.

The Court found the provision of Articles 67 and 423 of the Civil Procedure Code according to which “the appeal may be lodged by a person with legal representation participating in the examination of a case” to be in conformity with Articles 60 and 71.2 of the Constitution. The Court further recommended that the Cabinet of Ministers fix the amount of the payment for legal assistance at governmental expense in civil court proceedings and the relevant procedures for its payment.

#### Cross-references:

##### European Court of Human Rights:

- *Airey v. Ireland*, 09.10.1979, Series A, no. 32, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-003].

#### Languages:

Azeri, Russian, English (translations by the Court).



## Belgium Court of Arbitration

### Important decisions

*Identification:* BEL-1987-S-001

**a) Belgium / b) Court of Arbitration / c) / d) 29.01.1987 / e) 32 / f) / g) / h) CODICES (French, Dutch).**

*Keywords of the systematic thesaurus:*

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**

1.4.10.6.2 Constitutional Justice – Procedure – Interlocutory proceedings – Challenging of a judge – **Challenge at the instance of a party.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings.**

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

*Keywords of the alphabetical index:*

Constitutional Court, judge, challenging, participation in adoption of law examined.

*Headnotes:*

The fact that a Member of Parliament who has now become a judge at the Court of Arbitration took part in the debate and vote of a norm forming the subject-matter of a preliminary question does not constitute a ground for challenging that judge either under the Institutional Law on the Court of Arbitration or under Article 6 ECHR, or in application of the general principles of law.

### **Summary:**

The Court of Arbitration is composed of twelve judges, six French-speaking and six Dutch-speaking. In each linguistic group, three judges must have been Members for eight years (now five years) of the Chamber of Representatives, the Senate or a Community or Regional Parliament.

The Court was requested to give a preliminary ruling on the constitutionality of the Flemish Decree of 2 July 1981 on waste management. Three judges were asked to withdraw on the ground that they had participated in the debate and the vote of that norm at a time when, before the Court of Arbitration was established (in 1984), they were still Members of the Flemish Parliament.

In the Court's view, the grounds of challenge laid down in the Institutional Law on the Court of Arbitration do not provide for a judge to be challenged on the ground that before becoming a judge he or she participated, as a Member of Parliament, in the decision-taking process that led to the promulgation of a norm when he or she is subsequently required to assess whether that norm is consistent with certain provisions of the Constitution.

That ground of challenge was not listed in the law, which must be interpreted strictly, and, moreover, was expressly excluded by the legislature, whose intention was apparent both from the drafting history of the Institutional Law and from the provisions determining the rules on the composition of the panel.

The Court of Arbitration further considered that Article 6.1 ECHR was not applicable to it as a constitutional court. In preliminary reference proceedings, the Court merely responds to an abstract question, in isolation from the facts of the case before the referring court, as to whether the norms to be applied to those facts might violate the constitutional rules determining competence. Furthermore, the dispute which the referring court must determine, and which concerns the merits of a criminal charge or the determination of civil rights and obligations, does not in any way constitute the subject-matter of the dispute which is referred to the Court of Arbitration. Taking account, among other authorities, of the European Court of Human Rights Judgment *Buchholz v. Germany* (6 May 1981, Series A, no. 42) and the Judgment *Deumeland v. Germany* (29 May 1986, Series A, no. 100; *Special Bulletin – Leading Cases ECHR* [ECH-1986-S-001]), the Court acknowledged, however, that its intervention on a preliminary reference influences the assessment of a reasonable time, as the preliminary proceedings have the effect of delaying, by the length of time which they take, the time when a

definitive decision can be given on the dispute which gave rise to the preliminary question referred to it.

The Court held, moreover, that the application in the proceedings before it of the rule in Article 6.1 ECHR as a general principle of law would not always provide a ground for challenging the three judges in question.

The fact of having participated, as a Member of Parliament, in the decision-taking procedure which led to the promulgation of a decree and then, after having ceased to be a Member of Parliament, being required to assess, as a constitutional judge, whether that decree was consistent with the rules on competence was not comparable to or capable of being assimilated to the fact of having intervened on two occasions as a judge, in different capacities, in the same case.

More generally, the fact of having previously expressed a view in public – in any capacity whatsoever, provided that there was no connection with the facts or the proceedings in question – on a point of law which again arose in those proceedings did not affect the independence or the impartiality of the judge. To decide otherwise would mean that a judge could not deal with a case giving rise to a point of law which had already been settled by him in other cases.

The Court stated, last, that recourse to a general principle of law did not exempt the judge from applying the written law governing a particular matter; in this case, the Institutional Law on the Court of Arbitration governed in detail the independence and impartiality of the Court.

### **Supplementary information:**

When it replaced the Institutional Law of 28 June 1983, the special legislature expressly provided that the fact that a judge had participated in the preparation of a norm forming the subject-matter of an action for annulment or of a decision to refer the matter to the Court of Arbitration did not in itself constitute a ground for challenging that judge (Section 101 of the Special Law of 6 January 1989).

However, the Court has qualified its position on the inapplicability of Article 6 ECHR to a constitutional court, in the light of the Judgment of the European Court of Human Rights "*Ruiz Mateos v. Spain*" of 23 June 1993 (Series A, no. 262; *Special Bulletin – Leading Cases ECHR* [ECH-1993-S-003]). See *Bulletin* 1994/2 [BEL-1994-2-009].

### **Languages:**

French, Dutch.



## *Identification: BEL-1990-S-002*

**a)** Belgium / **b)** Court of Arbitration / **c) / d)** 05.07.1990 / **e)** 25/90 / **f) / g)** *Moniteur belge* (Official Gazette), 06.10.1990 / **h)** CODICES (French, Dutch).

## *Keywords of the systematic thesaurus:*

1.2.2.3 Constitutional Justice – Types of claim – Claim by a private body or individual – **Profit-making corporate body.**

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi.**

3.10 General Principles – **Certainty of the law.**

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Prohibition of reformatio in peius.**

5.3.38.2 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Civil law.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

## *Keywords of the alphabetical index:*

Expectation, legitimate / Liability for negligence.

## *Headnotes:*

When neither the Constitution nor legislation imposes with respect to aliens any derogations or limitations as regards the enjoyment of rights and freedoms, Article 191 of the Constitution (before 1994 Article 128) does not preclude those aliens from relying on Articles 10 and 11 of the Constitution (before 1994 Article 6 and 6bis).

It may be accepted that the legislature takes the view that the categories to which the contested Law of 30 August 1988 amending the Law of 3 November 1967 on the pilotage of sea-going vessels is addressed are, principally on account of their involvement in maritime activities, sufficiently specific to justify a special regime of liability.

By amending a statutory compensation scheme without re-opening claims based on a judicial decision, the legislature does not draw any unjustified distinction, as the protection ensured by Article 11 of the Constitution

and Article 1 Protocol 1 ECHR applies only to property that has already been acquired.

## *Summary:*

The Law of 30 August 1988 amending the Law of 3 November 1967 on the pilotage of sea-going vessels introduced a special regime of civil liability for damages for harm caused by negligence in the functioning of the pilotage service. Its aim was to exclude liability by the organisers of pilotage services for damage resulting from negligence on the part of the organiser itself or, on certain conditions, on the part of a member of its staff acting in the exercise of his or her duties. The legislature made that amendment retroactive for a period of thirty years.

Actions for annulment of the Law of 30 August 1988 were brought by twenty-five maritime companies governed by foreign law, in their capacity as users of a pilotage service. They complained that by exempting the State from liability with retroactive effect the contested law eliminated their claims against the State for compensation.

The Court of Arbitration considered that the actions were admissible. The contested law applied to both foreign persons and Belgian persons, all of whom were required by the Law of 3 November 1967 to employ a pilotage service, who had sustained or might sustain damage following the intervention of that service and who, in order to obtain compensation, might thus have to bring proceedings before a Belgian court. Since, in that regard, neither the Constitution nor legislation applied to those aliens any derogations or limitations with respect to the enjoyment of rights and freedoms, Article 191 of the Constitution did not prevent those aliens from relying on Articles 10 and 11 of the Constitution.

In their first plea, the applicants claimed that the contested law violated the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), because, first, the victims of damage caused by a pilotage service were treated differently from the victims of damage caused by the negligence of another public service and because, second, the members of the staff of a pilotage service were treated differently from other members of staff, both in the public sector and in the private sector.

According to the Court of Arbitration, it could be accepted that the legislature had taken the view that the categories to which the contested law was addressed were, principally on account of their involvement in maritime activities, sufficiently specific to justify a special regime of liability.

As regards the retroactive scope of the law, the Court considered that although the retroactive element constituting the special regime of liability introduced for pilotage breached the fundamental principle of legal certainty, according to which the content of the right must in principle be foreseeable and accessible, that violation was not in this case disproportionate by reference to the objective pursued by the contested law. The Court pointed out, in that regard, that the legislature's intention in passing the contested law had been, first, to counter a new direction taken in the case-law of the Court of Cassation, the effect of which was that State liability might be incurred, and, second, to take into account the significant budgetary consequences arising in an unforeseen manner for the public authorities from that modification of the case-law.

The applicants also criticised the fact that by fixing the time when it produced its effects, the contested law created an unwarranted distinction between pending disputes (*causae pendentes*), to which the law was applicable, and disputes which had already been dealt with (*causae finitae*), to which it did not apply.

The Court observed in that regard that the fact that a rule of law was given retroactive effect meant in principle that that rule was to apply to legal relationships which had come into existence and been definitively completed before the rule entered into force. The Court added, however, that that rule could apply only to pending and future disputes and had no effect on disputes which had already been dealt with. According to a fundamental principle of the Belgian legal order, a judicial decision could be amended only by means of an appeal.

The applicants complained, finally, that there had been a discriminatory breach of their enjoyment of the right of property, granted by Article 16 of the Constitution (before 1994 Article 11) and Article 1 Protocol 1 ECHR.

The Court considered that by altering a statutory scheme for compensation for damage without reopening claims based on a judicial decision, the legislature had not introduced any unjustified distinction, as the protection ensured by those provisions applied only to property which had already been acquired.

#### *Supplementary information:*

The applicants before the Court of Arbitration lodged an application with the European Commission for Human Rights. They claimed, in particular, that the liability regime introduced by the Law of 30 August 1988 violated Article 1 Protocol 1 ECHR. The case was referred to the European Court of Human Rights, which

gave a broader interpretation of the concept of possessions, the subject-matter of the protection afforded by Article 1 Protocol 1 ECHR, and concluded that there had been a violation of that provision. Belgium was therefore found to have violated the Convention (European Court of Human Rights, the *Pressos Compania Naviera SA and others v. Belgium*, Judgment of 20 November 1995, *Bulletin* 1995/3 [ECH-1995-3-019]).

#### *Languages:*

French, Dutch.



#### *Identification: BEL-1991-C-001*

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 04.07.1991 /  
**e)** 18/91 / **f)** / **g)** *Moniteur belge* (Official Gazette),  
22.08.1991 / **h)**.

#### *Keywords of the systematic thesaurus:*

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.10 General Principles – **Certainty of the law.**

5.2 Fundamental Rights – **Equality.**

5.3.33.2 Fundamental Rights – Civil and political rights – Right to family life – **Succession.**

#### *Keywords of the alphabetical index:*

Preliminary question / Inheritance rights on intestacy / Descent, lawful / Child, natural / *Res judicata.*

#### *Headnotes:*

In continuing to enforce, on a transitional basis, a provision of the Civil Code which deprives natural children of their inheritance rights even after a judgment of the European Court of Human Rights declaring Belgium to be guilty of breaching Article 8 ECHR in conjunction with Article 14 ECHR (Judgment in the case of *Marckx v. Belgium* of 13 June 1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002]),

the legislature violates the constitutional principles of equality and non-discrimination (Articles 6 and 6bis of the former Constitution, now (since 1994) Articles 10 and 11 of the Constitution).

### *Summary:*

Under former Article 756 of the Civil Code, natural children were not recognised as heirs and had no rights in respect of the property of their deceased father and mother unless they had been officially recognised. They also had no rights under the article in respect of their parents' relatives' property. The Article was amended by an Act of 31 March 1987 but maintained, on a transitional basis for estates passed to heirs prior to the Act's entry into force on 6 June 1987.

A natural child applied to the Belgian civil courts to have his inheritance rights recognised. The Court of Cassation asked the Court of Arbitration to rule on the question of whether the transitional provision that applied the old law to estates passed to heirs in 1956 and 1983 was compatible with the principles of equality and non-discrimination.

The Court of Arbitration noted that the explanatory memorandum accompanying the amending bill was based, *inter alia*, on the view that it was necessary to put an end to the discrimination against children born out of wedlock, which constituted a "glaring exception" to the principle that all people were equal before the law. It also noted that in its Judgment in the case of *Marckx v. Belgium* of 13 June 1979 (*Special Bulletin – Leading cases ECHR* [ECH-1979-S-002]), the European Court of Human Rights had considered that the limitations imposed on the rights of recognised natural children in respect of their right to inherit their mother's property and the fact that they had no inheritance rights at all in respect of their close relatives on their mother's side breached Articles 8 and 14 ECHR (43).

The Court found that the difference in the treatment of children born in and out of wedlock, in terms of their inheritance rights and as established under Article 756 of the Civil Code and kept in force on a transitional basis under Section 107 of the Act of 31 March 1987, breached the constitutional principles of equality and non-discrimination (Articles 6 and 6bis of the former Constitution, now (since 1994) Articles 10 and 11 of the Constitution).

The Court then examined the question of the extent to which its decision constituted *res iudicata* (37). It noted that according to Section 28 of the Special Law of 6 January 1989, a ruling handed down by the Court of Arbitration in respect of a preliminary question only constituted *res iudicata* for the lower court and other

courts required to rule "on the same case". However, in accordance with Sections 4.2 and 26.2, subparagraph 3.1 of the Act, insofar as the scope of such a ruling exceeded the limits laid down in Section 28, the Court needed to bear in mind the possible consequences of its decision for cases other than the case giving rise to the preliminary question.

Accordingly, the Court observed that in its Judgment in the *Marckx* case, the European Court of Human Rights had stated that "the principle of legal certainty, which is necessarily inherent in the law of the Convention (...) dispenses the Belgian State from re-opening legal acts or situations that antedate the delivery of the present judgment". It found that the fact that estates passed to heirs prior to this judgment were not affected by the unconstitutionality ruling was justified by the principle of legal certainty. It followed that former Article 756 of the Civil Code could still be applied to estates passed to heirs prior to 13 June 1979 but not to any passed to heirs after that date.

### *Supplementary information:*

See also Decision no. 83/93 of 1 December 1993, *Bulletin* 1993/3 [BEL-1993-3-038].

### *Languages:*

French, Dutch, German.



### *Identification:* BEL-1991-S-002

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 04.07.1991 / **e)** 18/91 / **f)** "Marckx-bis" / **g)** Moniteur belge (Official Gazette), 22.08.1991 / **h)** CODICES (French, Dutch).

### *Keywords of the systematic thesaurus:*

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**

1.6.5.3 Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

- 3.10 General Principles – **Certainty of the law.**  
 5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status.**  
 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**  
 5.3.33.2 Fundamental Rights – Civil and political rights – Right to family life – **Succession.**  
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

*Keywords of the alphabetical index:*

Child, born out of wedlock / Relationship to parents out of wedlock, inheritance right, child born out of wedlock / Inheritance, child born out of wedlock / Law, evolution / Law, transitional.

*Headnotes:*

The former Article 756 of the Civil Code, maintained in force as a transitional measure, violates the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution – before 1994 Article 6 and 6bis) in that it grants illegitimate children rights over the assets of their deceased father or mother only where they are lawfully recognised, and in that it deprives them of any right over the assets of the relatives of their father or mother.

In the light of the *Marckx* Judgment of the European Court of Human Rights of 13 June 1979, which condemned the distinction between legitimate and illegitimate children with respect, *inter alia*, to inheritance rights, the Court concludes that successions opened before delivery of the *Marckx* Judgment should not be affected and that the non-discriminatory rule in the new Law of 31 March 1987 should be applied with effect from that date.

*Summary:*

Before 1987, a distinction was drawn in Belgium, with respect to inheritance and the right of succession, between "legitimate" and "illegitimate" children, on the basis of the provisions of the original Civil Code (*Code Napoléon* of 21 March 1804).

According to the *Marckx* Judgment of the European Court of Human Rights of 13 June 1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002], restrictions imposed on an illegitimate child in respect of his capacity to inherit from his unmarried mother (who had expressly recognised her child) were contrary to Article 14 ECHR in conjunction with Article 8 ECHR and Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR.

Before the *Marckx* Judgment, a number of Bills designed to adapt the legislation were already in existence, but it was only when the Law of 31 March 1987 was enacted that the differences in treatment in inheritance matters between children conceived within and those conceived out of wedlock were brought to an end.

In the meantime, an illegitimate child (who had not been recognised by his mother) claimed to be entitled to inherit from his mother, who had died in 1956, and also to inherit from his aunt, who had died in 1983 and had inherited from the mother and had herself remained without issue. The district court considered in 1986 that the child could inherit in the same way as a legitimate child, but the Court of Appeal held in 1988 that Article 8 ECHR was not directly applicable and that the child was not entitled to inherit.

Upon appeal against that judgment, the Court of Cassation decided to refer a preliminary question to the Court of Arbitration on the compatibility with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) set out in Article 756 of the Civil Code, taking into account the fact that that old provision continued to apply to successions opened in 1956 and 1983, on the basis of a transitional provision (Article 107 of the Law of 31 March 1987).

The Court of Arbitration noted that Article 756 established a difference in treatment in inheritance matters between illegitimate children and legitimate children, for the purpose of protecting the family as based on the institution of marriage but by denying the inheritance rights of the illegitimate child.

The Court then observed that the Law of 31 March 1987 is based, *inter alia*, on the opinion that attitudes have changed, as have views on unmarried mothers and children born out of wedlock. The legislature thus wished to put an end to discrimination against those children. The Court referred expressly to the *Marckx* Judgment of the European Court of Human Rights and concluded that Article 756 of the Civil Code, which was still in force, violated the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The Court did not confine itself in this case to a mere finding of a violation of the Constitution. Notwithstanding the fact that the answer given by the Court was binding solely on the parties to the case (see Supplementary Information), it was necessary, according to the Court, to have regard to the repercussions that its decision might have on situations other than that forming the subject-matter of the preliminary question.

The Court observed in that regard that in the *Marckx Judgment* the European Court of Human Rights stated that “the principle of legal certainty, which [was] necessarily inherent in the law of the Convention ..., [dispensed] the Belgian State from re-opening legal acts or situations that [antedated] the delivery of the *Marckx Judgment*” (§ 58). On account of that legal certainty, the Court of Arbitration concluded that, in spite of its unconstitutionality, the old provision should still be applied to successions opened before 13 June 1979 (that is to say, the date of the *Marckx Judgment*).

The Court further observed that the new, non-discriminatory rules in the Law of 31 March 1987 must apply from that date, as otherwise the Court’s review would be deprived of all practical effect.

#### *Supplementary information:*

Proceedings before the Court may be initiated, on the one hand, by actions for annulment brought by individuals and by a certain number of authorities and, on the other hand, by preliminary questions referred by the courts. The authority of the Court’s judgments in preliminary proceedings is different from the authority of judgments whereby it determines actions for annulment.

Where an action for annulment is well founded, the provision found to be contrary to the Constitution is annulled. The annulment applies *erga omnes*, with retroactive effect, that is to say, the provision which has been annulled is deemed never to have existed. However, the Special Law of 6 January 1989 on the Court of Arbitration allows the Court, where necessary, to modify the retroactive effect of the annulment by maintaining the effects of the provision which is annulled.

Where the preliminary question leads to a finding of a violation of the Constitution, the court which referred the question will not apply the unconstitutional provision. However, that provision continues to exist in the legal order and the Court’s judgment is in principle binding only on the referring court and the courts required to adjudicate in the same case (for example on appeal) between the same parties. Unlike the position in actions for annulment, the Law of 6 January 1989 makes no provision for any modification of the effects in time of a preliminary judgment. However, the courts dealing with similar cases can no longer apply the unconstitutional provision (see Article 26 of the Special Law of 6 January 1989).

In the present case, the Court none the less took account of the possible impact of its judgment on situations other than those of the case before the referring court and, in the interest of legal certainty, it proposed a solution to the possible effects in time of the finding of unconstitutionality. In that regard, the Court

took as a criterion the date of delivery of the *Marckx Judgment* of the European Court of Human Rights, after the European Court had itself considered (§ 58) that legal certainty justified that legal acts or situations antedating that judgment should not be re-opened.

#### *Cross-references:*

- *Marckx v. Belgium*, no. 6833/74, 13.06.1979; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002].

#### *Languages:*

French, Dutch.



#### *Identification:* BEL-1993-3-038

- a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 01.12.1993 / **e)** 83/93 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.03.1994; *Cour d’arbitrage – Arrêts* (Official Digest), 1993, 977 / **h)** *Information et documentation juridiques*, 1994, 27; *Revue trimestrielle de droit familial*, 1993, 416.

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments**.

5.2 Fundamental Rights – **Equality**.

5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

#### *Keywords of the alphabetical index:*

Succession law / Child, born out of wedlock.

#### *Summary:*

The basic objective pursued by the legislator in adopting the law of 31 March 1987 was to put an end to inequality between children, notably in respect of determining their descent and its consequences, particularly for succession; by acknowledging that the children born to a woman other than their father’s spouse have, in

principle, an entitlement to their father's succession which is equal to that of the other children, the legislator sought to comply with Articles 8 and 14 ECHR, as interpreted by the European Court of Human Rights, notably in its Judgments in the *Marckx* (*Special Bulletin – Leading cases ECHR* [ECH-1979-S-002]), *Vermeire and Johnston* cases (*Special Bulletin – Leading cases ECHR* [ECH-1986-S-006]). Consequently, former Article 756 of the Civil Law Code violates Articles 6 and 6bis of the Constitution which guarantee the principles of equality and non-discrimination, to the extent that it excludes the right of children born to a woman other than their father's spouse to succeed their father (B.4 to B.5.1).

### *Languages:*

Dutch, French, German.



### *Identification: BEL-1994-3-021*

a) Belgium / b) Court of Arbitration / c) / d) 22.12.1994 / e) 90/94 / f) / g) *Moniteur belge* (Official Gazette), 12.01.1995, 8, 546; *Cour d'arbitrage – Arrêts* (Official Digest), 1994, 1021 / h) *Information et documentation juridiques*, 1994, 717; *Journal des tribunaux*, 1995, 241.

### *Keywords of the systematic thesaurus:*

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution**.

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.

3.6.2 General Principles – Structure of the State – **Regional State**.

4.3 Institutions – **Languages**.

4.5.1 Institutions – Legislative bodies – **Structure**.

4.5.3.2 Institutions – Legislative bodies – Composition – **Appointment of members**.

4.8.6.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Deliberative assembly**.

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system**.

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies**.

4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities**.

5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language**.

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

### *Keywords of the alphabetical index:*

Constituency.

### *Headnotes:*

The Court cannot rule on choices made by the authors of the Constitution (B. 2.3 and B.3.5).

Article 3 Protocol 1 ECHR safeguards the right to vote or to be elected, but only in elections to assemblies which exercise legislative powers over electors or candidates who invoke that article (B.4.6 to B.4.8, B.4.15 and B.4.16).

Article 27 of the International Covenant on Civil and Political Rights concerns the protection of persons belonging to ethnic, religious and linguistic minorities, and prohibits Contracting States, *inter alia*, from denying these persons the right to their own cultural life in community with other members of their group. The constitutional rules safeguarding the principles of equality and non-discrimination covered by the aforementioned Article 27 of the International Covenant on Civil and Political Rights are not violated by the legislative provision which no longer allows French-speaking inhabitants of a district in the Flemish region to sit on the Council of the French Community, which has no legislative power over the said inhabitants, but does not deprive them of the right to have their own cultural life in community with other members of their group or of the right to use the cultural amenities for which the French Community is responsible (B.4.12 to B.4.14).

In the light of the case-law of the European Convention on Human Rights (Mathieu-Morin and Clerfayt case, Series A, no. 113, paragraph 57, *Special Bulletin – Leading cases ECHR* [ECH-1987-S-001]) and in view of the fact that the oath taken by elected representatives is of equal concern to those who administer and those who take it, the obligation of taking the oath in Dutch imposed on all members of the Flemish Council, including French-speaking members, by the special law under Article 115 of the Constitution, is not discriminatory. This obligation cannot be regarded as a clearly unreasonable restriction of the right secured to every person by Article 27 of the International Covenant on Civil and Political Rights to use their own language in community with other members of their group. The different systems applying in other legislative assemblies reflect their special character (B.4.18 to B.4.24).

The decision to keep the Brussels-Hal-Vilvorde constituency, comprising communes located in two separate regions (the Flemish region and the Brussels-Capital region), for elections to the federal chambers and the European Parliament was taken for the sake of arriving at a general compromise and securing the essential balance between the interests of the various communes and regions within the Belgian State. This aim may justify the distinction made by the challenged provisions between electors and candidates in the constituency of Brussels- Hal-Vilvorde and those in other constituencies, provided that the measures taken can reasonably be regarded as not disproportionate. They would be if they disregarded fundamental freedoms and rights (B.5.5 to B. 5.10).

#### *Summary:*

This judgment concerns an application for setting-aside of various provisions in the laws governing elections to the parliamentary assemblies of the federation (House of Representatives and Senate) and the federated entities (councils of the communities and regions). One of the complaints was that, in direct elections to the Senate, there is no constituency for the German-speaking region, as there is for the Dutch- and French-speaking regions. The Constitution itself stipulates that twenty-five senators are to be directly elected by the Dutch constituency and fifteen senators by the French constituency, and that a fixed number of senators are to be nominated by the councils of the three communities (Flemish, French-speaking and German-speaking) and by the directly elected senators. Concerning the complaint that the principles of equality and non-discrimination have been violated, the Court notes that the Constitution itself regulates the nomination of directly elected senators and that it cannot rule on a claim which would involve it in assessment of a choice made by the authors of the Constitution. A similar reply was given to the complaints concerning the composition of the House of Representatives.

Another complaint was lodged by natural persons, in their capacity as members of parliament or French-speaking electors, against legislation which no longer permits French-speaking inhabitants of the administrative district of Hal-Vilvorde, which is part of the Flemish region, to sit on the Council of the French Community. The decrees of the Council of the French Community are not legally binding in the Dutch-speaking region. Having first defined the scope of Article 3 Protocol 1 ECHR, the Court noted that both Dutch-speaking and French- speaking inhabitants have the right to vote in elections to the legislative assembly which is responsible for community matters concerning them and that, conversely, neither group may vote in elections to a legislative assembly which is not responsible for them. There is, in this respect, no

discrimination between the French-speaking electors in Hal-Vilvorde, on the one hand, and the Dutch-speaking electors in Hal-Vilvorde, the Dutch-speaking electors of Brussels-Capital and the French-speaking electors of Brussels-Capital, on the other. Nor does the Court consider that there has been a violation of the principles of equality and non- discrimination covered by Article 27 of the International Covenant on Civil and Political Rights, in view of the explanations relating to application of this provision given in the judgment.

In this same context, the Court considers that the obligation imposed on members of the Flemish Council, including French-speaking members, of taking the oath in Dutch, does not violate the principles of equality and non-discrimination covered by Article 3 Protocol 1 ECHR and Article 27 of the Covenant.

As for the complaint that maintenance of a single electoral district covering two regions (Brussels-Hal-Vilvorde, situated in both the bilingual Brussels-Capital region and in the monolingual Flemish region) violates the constitutional rules on equality and non-discrimination, since it makes a distinction between electors and candidates in the same language region, region and province, by including some, but not others, in a bilingual constituency, the Court considers the measure justified by the need to secure that general compromise which opened the way to institutional reform in Belgium, and by the fact that there has been no disproportionate interference with fundamental freedoms or rights. The challenged provisions do not disproportionately affect the freedom of each person to vote for the candidate of his choice and to stand for election, and do not impair the essence or nullify the substance of the individual's electoral rights. Nor do they mean that some electors have less influence on the nomination of representatives than others, that one political party is favoured to the detriment of other parties, or that one candidate has an electoral advantage over others. The fact that the districts of Nivelles and Louvain were not brought into a single constituency with Brussels-Hal-Vilvorde can be justified by the fact that the outlying communes which have special status concerning the use of languages for administrative purposes, are all situated in the Hal-Vilvorde district.

#### *Languages:*

Dutch, French, German.



## *Identification: BEL-2001-1-001*

a) Belgium / b) Court of Arbitration / c) / d) 07.02.2001 / e) 10/2001 / f) / g) *Moniteur belge* (Official Gazette), 01.03.2001 / h) CODICES (French, Dutch, German).

### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.3 General Principles – **Democracy.**

3.19 General Principles – **Margin of appreciation.**

4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing.**

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

5.2 Fundamental Rights – **Equality.**

### *Keywords of the alphabetical index:*

Political party / Extremism, right-wing / Racism / Xenophobia / Immunity, parliament.

### *Headnotes:*

A legislative provision whereby a political party can lose part of its annual financial allocation if it itself or any of its components displays manifest hostility towards rights or freedoms guaranteed by the European Convention on Human Rights (ECHR) or its protocols is not unconstitutional.

### *Summary:*

Belgium's law of 4 July 1989 introduced rules on the financing of political parties. The law of 12 February 1999 inserted into that first law an Article 15ter, laying down that, on a complaint from a given number of members of parliament, a bilingual chamber of the highest administrative court could withdraw the funding of a political party which was found to display manifest hostility towards fundamental rights or freedoms guaranteed by the European Convention on Human Rights (ECHR) or its protocols.

Leaders of the right-wing extremist party *Vlaams Blok*, together with the association which received the allocation on the party's behalf, had applied to have the

law of 12 February 1999 annulled on the ground of contravention of the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) and freedom of expression (Article 19 of the Constitution).

The Court held that it was for the legislature to introduce whatever measures it considered necessary or desirable for guaranteeing fundamental rights and freedoms, as Belgium had undertaken to do in particular in ratifying the European Convention on Human Rights. In appropriate cases the legislature could lay down penalties for threatening the basic principles of democratic society. The Court did not have discretionary or decision-making powers comparable to those of democratically elected legislative assemblies. It would be exceeding its jurisdiction if it substituted its own assessment of the matter for the policy decision which the legislature had made. It was, however, required to consider whether the system introduced was in any way discriminatory.

In the Court's view this was not the case: only a political party which "gave a number of manifest and concordant indications of hostility" towards guaranteed rights or freedoms was liable to lose, for a time, a proportion of its grant from the public authorities.

The Court nonetheless considered it important that the challenged provisions be interpreted strictly and not allow a party to be deprived of funding that had merely called for some rule in the European Convention on Human Rights or its protocols to be reinterpreted or revised or which had criticised the underlying philosophy or ideology of those international instruments. In this context "hostility" must be understood to mean incitement to contravene a legal provision in force (in particular, incitement to commit violence or oppose the aforementioned rules); it was also for the relevant upper courts to check that what the hostility was being directed at was indeed a principle crucial to the democratic nature of the political system. Condemnation of racism or xenophobia was undoubtedly one such principle since if these tendencies were tolerated there was a danger (*inter alia*) of their leading to discrimination against certain sections of the community in the matter of rights, including political rights, on the ground of their origins.

A further point was that the challenged provisions did not interfere with the rights to stand as candidate, to be elected or to sit in a legislative assembly and could not be interpreted as interfering with the parliamentary immunity afforded by Article 58 of the Constitution. Article 15ter could therefore not be applied to an opinion expressed or a vote cast by a member of parliament. Subject to that, the measure was not disproportionate.



The Court concluded that there had not been any contravention of the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) as such, or even when taken together with the constitutional provision guaranteeing freedom of expression (Article 19 of the Constitution). With regard to freedom of expression the Court took into account Articles 10 and 17 ECHR and Article 19 of the International Covenant on Civil and Political Rights, together with the case-law of the European Court of Human Rights (see, in particular, the Judgments of 7 December 1976, *Handyside v. United Kingdom*, paragraph 49, *Special Bulletin – Leading cases ECHR* [ECH-1976-S-003]; 23 September 1998, *Lehideux and Isorni v. France*, paragraph 55; and 28 September 1999, *Öztürk v. Turkey*, paragraph 64).

Further, a political party could lose its funding whether by its own actions or those of its component groups, its lists, its candidates or persons representing it in elective public office. The Court had no objection to the legislature's concerning itself with a party's members or component groups: political parties themselves generally did not have legal personality and it could be either the political party itself or one of its component elements that was doing the incitement, although in the latter case there must be no doubt as to the connection between such elements and the political party. The measure would, however, be manifestly disproportionate if it caused the party to lose some of its funding on account of such elements' expressing hostility within the meaning of Article 15ter.1 when the party itself had clearly and publicly disavowed the elements in question.

The Court rejected the appeal with the proviso that the provisions under challenge must be interpreted strictly, could not affect parliamentary immunity and could not cause a party to lose funding which had clearly and publicly disavowed the group or member manifesting hostility within the meaning of Article 15ter.

#### Cross-references:

European Court of Human Rights:

- *Handyside v. United Kingdom*, 07.12.1976, *Special Bulletin – Leading cases ECHR* [ECH-1976-S-003];
- *Lehideux et Isorni v. France*, 23.09.1998;
- *Öztürk v. Turkey*, no. 22479/93, 28.09.1999.

#### Languages:

French, Dutch, German.

*Identification: BEL-2002-1-003*

- a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 28.03.2002 / **e)** 56/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.04.2002 / **h)** CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

- 1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body**.
- 1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.
- 1.6.5.3 Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect**.
- 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation**.
- 3.10 General Principles – **Certainty of the law**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.
- 3.16 General Principles – **Proportionality**.
- 3.19 General Principles – **Margin of appreciation**.
- 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
- 5.2 Fundamental Rights – **Equality**.
- 5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.
- 5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case**.
- 5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem**.

**Keywords of the alphabetical index:**

Crime, urban / Hooliganism / Police, custody, legality / Criminal procedure, immediate trial / Criminal procedure, preparatory phase, guarantees.

**Headnotes:**

The law has discretionary power to waive the normal rules of criminal procedure, so that certain cases can be dealt with more rapidly under summary procedure before a criminal court judge. The Court must decide, however, whether the measures adopted for this purpose do not adversely affect the rights of the accused in a discriminatory manner.

Article 6 ECHR applies to the preparatory phase of criminal proceedings.

In leaving the law to decide when, and in what form, criminal proceedings may be brought, Article 12.2 of the Constitution guarantees that no one may be prosecuted, except under rules adopted by a democratically elected deliberative assembly. Delegation to another authority does not violate the principle of legality, provided that the powers of that authority are defined with sufficient clarity and concern the execution of measures, of which the essential features have been previously defined by law.

**Summary:**

In anticipation of the Euro 2000 European football championship, the Act of 28 March 2000 provided for summary proceedings before a criminal court judge, as a way of dealing immediately with certain forms of urban crime and hooliganism.

The "summary proceedings Act" may be used when offenders are caught in the act (or enough evidence is collected within a month to take the case to court), and when the offence is punishable by one to ten years' imprisonment. In such cases, the public prosecutor may apply for an arrest warrant for immediate trial. The accused is entitled to a lawyer, and may inspect the case file (or a copy). Having heard the accused, the investigating judge may order his arrest, and he must then appear before the criminal court between four and seven days later. In principle, the court gives judgment at once or within five days.

The "*Ligue des droits de l'homme*" ("Human Rights League"), a non-profit association, applied to have the whole Act repealed. In view of its statutory aim ("to combat injustice and all arbitrary violations of individual or collective rights") and of the nature of the impugned

provisions, the Court decided that it had an interest in repeal of the Act.

The Court examined each of its arguments, and found some of them well founded.

1. Firstly, the association argued that the Act violated the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with Articles 5 and 6 ECHR, since it failed to regulate the situation of accused persons who were not arrested or were conditionally released. The Court found that the difference in treatment between accused persons who were arrested by order of the investigating judge (procedure specified in the Act), and accused persons who were not arrested (no procedure specified) was unjustified.
2. Secondly, the association argued that summary proceedings violated the accused person's defence rights, by comparison with ordinary proceedings. The Court decided that the measures were justified in principle, but restricted the defendant's defence rights in two ways which were not commensurate with the aim pursued: first, the accused person was given very little time to prepare his defence; secondly, he was not allowed to have further investigations carried out.
3. Thirdly, the association argued that the Act made no provision for judicial review of the lawfulness of detention. The Court noted that cases were heard, in principle, within seven days. This might be two days more than the five allowed in ordinary proceedings, but the measure was not a disproportionate encroachment on the right of persons arrested or detained to challenge the lawfulness of their detention under Article 5.4 ECHR.
4. The association also argued that there was discrimination between persons prosecuted under the summary procedure and persons punished for the same offences with administrative sanctions under Section 23 of the Act of 21 December 1998 on security at football matches. The Court noted that this first act punished a specific kind of crime, and that it was up to the law to decide whether criminal or administrative sanctions should apply.
5. The association objected to the fact that the same investigating judge who had issued the summary trial warrant might, in some cases, issue an arrest warrant later. This would violate the impartiality guaranteed by the general principles of Belgian law and by Article 6 ECHR. Referring to the *Imbrioscia v. Switzerland*, 24.11.1993 (*Special Bulletin* –

*Leading cases ECHR [ECH-1993-S-008]),* the Court confirmed that this article applied to the preparatory phase of criminal proceedings.

It held that the fact that the same judge took part in a later stage of the proceedings was not at variance with Article 6 ECHR.

6. The association further argued that the scope of the summary procedure was not sufficiently clearly defined. The Court noted that the procedure was designed to combat certain “less serious or less organised” forms of crime, but that the offences covered carried prison sentences of one to ten years. It pointed out that, under Article 12 of the Constitution, criminal offences and punishments must be strictly defined in law, and found that the law in this case was not sufficiently specific about the cases in which exceptions to the guarantees offered by ordinary criminal law were permitted.
7. Finally, the association argued that the summary procedure discriminated between accused persons at first instance and in appeal proceedings. The Court took the view that, when the Act was interpreted in conformity with the Constitution, this allegation was unfounded.

It decided to repeal certain parts of the Act forthwith, but made use of the possibility (see Article 8 of the special Act of 6 January 1989 on the Arbitration Court – CODICES) of maintaining the effects of the repealed provisions, in order to avoid overloading the prosecuting authorities and courts, and to safeguard the rights of victims. In other words, detentions and convictions already decided under these provisions could not be challenged.

#### Cross-references:

##### European Court of Human Rights:

- *Imbrioscia v. Switzerland*, 24.11.1993, Vol. 275, Series A; *Special Bulletin – Leading cases ECHR [ECH-1993-S-008]*.

#### Languages:

French, Dutch, German.



#### *Identification: BEL-2005-3-015*

- a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 26.10.2005 / **e)** 160/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 11.01.2006 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

#### *Keywords of the alphabetical index:*

Legal aid, right / Legal aid, purpose / Expert, fees, legal aid / Expert, medical, examination, report.

#### *Headnotes:*

The provisions of the Judicial Code on legal aid (exemption from certain legal fees for those not having sufficient means of their own) are unconstitutional in so far as they do not provide cover for the fees and costs of a medical expert in the context of an examination ordered by the court in relation to a dispute of a medical nature concerning social security allowances.

#### *Summary:*

An individual was attempting before the Brussels Labour Court to obtain payment of a handicapped person's social security allowances. In a prior administrative stage, the Medical Officer of the Belgian State had considered that the person concerned did not satisfy the medical requirements and refused the allowance. The person concerned requested the court to appoint a medical expert and sought legal aid for that purpose. The Court declared that a medical expert's fees were not covered by the legal aid provisions in force. It referred to the Court of Arbitration the question whether those provisions are contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution, taken on their own or read with Article 6 ECHR) and with the constitutional right to legal aid (Article 23.3.2 of the Constitution).

In its reply, the Court referred first of all to the right to legal aid, guaranteed by Article 23 of the Constitution, and to Article 6 ECHR (with reference to the right to be assisted by a lawyer where the person concerned is unable to present his or her own case – European Court of Human Rights, *Airey v. Ireland*, 9 October

1979, Series A, no. 32, p. 13; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-003]). The Court observed that the right to a fair hearing must also be guaranteed in proceedings involving an expert examination ordered by the court, the findings of which may have a decisive influence on the decision of the court. Anyone who is unable to receive the assistance of a medical expert during the proceedings is, according to the Court, not on an equal footing with an opponent who is assisted by a medical expert. Such a person is therefore the victim of a discriminatory interference with his or her right to a fair hearing.

The Court further observed that the public service of justice must also be accessible to all litigants. A difference in treatment on the basis of the financial situation of one party to the proceedings cannot be justified.

According to the Court, the difference in treatment also constitutes a violation of the right to legal aid guaranteed by Article 23.3.2 of the Constitution.

#### *Languages:*

French, Dutch, German.



*Identification:* BEL-2005-3-017

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 23.11.2005 / **e)** 17/1/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 20.01.2006 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

#### *Keywords of the alphabetical index:*

Name, family / Name, change / Child, name / Paternity, contested.

#### *Headnotes:*

The obligation to change surnames after legal proceedings to contest paternity constitutes interference in the exercise of the right to respect for private life. There is no justification for purely and simply prohibiting a child of full age who has successfully brought an action to disprove his or her paternity from keeping his or her original surname.

#### *Summary:*

I. A woman of full age institutes court proceedings to contest her paternity, submitting as evidence a genetic test in support of her claim. She expresses the desire, however, to keep her surname. Article 335 of the Civil Code does not allow her to do so: it provides that a child for whom only the maternal affiliation has been established, must carry the mother's surname. The Liège court of first instance therefore asks the Arbitration Court to rule on the conformity of this Article with the Constitutional provisions concerning equality and non-discrimination (Articles 10 and 11 of the Constitution), on the grounds that it would discriminate between children of full age whose paternal affiliation is established after their maternal affiliation, who as a rule keep their original surname, and children of full age who successfully bring an action to contest paternity, who may not keep their surname.

II. In answer to the Cabinet (Council of Ministers), which as a party before the Court to defend the law was of the opinion that the categories of persons were not comparable, the Arbitration Court first points out that the two categories of people concerned are comparable in that, in both cases, it is a question of enabling a child of full age, whose civil status has been changed, to keep his or her surname.

The Court goes on to state that a family name is assigned mainly for reasons of social usefulness. In contrast to the assignment of a first name, it is governed by law, the law being designed both to establish the family name in a simple and uniform manner and to ensure that the family name is, by and large, unvarying.

The Court then notes that, under Article 335.2 of the Civil Code, a child of full age who successfully contests paternity loses his or her original surname and takes on his or her mother's surname.

This obligation to change surnames constitutes an interference in the exercise of the right of the person concerned to respect for his or her private life (European Court of Human Rights, 25 November 1994, *Stjerna v. Finland*, Series A, no. 299-B; *Bulletin* 1994/3

[ECH-1994-3-019]). The Court therefore considers that it must ascertain whether the decision in question disproportionately violates the right to respect for the private lives of children of full age and, in particular, undermines the social safeguard of keeping the same family name when their civil status is changed. It is of little importance for this purpose that the change of surname is linked to proceedings to contest paternity that "may be motivated on other grounds and have consequences other than a change of surname". Lastly, the Court holds that the provision in the Surnames and First Names Act of 15 May 1987 whereby a child of full age may ask the competent authority to change his or her surname is not such as to provide reasonable justification for the contested difference in treatment, as this possibility is inherently hypothetical. The Court therefore concludes that there has been a violation of Articles 10 and 11 of the Constitution.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2005-3-019

- a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.12.2005 /
- e)** 194/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 10.02.2006 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

- 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
- 5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.
- 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

#### *Keywords of the alphabetical index:*

Foreigner, residence, illegal, deportation, obstacle / Foreigner, child, residence / Foreigner, medical assistance, urgent care, limitation / Disability, serious / Child, disabled, care.

#### *Headnotes:*

The mutual enjoyment by parents and child of each other's company constitutes a fundamental element of family life; the natural family relationship is not terminated by reason of the fact that the child is taken into public care.

It is discriminatory to treat in the same way, without reasonable justification, foreigners who are illegal residents in the country but are in fundamentally different situations, namely those who may be deported and those who may not as they have an under-age child, who is completely unable to leave the country because of a serious disability and whose right to respect for family life must be preserved, by ensuring that his or her parents are present at his or her side.

#### *Summary:*

I. The Court must consider yet again (see references) whether Section 57.2 of the Law of 8 July 1976 laying down the principles governing the organisation of state social welfare centres is compatible with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), in that it provides that foreigner illegally resident in Belgium are not entitled to social welfare other than emergency medical assistance.

The actual case concerns a foreign mother illegally resident in the country, whose under-age son is severely disabled and cannot be deported, for medical reasons.

In its Judgment no. 80/99 of 30 June 1999, the Arbitration Court held that it was contrary to the principle of equality to deprive all foreigners, who had been ordered to leave the country of social welfare and not to take account of the situation of those who, for medical reasons, were completely unable to comply with the order to leave Belgium.

The Brussels employment tribunal asks the Arbitration Court to review the above-mentioned Section 57.2 in the light of Articles 10 and 11 of the Constitution, possibly taken together with other rights and freedoms enshrined in the Constitution or the European Convention on Human Rights and in the UN Convention on the Rights of the Child, given that it allegedly deals identically with all illegal aliens, without making a distinction according to whether or not they have a dependent, seriously disabled under-age child who, because of the disability, is completely unable to leave the country.

II. In its reply, the Court first points out that the mutual enjoyment by parent and child of each other's company is a fundamental element of family life, and that the natural family relationship is not terminated by reason of the fact that the child is taken into public care (the Court refers to the Judgments of the European Court of Human Rights in the cases of *W., B. and R. v. the United Kingdom*, 08.07.1987, paragraph 59 and *Gnahoré v. France*, 19.09.2000, paragraph 50, *Reports of Judgments and Decisions* 2000-IX).

The right to respect for private and family life (Article 8 ECHR, Article 22 of the Constitution) is essentially designed to protect individuals from arbitrary interference by the authorities. According to the Court, it also means that the State has positive obligations inherent in the need to ensure that family life is respected in practice: "Where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed ..." and take steps to reunite the parent and child concerned (European Court of Human Rights, *Eriksson v. Sweden*, 22.06.1989, paragraph 71, Series A, no. 156; *Special Bulletin – Leading cases ECHR* [ECH-1989-S-002]; *Margarita and Roger Andersson v. Sweden*, 25.02.1992, paragraph 91, Series A, no. 226-A; *Olsson v. Sweden* (no.2), 27.11.1992, paragraph 90, Series A, no. 250; *Keegan v. Ireland*, 26.05.1994, paragraph 44, Series A, no. 290; *Bulletin 1994/2* [ECH-1994-2-008] and *Hokkanen v. Finland*, 23.09.1994, paragraph 54, Series A, no. 299-A; *Bulletin 1994/3* [ECH-1994-3-015]).

The Court therefore concludes that, as interpreted by the lower court, the provision in question deals in the same way, with no reasonable justification, with persons who are in fundamentally different situations: those who may be deported and those who may not because they are the parents – and can prove it – of an under-age child who, for medical reasons, is completely unable to comply with an order to leave the country because of a serious disability that cannot be treated appropriately in the country of origin or in another country obliged to take the child back, and that the right to respect for family life must be preserved by ensuring that the child's parents are present at his side.

It therefore concludes that Articles 10, 11 and 22 of the Constitution have been violated.

#### *Supplementary information:*

See also *Bulletin* 2003/2 [BEL-2003-2-009]; *Bulletin* 2002/3 [BEL-2002-3-012]; *Bulletin* 1999/2 [BEL-1999-2-006].

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2006-2-007

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 07.06.2006 /  
**e)** 91/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette),  
23.06.2006 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

- 1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc)**.
- 2.1.1.4 Sources – Categories – Written rules – **International instruments**.
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 3.19 General Principles – **Margin of appreciation**.
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.
- 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

#### *Keywords of the alphabetical index:*

Media, journalist, source, disclosure, refusal, right / Media, information, source, disclosure / Media, journalist, information, source.

#### *Headnotes:*

Anyone working as a journalist is entitled to keep his or her sources of information secret. Confining protection of the confidentiality of sources to persons who regularly work as journalists and who carry on the occupation in a self-employed capacity or as paid employees violates freedom of expression and freedom of the press, as guaranteed in the Constitution and conventions.

The Court, which has no jurisdiction to perform a direct review of statute law's compliance with the terms of a convention, can nonetheless take into consideration provisions of international law guaranteeing rights and freedoms similar in scope to the constitutional provisions effectively coming within its powers of review.

It is not discriminatory nor does it breach the right to respect for private and family life that the legislator has provided that the courts can waive confidentiality of sources where this makes it possible to prevent the commission of offences involving a serious threat of physical harm to one or more individuals, but they are not authorised to do so where individuals' reputation, good name and/or privacy could be jeopardised.

Allowing the courts to waive confidentiality of journalists' sources solely if there is a serious threat of physical harm to individuals, but not where an offence has already taken place, does not infringe the right to life.

### **Summary:**

A number of individuals applied to the Court seeking the annulment of the Act of 7 April 2005 on protection of journalists' sources.

According to this Act, journalists and editorial staff are entitled not to disclose their sources of information (Section 3). They can be obliged to reveal their sources only by a court order and "if this might prevent the commission of offences representing a serious threat of physical harm to one or more individuals" (Section 4).

Section 2.1 defines a "journalist" as "any person who, in a self-employed capacity or as a paid employee, and any legal entity which contributes regularly and directly to gathering, drafting, producing or distributing news via a media outlet for the public's benefit."

The protection afforded by law is accordingly enjoyed by individuals only if they pursue journalistic activities as their occupation, in a self-employed capacity or as a paid employee.

In their first submission, the applicant complained that freedom of expression and freedom of the press were restricted in a discriminatory manner since a person who did not meet the above conditions could not assert the legally recognised right not to disclose his or her sources of information.

Relying on the provisions guaranteeing freedom of expression and freedom of the press (Articles 19 and 25 of the Constitution, Article 10 ECHR and Article 19.2

of the International Covenant on Civil and Political Rights), the Court pointed out that freedom of expression was one of the essential foundations of society and that a free press constituted a key component of that freedom.

Referring to the case-law of the European Court of Human Rights (*Goodwin v. United Kingdom* of 27 March 1996, § 39, *Reports* 1996-II; *Roemen and Schmit v. Luxembourg*, 25.02.2003, § 46, *Reports of Judgments and Decisions* 2003-IV; *Bulletin* 2003/1 [ECH-2003-1-004]; *Ernst and Others v. Belgium*, 15.07.2003, § 91), the Court observed that the right to confidentiality of journalistic sources must be guaranteed not to protect the interests of journalists as a professional category but to enable the press to play its role of "watchdog" and to inform the public on matters of public interest. Anyone performing journalistic activities was entitled under the above-mentioned constitutional and convention provisions to keep his or her sources of information secret.

The Court held that the first submission was founded. By denying the right of confidentiality of information sources to persons who performed journalistic activities other than in a self-employed capacity or as paid employees and to those who did not perform such activities on a regular basis, Section 2.1 of the impugned Act breached Articles 19 and 25 of the Constitution, whether or not taken together with Article 10 ECHR and Article 19.2 of the International Covenant on Civil and Political Rights. The Court annulled (*ex tunc*) the phrases "journalists, that is to say", "in a self-employed capacity or as a paid employee, and any legal entity which" and "regularly and".

The applicants also complained that, under Section 4 of the impugned Act, a court could order journalists and editorial staff to disclose their sources only where it might prevent the commission of offences posing a serious threat of physical harm to one or more individuals. The applicants contended that the law's failure to allow a court to waive confidentiality of sources where the reputation, good name and/or privacy of individuals were seriously jeopardised constituted a discriminatory breach of the right to respect for private and family life.

In this connection, the Court pointed out that freedom of expression and freedom of the press were not unconditional in nature. The European Court of Human Rights had also acknowledged that, in certain circumstances, an interference with the right to confidentiality of sources could be justifiable. Where freedom of expression and freedom of the press were at risk of coming into conflict with the right to respect for private and family life (Articles 22 and 29 of the

Constitution, Article 8 ECHR) a fair balance must be struck between these rights and freedoms and the related interests.

The Court considered that the legislator could have deemed that, on account of the gravity and the often irreparable nature of offences involving physical harm, the need to prevent their commission could justify an exception from the confidentiality of sources. It was also for the legislature to decide whether this exception must extend to prevention of offences interfering with private and family life, which were neither as serious nor as irreparable in nature. Declining to extend the exception to interferences with private and family life would doubtless have disproportionate consequences if individuals were as a result deprived of effective protection of their right to respect for their private and family life. However, in particular since a journalist was liable for any serious breach of privacy and was free to conceal or reveal his or her sources in cases involving his or her liability, the Court held that it was not unreasonable to treat the right to life or physical integrity differently from the right to respect for private and family life, with regard to a source disclosure order that might be issued by a court as a departure from the principle that journalistic sources are confidential.

In a subsequent submission – we will not examine all of their arguments – the applicant complained of an infringement of the right to life, in that a court could indeed waive source confidentiality where there was a serious threat of physical harm to individuals, but not where the offences had actually been perpetrated.

The Belgian Constitution recognises that all children have a right to respect for their moral, physical, mental and sexual integrity (Article 22bis of the Constitution) and that everyone is entitled to a life consistent with human dignity (Article 23 of the Constitution). Although these provisions do not guarantee the right to life as such, the exercise of the rights enshrined in them entails respect for it, with the result that the constitutional provisions mentioned can be combined with the convention provisions which expressly safeguard this right, in particular Article 2 ECHR and Articles 6.1 and 9.1 of the International Covenant on Civil and Political Rights.

The Court considered that the legislator could have deemed that where life or physical integrity had already been jeopardised, there was no reason to interfere with the fundamental right to freedom of expression, of which the secrecy of journalists' sources was part, since the judicial authorities had sufficient other means of conducting investigations into the offences committed. The Court further observed that where an individual had not already suffered physical harm, a journalist in possession of information that might avert

such harm had a legal obligation to come to the assistance of someone in grave danger, which was not the case where the harm had already been done and the journalist was subsequently in possession of information on the subject. The Court held that this submission was unfounded.

*Languages:*

French, Dutch, German.



# Bosnia and Herzegovina Constitutional Court

## Important decisions

*Identification:* BIH-2004-3-006

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Grand Chamber (Five Judges) / **d)** 30.11.2004 / **e)** AP 105/03 / **f)** 15/05 / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 15/05 / **h)** CODICES (Bosnian).

*Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law.**

3.10 General Principles – **Certainty of the law.**

4.7.2 Institutions – Judicial bodies – **Procedure.**

5.2 Fundamental Rights – **Equality.**

5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

*Keywords of the alphabetical index:*

Witness, testimony outside trial.

### Headnotes:

If the contested judgment meets the criteria of legality and constitutionality, in accordance with the principle of the rule of law under Article I.2 of the Constitution, there is no legal basis for claiming discrimination in relation to a fair hearing merely because the court decided an earlier case differently in a similar situation.

A different application of the law in different cases is allowed if there is a reasonable and justified reason for it. This is the case, for example, where a challenged decision is legal and constitutional. If the decision is in accordance with the law and the Constitution, there is no legal basis for saying that discrimination has occurred, and the claim for equal treatment fails. Such an interpretation leads to the limitation of the principle of prohibition of unequal treatment in the sense of legal certainty, but it is in accordance with the principle of the rule of law provided for in Article I.2 of the Constitution.

### Summary:

The appellant was found guilty of having committed the criminal offence of people-trafficking for the purpose of prostitution and was sentenced to two years' imprisonment and a security measure preventing him from carrying out independent catering business for a period of five years was imposed.

The appellant alleged that the challenged judgments violated his rights to a fair trial provided for in Article II.3.e of the Constitution and Article 6.3.d ECHR and his right to prohibition of discrimination provided for in Article II.4 of the Constitution and Article 14 ECHR.

The appellant invoked a violation of the right to a fair trial in that the witnesses, girls who were foreign nationals, were heard in the preliminary criminal proceedings, after which their statements were read out at the main hearing without their presence. As to the complaints about the violation of the right to prohibition of discrimination, the appellant alleged that the Supreme Court of Republika Srpska did not use the jurisprudence applicable in cases such as his.

In the present case, the allegations made in the appeal related to the first part of Article 6.3.d ECHR. The Constitutional Court noted that the said provision required putting the accused on an equal footing with the prosecutor regarding the summoning and examination of witnesses. However, the Constitutional Court pointed out that the said provision did not have absolute effect, i.e. the rights of the accused to summon and examine witnesses are not unlimited. If there was no appropriate and prescribed opportunity for the accused to examine a witness, a judgment cannot be based solely or mostly on the statement of that particular witness. The use of a statement that was made by a person in the preliminary stage of the proceedings as evidence – if this person, according to national law, refuses to offer that evidence in the courtroom at a subsequent point in time – may result in a judgment only if there is evidence that corroborates that particular statement. The same applies to the statement of a witness who disappeared and who cannot be summoned to appear before a court of law.

The Constitutional Court took note that, in the case at hand, the previous testimonies of witnesses had been read out at the main hearing, without their presence at the hearing in person in the capacity of witnesses. However, the ordinary courts had valid reasons for such procedure: the testimonies had been read out on the basis of powers given under Article 333.1.1 of the Law on Criminal Procedure, because it had not been possible to summon witnesses to the main hearing since their place of residence was not on the territory of the Republika Srpska any more; the judgment was not

exclusively based on the stated testimonies, but on the statement of another witness and material evidence; and the appellant had had an opportunity to give his statement in relation to the previously given testimonies of the disputed witnesses. The stated circumstances came within the quoted case-law of the Constitutional Court and the European Court of Human Rights, in relation to cases where witnesses have not given their testimonies before, nor were present at, the main hearing.

In view of this, the Constitutional Court concluded that in the case at hand, there had been no violation of the right to fair trial in relation to hearing witnesses under Article II.3.e of the Constitution and Article 6.3.d ECHR.

As to the complaints about the violation of the right to prohibition of discrimination, the appellant alleged that the Supreme Court had not used the jurisprudence applicable in cases such as his. As an example he offered a case where a violation of Article 6.3.d ECHR had been found because the statements made by the witnesses during the investigation proceedings had been read out at the main hearing in their absence.

The Constitutional Court referred to its case-law in a decision relating to a situation similar to this one.

#### *Cross-references:*

#### *European Court of Human Rights:*

- *Unterpertinger v. Austria*, 24.11.1986, Vol. 110, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1986-S-004].

#### *Languages:*

Bosnian, Serbian, Croatian, English (translation by the Court).



#### *Identification:* BIH-2004-3-007

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 17.12.2004 / **e)** AP-288/03 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 8/05 / **h)** CODICES (Bosnian).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

3.9 General Principles – **Rule of law**.

3.16 General Principles – **Proportionality**.

3.17 General Principles – **Weighing of interests**.

3.18 General Principles – **General interest**.

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State**.

#### *Keywords of the alphabetical index:*

Court, decision, execution.

#### *Headnotes:*

Omissions in the organisation of the judicial system of the state must not be allowed to deny the respect for individual rights and freedoms as established by the Constitution as well as the requirements and guarantees set forth in Article 6 ECHR. An excessive burden must not be placed on the individual in finding the most efficient way in which to realise his or her rights. The state accordingly has the obligation to organise its legal system so as to allow the courts to comply with the requirements and conditions of the European Convention on Human Rights.

#### *Summary:*

The appellants filed an appeal with the Constitutional Court for the failure to enforce the legally binding ruling of the Basic Court in Banja Luka whereby the Army of Republika Srpska was obliged to pay the appellants a total amount of 24,000 KM by way of compensation for war damages. The appellants argued that there had been a violation of their constitutional right to a fair trial.

The Military Attorney's Office claimed that it was not responsible for a possible violation of the appellants' constitutional rights and that the ruling in question was not to be enforced on the basis of the Law which provided that pecuniary and non-pecuniary damages which occurred during the war shall be settled by the issue of bonds with a maturity time limit up to 50 years, with payment in ten equal yearly instalments starting nine years before the final date of maturity and with zero rate of interest.

The Constitutional Court invoked the case-law of the European Court of Human Rights according to which Article 6.1 ECHR secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way Article 6.1 ECHR embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if the local legal system of the contracting state allowed final, enforceable court decisions not to be enforced, to the detriment of one of the parties. It would be unacceptable if Article 6 ECHR were to prescribe in detail the procedural guarantees given to the parties – proceedings which are fair, public and expedited – without the protection of enforcement of the court decision. Interpreting Article 6 ECHR as being concerned exclusively with the conduct of proceedings would probably lead to situations which were incompatible with the principles of the rule of law which the contracting states undertook to respect when they ratified the Convention. Enforcement of a judgment adopted by any court must therefore be seen as an integral part of the "hearing" within the meaning of Article 6 ECHR.

The administrative authorities must comply with legally valid court judgments. The Constitutional Court pointed out that the state, in principle, cannot adopt laws whereby it will prevent enforcement of legally valid court decisions, as it would be in contravention of the principle of the rule of law under Article I.2 of the Constitution and of the right to a fair hearing under Article II.3.e of the Constitution and Article 6.1 ECHR.

One cannot challenge the right of the state to adopt laws whereby certain human rights are revoked or limited in cases when such limitation is provided by the European Convention on Human Rights, the provisions of which regulate limitations of certain rights, such as the right to property, etc. However, the European Convention on Human Rights does not afford the right to the member states to adopt laws by which it will prevent enforcement of legally valid court decisions adopted in accordance with Article 6 ECHR. In the present case, the law itself prevented the enforcement of legally binding court decisions, which were related to established claims based on pecuniary and non-pecuniary compensation for damages that occurred during the war in Bosnia and Herzegovina. If the mentioned law were seen as an interference by the state with certain property rights of citizens (considering that it was directed towards the suspension of enforcement of monetary claims) there should be a fair balance struck between the requirements of the general interest of the community and the need for the protection of the fundamental rights of an individual, i.e. there should be a reasonable proportionality between

the means employed and the aim sought to be achieved. Moreover, such a law should be adopted in the public interest, pursue legitimate goals and meet the already mentioned principle of proportionality. The necessary balance, i.e. the proportionality between the public interest of the community and fundamental rights of the individual, is not achieved if "certain persons must bear an excessive burden".

When these principles were applied to the cited Law which established the manner of settlement of the internal debt of the Republika Srpska, one comes to the conclusion that the law, in addition to the fact that its adoption is questionable within the meaning of the principles under the European Convention on Human Rights, also violates the principle of proportionality with respect to the fundamental rights of individuals. Regardless of the evident public interest of the state to adopt this law, due to the enormous debt which was incurred as a result of the pecuniary and non-pecuniary damages caused by the war, the Constitutional Court held that by the adoption of such a law "an excessive burden was placed on the individuals" and therefore the requirement of proportionality between the public interest of the community and fundamental rights of individuals had not been met. The Constitutional Court referred to the excessive burden which was placed on the individuals by the fact that Article 21.1 of the Law provided that the claims which were established in legally binding court judgments shall be settled "by issuing of bonds with a maturity time limit up to 50 years" which justifiably posed the question whether any of the citizens who might possess such bonds would live to cash them in and thus realise their rights. Moreover, the challenged law provided that the obligations shall be settled without interest rates being charged, which, considering the mentioned time period, would surely mean that the amounts to be paid out to the individuals would be considerably decreased.

#### Cross-references:

European Court of Human Rights:

- *Hornsby v. Greece*, 19.03.1997, Reports of Judgments and Decisions 1997; Bulletin 1997/1 [ECH-1997-1-008].

#### Languages:

Bosnian, Croatian, Serbian, English (translation by the Court).



*Identification:* BIH-2005-1-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 28.01.2005 / **e)** AP 35/03 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 30/05 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

4.9.9 Institutions – Elections and instruments of direct democracy – **Voting procedures.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

*Keywords of the alphabetical index:*

Election, seats, allocation / Parliament, chamber, member, indirect election.

*Headnotes:*

Article 3 Protocol 1 ECHR does not create an obligation for a State to introduce a specific election system. It does not exclude the possibility of people freely expressing their opinion on the final composition of the legislature through indirect elections.

*Summary:*

The Social-Democratic Party (the appellant) filed an appeal with the Constitutional Court against a ruling of the Court of Bosnia and Herzegovina, seeking the annulment of the results of the election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina in all ten cantons of the Federation of Bosnia and Herzegovina. The grounds for the appeal was that the impugned decision of the Election Commission, approved by the Court of Bosnia and Herzegovina, violated the appellant's right to free elections, set out to in Article 3 Protocol 1 ECHR. The appellant maintained that the number of votes received by each party in the elections for Cantonal Legislatures should have been taken into consideration during the

election of delegates to the House of Peoples. Consequently, the appellant argued that the number of seats allocated to it should have been proportionate to the voting results in the direct general elections for Cantonal Legislatures.

However, the Court of Bosnia and Herzegovina and the Election Commission took the position that, firstly, the results of the elections for the House of Peoples were established on the basis of the results of the direct elections conducted in the cantonal assemblies, whose representatives elect delegates for the House of Peoples and, secondly, the delegates to the House of Peoples were not to be elected on the basis of the results of the political parties in the direct and general elections for the cantonal assemblies.

The Constitutional Court pointed out that the Constitution of the Federation of Bosnia and Herzegovina sets out that elections for Cantonal Legislatures and elections for the House of Peoples of the Parliament of the Federation are two different types of elections. Elections for Cantonal Legislatures are provided for by the original text of the Constitution of the Federation of Bosnia and Herzegovina, the provisions of which stipulate direct elections in which voters cast a secret ballot to elect representatives to a Cantonal Legislature. Elections for the House of Peoples of the Parliament of the Federation are provided for by Amendment XXXIV to the Constitution of the Federation of Bosnia and Herzegovina. The manner of election of the delegates to the House of Peoples of the Parliament of the Federation is determined in detail in the Law on Amendments to the Election Law. The above-mentioned constitutional and legal provisions refer to indirect elections, which are to be held after direct elections for Cantonal Legislatures; the elected representatives of Cantonal Assemblies elect delegates to the House of Peoples of the Parliament of the Federation.

It is possible under the Constitution of the Federation of Bosnia and Herzegovina and the Election Law for the political party with the highest number of votes in the direct elections for Cantonal Legislatures not to be allocated any seats in the House of Peoples of the Parliament of the Federation. That is so because the constitutional and legal provisions do not provide for the number of seats allocated to the political parties in the House of Peoples of the Parliament of the Federation to be determined solely in proportion to the number of votes received by the political parties in the direct elections for Cantonal Legislatures.

Consequently, the Constitutional Court found no reason to impose the results of the direct elections for Cantonal Legislatures on the election of delegates to the House of Peoples of the Parliament of the Federation, since two different types of elections were at issue. The

results of the elections for the House of Peoples of the Parliament of the Federation may only be calculated on the basis of results of indirect elections held in accordance with the above-mentioned constitutional and legal provisions. If the composition of the House of Peoples of the Parliament of the Federation were to be proportionate to the election results of the parties in the direct elections for Cantonal Legislatures, one could rightfully ask the questions: "What is the point of holding indirect elections?"; "Why was Amendment XXXIV to the Constitution of the Federation of Bosnia and Herzegovina adopted in the first place?"; and "Why where the amendments to the Election Law concerning the election of delegates to the House of Peoples of the Parliament of the Federation adopted?".

The Constitutional Court noted that Article 3 Protocol 1 ECHR contains the concept of subjective political rights relating to "the right to vote" and "the right to stand for election to the legislature". As important as the rights under Article 3 Protocol 1 ECHR are, they are not absolute. Since Article 3 Protocol 1 ECHR recognises them without setting them forth in express terms or defining them, there is room for "implied limitations". In their internal legal orders, the Contracting States have made the rights to vote and to stand for election subject to conditions which are not in principle excluded under Article 3 Protocol 1 ECHR. The rights in question must not be limited "to such an extent as to impair their very essence and deprive them of their effectiveness". Care must be taken to ensure that any limitation pursues a legitimate aim and that the means employed are not disproportionate. As regards the method of appointing the "legislature", Article 3 Protocol 1 ECHR provides only for "free" elections "at reasonable intervals" "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people". Subject to that, it does not create any obligation to introduce proportional representation or majority voting with one or two ballots. Moreover, the phrase "conditions which will ensure the free expression of the opinion of the people in the election of the legislature" implies essentially – apart from freedom of expression (already protected under Article 10 ECHR) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. The Constitutional Court held that Article 3 Protocol 1 ECHR also relates to the system of indirect election of the legislature. Moreover, the Constitutional Court found that the European Court of Human Rights had not expressed in any of its decisions any intention to exclude the system of indirect elections from Article 3 Protocol 1 ECHR.

#### *Supplementary information:*

Judge Constance Grewe delivered a dissenting opinion.

#### *Cross-references:*

#### *European Court of Human Rights:*

- *Mathieu-Mohin and Clerfayt v. Belgium*, 02.03.1987, Vol. 113, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1987-S-001].

#### *Languages:*

Bosnian, Serbian, Croatian, English (translations by the Court).



#### *Identification:* BIH-2007-1-002

- a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Chamber / **d)** 21.12.2006 / **e)** AP-2271/05 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 38/07 / **h)** CODICES (Bosnian, English).

#### *Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law**.  
 3.12 General Principles – **Clarity and precision of legal provisions**.  
 5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.  
 5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.

#### *Keywords of the alphabetical index:*

Detention, lawfulness / Detention, psychiatric hospital / Mentally incapacitated, detention, preventative.

#### *Headnotes:*

There is a violation of the right to liberty and security in cases where persons who have committed a criminal offence in a state of mental incapacity are deprived of their liberty in a way which fails to meet the requirement of "lawfulness" under the European Convention on Human Rights, and where the legislation in force is imprecise, which may give rise to the arbitrary application of law.

**Summary:**

I. The appellants lodged appeals with the Constitutional Court claiming infringements of their rights to liberty and security under Article II.3.d of the Constitution and Article 5.1.e and 5.4 ECHR. The appellants had all been subject to security measures of compulsory psychiatric treatment and placement in a health-service institution, and had been placed in the Forensic Ward of the Correctional Institution of Zenica (hereinafter, the "Forensic Ward"). They argued that the requirements necessary to secure their freedom had been met by the adoption of new criminal legislation, that they could undergo medical treatment once they were discharged, and that the Federation of Bosnia and Herzegovina Criminal Procedure Code (hereinafter, "CPC"), which entered into force in 2003, contained no provisions to justify any further extension of their confinement. They suggested that the Forensic Ward was not an appropriate place to implement the security measures. They asked to be released, to continue their medical treatment once they were discharged, and to be placed under the supervision of a competent social welfare centre.

The lower courts had imposed measures of compulsory medical treatment and placement in institutions, which were in place under the former CPC, on the basis that they had committed various criminal offences in a state of mental incapacity. Proper medical examinations had been undertaken, to establish that they were all suffering from serious mental disorders which posed a threat to public safety, and they therefore had to be medically treated and confined in medical facilities. The new Federation of Bosnia and Herzegovina Criminal Code (hereinafter, the "CC") entered into force in 2003. It stipulates that measures of compulsory psychiatric treatment can only be imposed on persons who committed criminal offences in a state of substantially diminished mental capacity or in a state of diminished mental capacity if there is a danger that this mental state might push the perpetrator into committing further criminal offences. The new CC no longer imposes the security measures described above on those who commit criminal offences in a state of mental incapacity. The appellants based their request for discharge on precisely these grounds.

II. The Constitutional Court observed that when new legislation was adopted, the case-law pertaining to the extension of the measures was viewed differently in the Federation of Bosnia and Herzegovina. Since the adoption of the new CC and CPC, some courts have held that the persons concerned are no longer within their jurisdiction, but rather within the jurisdiction of social welfare centres. The courts have been imposing detention orders of up to thirty days in custody, under the new CPC, and then referring cases to the

appropriate social welfare centre. The problem with the social welfare centres is that they have insufficient space and inadequate conditions for these persons. No procedure is set down. Consequently, mentally ill persons have been detained in the Forensics Ward in the absence of an official decision to justify it. Other courts have been adopting decisions on the extension of security measures already imposed in accordance with the former CPC and the Law on Protection of Persons with Mental Disabilities and the Law on Execution of Criminal Sanctions. The Constitutional Court observed that imprecise laws create scope for arbitrariness, which is demonstrated by the emergence of different case-law dealing with similar situations.

If courts consider that they have no jurisdiction, and the social welfare centres cannot cater for the persons being referred by the courts and have no set procedures, there is a danger that detention measures will extend to persons who committed criminal offences in a state of mental incapacity. This is inconsistent with the requirements that must be satisfied for the deprivation of liberty to be "in accordance with the law" as referred to in Article 5.1.e ECHR. This is accentuated because the other provisions, i.e. the Law on Protection of Persons with Mental Disabilities and Law on Execution of Criminal Sanctions have not been brought into accord with the new criminal legislation and they only refer to the former CPC which is no longer in force.

The Constitutional Court observed that where detention has been imposed on those who have committed criminal acts whilst in a state of mental incapacity, this tended to be carried out in the Forensics Ward. This is still the case, even though new criminal legislation is now in force. They were usually placed on the prison ward, although when the security measure of compulsory medical treatment and placement in an institution was imposed on the appellants, the Law on Execution of Criminal Sanctions was in effect, which required the detention to be carried out in an institution designated for such patients or in a special ward of such an institution. Only in exceptional cases was the detention to be in a special ward of a correctional institution. However, the Constitutional Court noted that actual institution was not defined in the Law on Execution of Criminal Sanctions, and the appellants were assigned to the special ward of the prison in Zenica as a rule rather than an exception.

The Constitutional Court held that the assignment of mentally ill persons in a special ward is, to a certain extent, in accordance with the domestic law which provides for such a possibility in exceptional circumstances. However, it is out of line with the European Convention on Human Rights which requires mentally ill persons to be detained in a hospital, clinic or other appropriate institution.

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The appeals also raise the issue as to whether the appellants were afforded the possibility of having the court examine the period of detention at regular intervals, as envisaged by Article 5.4 ECHR. There are no procedural provisions in the new CPC regarding persons who carry out crimes in a state of mental incapacity. It only provides for the matter to be referred to a body in charge of social welfare issues for the purpose of initiating the relevant proceedings. Yet there is no definition of the expression "relevant proceedings". The Constitutional Court did not consider that the proceedings envisaged by the Law on Protection of Persons with Mental Disabilities could be "relevant proceedings" as mentioned in the new CPC. This law has never been updated or harmonised with the amendments to CPC. Its provisions simply refer to the procedure prescribed by the former CPC which is no longer in force, and thus the circle is closed.

One might assume that the procedural rules of administrative proceedings would apply to these persons, as they are applicable to cases handled by social welfare agencies. Alternatively, the procedural rules of non-contentious proceedings might apply, as they are applicable in cases of enforced detention of mentally ill persons who have not committed a criminal offence. See Law on Protection of Persons with Mental Disabilities. However, there is no explicit definition in any of the legal provisions currently in force of which "court" the appellants are supposed to address; the proceedings which should be conducted in order to review the legality of extended detention, the time limit for a review of any extension of the measure, the procedural guarantees at their disposal; and the time frame within which a decision must be taken.

The Constitutional Court observed that the competent authorities are obliged to undertake appropriate legislative and other measures to ensure that the deprivation of liberty of persons who committed criminal acts in a state of mental incapacity is carried out legally, as required by the European Convention on Human Rights. This includes placing them in an appropriate health institution, as well as measures to provide them with the right of access to a "court" within the meaning of Article 5.4 ECHR.

The Constitutional Court accordingly concluded that in the present case, the appellants' right to liberty and security under Article II.3.d of the Constitution and Article 5.1.e and 5.4 ECHR had been violated.

#### Cross-references:

##### European Court of Human Rights:

- *Winterwerp v. the Netherlands*, 24.10.1979, Vol. 33, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-004].

#### Languages:

Bosnian, Serbian, Croatian, English (translations by the Court).



#### Identification: BIH-2007-3-004

- a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 29.09.2007 / **e)** AP-286/06 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 86/07 / **h)** CODICES (Bosnian, English).

#### Keywords of the systematic thesaurus:

- 1.2.1.11 Constitutional Justice – Types of claim – Claim by a public body – **Religious authorities**.
- 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
- 3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
- 5.1.1.5 Fundamental Rights – General questions – Entitlement to rights – **Legal persons**.
- 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.

#### Keywords of the alphabetical index:

Canonic law, application by State / Church, property / Church, state, separation.

#### Headnotes:

There had been no restrictions on the appellant's freedom of religion in the proceedings before the Supreme Court, which had declined to apply canon law. Such action is in accordance with the constitutional and legal position of religious communities.

**Summary:**

I. The appellant, the parish of St. Ante Padovanski of Bugojno, of the Franciscan Province of Bosna Srebrna, Sarajevo, lodged an appeal with the Constitutional Court against a judgment of the Supreme Court of the Federation of Bosnia and Herzegovina. The Supreme Court had rejected the appellant's claim for the recognition of its ownership rights over certain property, which was in the name of Father Bruno Batinic at the time of his death. The Supreme Court dismissed as irrelevant the contents of the written statement given before the solemn profession, and the text of the oath, by which Father Bruno Batinic undertook to observe the provisions of "the Holy Canons", as stated in the text of the oath. The appellant cited Canon 668 of the Code of Canon Law in support of its case. This prescribes that whatever a member of a religious institution acquires through personal effort or through the institution is acquired for that institution. To act otherwise would be to breach the vow of poverty. The Supreme Court rejected this argument. It concluded that the lower instance courts had erred in their finding that there were grounds for their application of the Canon Law in the provisions of the Protocol on Conversations between the representatives of the Government of the former Yugoslavia and the representatives of the Holy See, enacted in 1966 and ratified on 25 June 1966 in Belgrade. This was because Bosnia and Herzegovina did not take over the mentioned Protocol. Neither was a bilateral agreement concluded between Bosnia and Herzegovina and the Holy See.

The appellant contended that the Supreme Court's judgment had violated its rights to a fair trial, freedom of thought, conscience and religion and the right to property under Article II.3.e, II.3.g and II.3.k of the Constitution and Articles 6.1 and 9 ECHR, and Article 1 Protocol 1 ECHR. The Supreme Court had modified "the judgments of the lower-instance courts indiscriminately and without legal arguments".

II. The Constitutional Court held that the Supreme Court had given relevant and articulated reasons in its judgment, when it determined that the lower instance courts had erroneously assessed that the Canon Law was applicable to the present case, referring to the relevant provisions of the substantive law and procedural law, applicable to the present legal situation. The Constitutional Court took particular note of the Supreme Court's reasoning that Bosnia and Herzegovina did not take over the Protocol on Conversations between the representatives of the Government of SFRY and the representatives of the Holy See enacted in 1966, nor was a bilateral agreement concluded between Bosnia and Herzegovina and the Holy See.

The Constitutional Court also noted the provisions of the Constitution, the Law on the Legal Position of Religious Communities and the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities. Under Article 8.1 of the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities, the appellant, as a religious community, has a status of a legal person. However, in accordance with the proclaimed principle of a secular social system under Article 14 of the above law, the state and religious communities shall be separate, and the appellant, as a religious community, has internal autonomy to apply its religious norms, which, under Article 11.1 of the said law, "have no civil and legal effects whatsoever". In order for Canon Law, as an internal legal norm of a religious community, (such as the appellant in these proceedings), to be introduced into the national legal system, that issue, by virtue of Article 15.1 of the above law, must be regulated by special agreement between the state and the religious community. No such agreement existed in the present case. The Constitutional Court mentioned Article 4 of the former Law on the Legal Position of Religious Communities, under which religious communities had to operate in accordance with the Constitution and the law. Article 12 of the law mentioned overleaf governs the legal position of religious communities, and allows religious communities to acquire property in accordance with the law. The Constitutional Court emphasised the principle of the rule of law under Article I.2 of the Constitution, which obliges ordinary courts to apply applicable legal norms and to adopt judgments accordingly.

The Constitutional Court held that the Supreme Court clearly explained its decision within the meaning of Article II.3.e of the Constitution and Article 6.1 ECHR. It rejected the contention in the appeal that the Supreme Court had arbitrarily misapplied the substantive law without reasoning behind its decision.

Dealing with the alleged breach of Article 9 ECHR, the Constitutional Court observed that, generally speaking, the definition of the protection and restriction of the freedom of religion in Bosnia and Herzegovina is in the Law on the Freedom of Religion and the Legal Position of Churches and Religious Communities. In essence, this law adopts the principles of the secular social system established by the old Law on the Legal Position of Religious Communities. The current legislation not only incorporates the provisions of Article 9 ECHR, but also places religious communities in their legal context, within the democratic and secular social system of Bosnia and Herzegovina.

There is a line of authority from the Human Rights Chamber for Bosnia and Herzegovina, and from the Convention institutions, to the effect that religious

communities enjoy the protection of the rights under Article 9 ECHR in its collective dimension. The Constitutional Court therefore concluded that the appellant, as a religious community, is the holder of rights under Article II.3.g of the Constitution and Article 9 ECHR.

That being so, the question arose as to whether the Supreme Court's judgment restricted the freedom of the appellant, and, if so, whether such a restriction was justified within the meaning of Article 9.2 ECHR. For the restriction to be justified, it must be in accordance with the law and should be necessary in a democratic society to achieve one or more legitimate goals listed in Article 9.2 ECHR.

The Constitutional Court noted that the ordinary courts had established that Fr. Bruno Batinic had had his own property when he died, and that he had not bequeathed it to the appellant by will. Under canon law, a member of a religious order is obliged to make a will as a legal act disposing of his own property, which would be valid within the civil legal framework. The property of a physical person who is simultaneously a member of a religious order is not automatically the property of Church by operation of law, including the norms of canon law. The Supreme Court, taking into account the circumstances and the appellant's constitutional and legal status, concluded that the appellant did not submit evidence that could prove that he had lawfully acquired the property within the meaning of Article 23 of the Law on Legal Ownership Relations. As a result, the Constitutional Court held that the Supreme Court's judgment rejecting the appellant's claim did not place restrictions on the appellant's freedom as a religious community within the meaning of Article 9 ECHR.

#### Cross-references:

European Court of Human Rights:

- *Metropolitan Church of Bessarabia and others v. Moldova*, no. 45701/99, 13.12.2001, *Reports of Judgments and Decisions* 2001-XII; *Bulletin* 2002/1 [ECH-2002-1-003].

#### Languages:

Bosnian, Serbian, Croatian, English (translations by the Court).



#### *Identification:* BIH-2012-1-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 19.11.2011 / **e)** AP 291/08 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

#### *Keywords of the systematic thesaurus:*

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.

#### *Keywords of the alphabetical index:*

Criminal proceedings / Evidence, obtained unlawfully / Law, application, incorrect / Search and seizure / Search warrant.

#### *Headnotes:*

There has been a violation of the right to a fair trial under Article 6.1 ECHR in a criminal trial where the regular court grounded its decisions on evidence obtained by arbitrary application of the Criminal Procedure Code and which was in fact the only direct evidence that constituted incriminating evidence against the appellant.

#### *Summary:*

I. The present case concerned criminal proceedings in which the appellant was pronounced guilty of the criminal offense as stipulated by the law and received a prison sentence. The appellant was sentenced based on evidence, namely, that 16 kilograms and 373 grams of narcotics marijuana had been found when the vehicle he was driving was searched. The appellant contended that the search in question was conducted in a manner inconsistent with a number of provisions of the Criminal Procedure Code of the *Republika Srpska* (hereinafter, the "Criminal Procedure Code") as he was not allowed to call an attorney to be present at the search of the vehicle and as the search warrant was not carried out in accordance with the provisions of the Criminal Procedure Code, since the preliminary proceedings judge, when issuing the search warrant based on an oral request, failed to take minutes of the conversation with the requesting official concerning the oral request and to submit them to the Court.

II. The Constitutional Court noted that Article 120.3 of the Criminal Procedure Code provides that, where a search warrant is being issued on foot of an oral request, the preliminary proceedings judge shall record

the course of the conversation regarding the request and submit the signed copy of the minutes to the court within 24 hours of issuing the warrant. In the opinion of the Constitutional Court, this provision is undisputedly of imperative character and clearly and unambiguously imposes an obligation on the preliminary proceedings judge to take minutes when issuing a search warrant based on the oral request and to give those minutes to the Court within 24 hours. The Constitutional Court found that this obligation is imposed due to the guarantee in the Criminal Procedure Code that a search warrant issued on foot of an oral request is to be issued exclusively based on the approval of the preliminary proceedings judge.

In the Constitutional Court's view, it was indisputable that the search warrant concerning the appellant's vehicle based on an oral request was not issued in accordance with the provisions of Article 120.3 of the Criminal Procedural Code as the Criminal Procedure Code provides strict conditions for the issuing of such a warrant and the failure to comply cannot be validated by subsequent actions. Therefore, the Constitutional Court found that the regular courts had applied the provisions of Article 120.3 of the Criminal Procedure Code arbitrarily as the courts had believed that the statement of a preliminary proceedings judge could justify his obvious failures, namely, his failure to record the course of the conversation with the official concerning the oral request for a search warrant as well as his failure to submit a verified copy of the minutes to the court concerning the issued oral search warrant.

Further, the Constitutional Court found that the question was raised whether the arbitrary application of Article 120.3 of the Criminal Procedure Code, in the instant case, had as a consequence the adoption of arbitrary decisions that led to violation of the appellant's right to a fair trial under Article 6.1 ECHR.

Bearing in mind that the search of the appellant's vehicle had been carried out illegally, that the regular courts had used the narcotics discovered as a result of that search as evidence in the criminal proceedings, and more precisely that it was *de facto* the only direct incriminating evidence presented against the appellant, that it was therefore the only evidence upon which the court had found the appellant guilty for the criminal offense of unauthorised production and sale of narcotics under Article 224 of the Criminal Procedure Code, and that the said evidence had been obtained by arbitrary application of Article 120.3 of the Criminal Procedure Code, the Constitutional Court held that the evidence (narcotics) did not have the necessary quality for the courts to ground their decisions on it, as they had done in the instant case. In such a manner arbitrary decisions had been taken that violated the appellant's right to a fair trial under Article 6.1 ECHR.

In addition, pursuant to the consistent case-law to have the fairness of the proceedings "as a whole" examined, the Constitutional Court was required to examine the appellant's objection that, as understood by the Constitutional Court, raised a question as to the identity of the temporarily seized items; in other words, it raised an issue regarding the use of the temporarily seized items as evidence against the appellant. As already stated, the appellant emphasised that during the procedure of opening and inspecting the seized items, there was no preliminary proceedings judge present. In addition, neither he personally nor his defence counsel were present as provided for by Article 135 of the Criminal Procedure Code. The appellant contended that this failure led to a situation in which the seized items represented legally invalid evidence, especially as certain witnesses identified the items as 16 packages of green herbal substance in yellow packaging, while some referred to brown packaging, on which no fingerprints of the appellant were found.

The Constitutional Court noted that the reasoning of the regular court was primarily focused on provisions of Article 135.3 of the Criminal Procedure Code, which provide that when opening and inspecting seized items care must be taken that their contents do not become known to any unauthorised person. From the referenced reasoning it could be concluded that the regular court considered that in the instant case there were no reasons for safeguarding the secrecy or confidentiality of the information or protection of privacy and that the opening and inspection of items seized from the appellant was carried out in accordance with the provisions of Article 135 of the Criminal Procedure Code.

However, the Constitutional Court emphasised that this reasoning fully disregarded the imperative provisions of Article 135.1 and 135.2 of the Criminal Procedure Code, which provide that the opening and inspection of temporary seized items and documentation shall be done by a prosecutor and that the prosecutor shall be bound to notify the person or the business enterprise from whom or from which the objects were seized, the preliminary proceedings judge and the defence attorney of the opening of the seized objects or documentation.

It was undisputed that the competent prosecutor in the instant case had failed to carry out the opening and inspection of the temporarily seized items in accordance with the imperative provisions of Article 135.1 and 135.2 of the Criminal Procedure Code. In addition, it was undisputed that, in terms of non-compliance with the said provisions, the regular courts had failed to give any reasoning except, in the opinion of the Constitutional Court, redundant reference to the lack of reasons under provision Article 135.3 of the Criminal Procedure Code. It should also be added

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that interrogated witnesses gave different statements in terms of the colour of scotch tape that was used to tape the items allegedly seized from the appellant and that there were no traces of the appellant's fingerprints on the seized items. Taking all of these matters into consideration, the Constitutional Court found that the regular courts in the instant case did not eliminate reasonable doubt as to the identity of the items seized from the appellant and considering that the challenged judgments were exclusively based on that evidence, the Constitutional Court held that the proceedings in question, seen as a whole, did not meet the standards of the right to a fair trial under Article 6.1 ECHR.

#### Cross-references:

European Court of Human Rights:

- *Bykov v. Russia*, no. 4378/02, 10.03.2009, *Reports of Judgments and Decisions of the Court, Bulletin 2009/2* [ECH-2009-2-004].

#### Languages:

Bosnian, Serbian, Croatian, English (translations by the Court).



**Identification:** BIH-2012-2-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 26.05.2012 / **e)** AP 2120/09 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 59/12 / **h)** CODICES (Bosnian, English).

#### Keywords of the systematic thesaurus:

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

#### Keywords of the alphabetical index:

Home, inviolability / House search / Search warrant, specification.

#### Headnotes:

The right to respect for home, private and family life is violated where the warrant providing the basis for a search of a person's home fails to specify, at a minimum level, the reasons suggesting that there exists a likelihood that someone (a perpetrator or accomplice) or something (the traces of a criminal offence or objects relevant to the proceedings) would be found in the home, which clearly stems from the content of the provisions of the Criminal Procedure Code and which represents a guarantee of justification for issuing a search warrant.

#### Summary:

I. In the instant case the appellant was suspected of a very serious offence; organised crime in connection with the offence of illicit narcotics trafficking. The grounds for suspicion were based on a Report of the Crime Police Administration of the Republica Srpska (one of the principal territories of Bosnia and Herzegovina) which was obtained through operations in the field. At the request of the prosecution, the Court issued a warrant which permitted a search of the appellant's apartment, car, mobile phones and computers, hard drives and other storage devices for the detection and seizure of items that encourage or can be brought into connection with the commission of the offence and traces of crime. The appellant complained that the search, which was conducted on foot of an unlawful search warrant of the court with excessive use of force and threats, and in full view of the public in order to discredit the appellant, was in violation of his rights under Article II.3.f of the Constitution and Article 8 ECHR.

II. The Constitutional Court examined whether the search warrant was issued "in accordance with the law". The Constitutional Court noted that the warrant was based on Article 51 of the Criminal Procedure Code which states that the search of a dwelling or other premises may be conducted only when there are sufficient grounds for suspicion that a perpetrator of a crime or accomplice to a crime, traces of a criminal offence or objects relevant to the criminal proceedings might be found there. The Constitutional Court observed that the reason or basis for the issuance of the warrant is the existence of grounds for suspecting that they will find something or someone. This implies that when issuing a search warrant, the court does not address the existence of grounds for suspicion that a crime was committed.

Grounds for suspicion that a crime was committed are the "jurisdiction" of the prosecution and that is a *conditio sine qua non* for issuing the warrant. It also means that after the prosecution establishes that there is a lower

degree of suspicion (so-called “reason to suspect” at the investigation stage) that the offence has been committed if there is a probability that something or someone can be found, it then submits a request for issuance of a search warrant but it must submit to the court the facts indicating the likelihood that the person, traces or objects (referred to in Article 51.1) will be found at the designated or described place or with a certain person.

When issuing a search warrant, the court does not deal with the grounds for suspicion that a criminal offence was committed but must establish sufficient grounds for suspicion that the search, of a person or place(s), will lead to the discovery of certain objects, traces or persons. Since the Criminal Procedure Code contains the terms “grounds for suspicion”, “likelihood” and “well-grounded suspicion”, which could be graded differently in ordinary life, it is important to note that “grounds for suspicion” is the lowest degree of suspicion, “well-grounded suspicion” is the degree of suspicion that the prosecution has when issuing the indictment (which implies a certain security) and the “likelihood” is found between these two degrees of suspicion. This also means that in order to issue a warrant, the court must have an even higher degree of suspicion that it will find something or someone through the search than just a mere grounds for suspicion that the crime was committed.

The reason for requiring a judicial decision on the issuance of a search warrant and for this “higher degree of suspicion” in a criminal investigation is the objective of protecting the home, privacy and family life of persons to whom a warrant relates. After the search is conducted, there is no more “confidentiality”, i.e. the person is already familiar with the specific actions of the prosecution. At this stage of the proceedings the sole guarantor of human rights protection (namely, the right to home, privacy and family life) is the court’s assessment of the probability that something will be found or the assurance of the court that the search is justified (Article 57 of the Criminal Procedure Code), and that the “assurance” of the court should be known to the person to whom the search warrant relates. The Constitutional Court did not receive an assurance from the issuing court that it had sufficient grounds for suspicion that the search would result in the discovery of something or someone, because the issuing court referred solely to grounds for suspicion that the appellant had committed the offence: the warrant offered grounds for suspicion that a crime was committed and the warrant clearly defined the “target” of the warrant (to seek and seize items that encourage or can be correlated with criminal offences and traces of the crime); but the warrant lacked “the essence of a warrant” and “concretisation” of sufficient grounds for suspicion that the perpetrator, the accessory, traces of

a criminal offence or objects relevant to the criminal proceedings might be found there.

The Court emphasised that grounds for suspecting the commission of a crime do not imply *a priori* a likelihood of finding items and clues to the crime; the “likelihood” must be set out in detail through a court warrant. The two concepts “grounds for suspicion” and “likelihood” are essentially and linguistically different and the court cannot operate on “automatism” and, if there are grounds for suspicion of a criminal offence, issue a search warrant.

On the basis of this analysis, the Constitutional Court held that in this case the procedure of issuing a search warrant for a search of the appellant and his home and others as specified by the warrant of the Court, did not satisfy the criterion of “interference in accordance with the law” under Article II.3.f of the Constitution and Article 8 ECHR. The Court held that the process of issuing the search warrant had not been conducted in accordance with the relevant regulations, given that the issuing court had not given reasons that it had sufficient grounds for suspecting that the search would result in finding something with the appellant or in his home, car, mobile or computer, which is a necessary condition for the issuance of a search warrant.

#### Cross-references:

European Court of Human Rights:

- *Niemietz v. Germany*, 16.12.1992, Vol. 251-B, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1992-S-007].

#### Languages:

Bosnian, Serbian, Croatian, English (translations by the Court).



# Croatia

## Constitutional Court

### Important decisions

*Identification:* CRO-2000-1-010

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 15.03.2000 /  
**e)** U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 31/2000 / **h)**.

*Keywords of the systematic thesaurus:*

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

3.9 General Principles – **Rule of law**.

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline**.

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.

*Keywords of the alphabetical index:*

Judge, relief of duty / Judge, appointment.

*Headnotes:*

The State Judicial Council is a body that deals with the appointment of judges and the termination of their judicial duties whereas the presidents of courts are appointed for internal management and court administration and their position belongs to the realm of administrative rather than judicial functions.

The law regulating the functioning of a state body has to determine its scope and powers, to lay down the procedure according to which it will act and to determine the ways to control the functioning of this body.

Decisions on the disciplinary responsibility of judges and public attorneys are to be passed only by the State Judicial Council itself, not by its bodies of first and second instance.

### Summary:

The Constitutional Court, accepting proposals to review the constitutionality of the Law on the State Judicial Council, repealed seven provisions of the law. It also used its powers under Article 36 of the Constitutional Act on the Constitutional Court and decided to institute proceedings to review the constitutionality of all the provisions of the law dealing with presidents of courts.

The legal effects of the decision were postponed until 31 October 2000.

### Cross-references:

European Court of Human Rights:

- *Sunday Times v. United Kingdom*, 26.04.1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-001];
- *Silver & Others v. United Kingdom*, 25.03.1983, *Special Bulletin – Leading cases ECHR* [ECH-1983-S-002];
- *Malone v. United Kingdom*, 02.08.1984, *Special Bulletin – Leading cases ECHR* [ECH-1984-S-007].

### Languages:

Croatian, English (translation by the Court).



*Identification:* CRO-2001-1-001

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 17.01.2001 /  
**e)** U-I-496/1994, U-I-110/1998, U-I-262/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 10/2001 / **h)** CODICES (Croatian).

*Keywords of the systematic thesaurus:*

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

*Keywords of the alphabetical index:*

Chamber, obligatory membership.

### **Headnotes:**

Article 43 of the Constitution which guarantees freedom of association, is not violated by the existence of the Croatian Chamber of Crafts, a public-law institution, the membership of which is obligatory for craftsman according to the Law on Crafts (*Narodne novine*, 77/93, 90/96). Its members are also free to organise other professional associations in order to protect their professional interests.

### **Summary:**

By legal definition craftsmen are persons who independently and permanently exercise economic production, trade and services, either themselves or also as employers of other persons. The disputed provisions of the law prescribe that all craftsmen who deal with the same craft, or similar crafts, shall organise an association of craftsmen of that sort. These associations, based on a profession, are also organised according to territories of one or more units of local government, and these are associated into regional territorial associations which all are associated into the Croatian Chamber of Crafts, an association of craftsmen on the state level. All members of regional associations are at the same time members of the Croatian Chamber of Crafts. They must pay membership fees, are submitted to the Chamber Statute and to the jurisdiction of the Chamber Tribunal.

The provisions of the law regulating the organisation of the Chamber were disputed as allegedly violating Article 43 of the Constitution. The issue before the Court was whether the constitutional provision, which guarantees freedom of association, but also includes freedom not to associate, was violated if an obligation to be a member of certain Chambers of associations is prescribed by law.

The Court differentiated two sorts of institutions. First, ones organised by citizens who exercise their constitutional right to freedom of association. That freedom is manifested in the organisation of trade unions and other associations (often called non-governmental organisations) in which members freely choose to join or leave. The very existence of such associations depends on the will of citizens, and nobody, not even the legislator, is allowed to restrict the rights of citizens concerning the organisation of such associations, except if their aim is a threat to the democratic constitutional order and independence, unity and territorial integrity of the Republic of Croatia.

The second sort of institutions are institutions of public law whose members are not "citizens" as such, but subjects of economic activities, who perform their

profession. Such institutions are established by law and authorised by law to perform public powers. The Croatian Chamber of Crafts, which has existed since 1852, is of the second sort. It is defined by law as a public law legal person, an independent professional organisation of craftsmen, which represents them before state and other bodies in the land and abroad; the documents which are issued by the Chamber (attestations, certificates) are public documents. Membership in the Chamber does not exclude association in other professional associations, or the freedom for individual citizens to organise such associations in order to protect their professional interests.

The disputed provisions were thus constitutional.

### **Cross-references:**

European Court of Human Rights:

- *Le Compte, Van Leuven & De Meyere v. Belgium*, 23.06.1981, *Special Bulletin – Leading cases ECHR* [ECH-1981-S-001].

### **Languages:**

Croatian.



**Identification:** CRO-2009-2-007

- a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 20.05.2009 /
- e)** U-III-1902/2008 / **f)** / **g)** *Narodne novine* (Official Gazette), 67/09 / **h)** CODICES (Croatian, English).

### **Keywords of the systematic thesaurus:**

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

### **Keywords of the alphabetical index:**

Child, best interest / Parental contact, joint consideration / Child, guardian, designation / Child, mother, separation / Child, parental rights / Child, right of access / Child, visiting, right, procedure / Family ties, break / Fundamental right, essence.

### **Headnotes:**

In order to provide protection against arbitrary decisions in the field of family life, all potential violations of the right to respect for family right must be examined by viewing in their totality all the proceedings that preceded those before the Constitutional Court, irrespective of the type of proceedings (administrative, judicial) and the bodies that conducted them (social welfare bodies, courts).

### **Summary:**

I. An injunction had been issued, on meetings and companionship between a mother and her child, which was preceded by a three-year period during which the applicant was prevented from meeting and spending time with her child. The control expertise recommended by the court experts was not carried out and the delay in the proceedings of the competent bodies in deciding on meetings and companionship between the mother and child had objectively made it possible to influence the child's attitude to his mother, which resulted in the child categorically refusing to see her. The conduct of the competent bodies, seen as a whole, had violated the applicant's right to respect for her family life over meetings and companionship between the applicant and her child during her stay in the detention/prison.

The applicant lodged a constitutional complaint against a ruling by the Second Instance Court of 28 March 2009, which upheld that part of the First Instance Court Judgment of 12 November 2007 which refused the applicant's proposal for the court to order meetings and companionship between herself and her child, born in 1996.

At the time when the proposal was submitted and at the time when the impugned rulings were passed the applicant was serving a prison sentence to which she had been condemned in the final Judgment of the Second Instance Court of 11 September 2006, for the murder in excessive self-defence of her husband and the father of their child.

In a ruling by the competent administrative body of 19 May 2005 the applicant's minor child was placed in care and the paternal grandmother was appointed as the child's guardian.

The procedure before the administrative and judicial bodies deciding on the applicant's meetings and companionship with her child lasted for more than three years, and it ended with an injunction by the court on meetings and companionship, during which period the applicant last saw her child on 13 September 2005.

The First Instance Court found that at the time when it decided on the applicant's proposal the conditions for meetings and companionship between the applicant and her child were not met, and it based its conclusion on the findings and opinion of expert psychiatrists and psychologists who found that meetings and companionship between mother and child were not possible at that point, as the child categorically refused contact with his mother. According to the experts' findings, the existing situation could be overcome if the child underwent psychotherapy aimed at working through the tragic event. The Second Instance Court entirely upheld the findings and legal stance of the First Instance Court.

The applicant argued that the disputed rulings and the conduct of the competent administrative and judicial bodies, which culminated in the complete breakdown of the family and the categorical refusal of the child to meet her, violated her constitutional right to respect of family life guaranteed by Article 35 of the Constitution and the right to respect of family life guaranteed by Article 8 ECHR.

II. The Constitutional Court firstly stated principal legal views regarding the meaning and scope of the constitutional guarantee to respect of family life in line with those expressed by the European Court of Human Rights. It also noted that the procedure followed by the competent body in deciding on appointing a guardian and the procedure followed when it decides about enabling meetings and companionship between children and parents or about access to children in foster homes affected the substance of the decision about the main issue, and that there was a strong need for protection from arbitrary decisions in the field of family life, and that all potential violations of the right to respect for family right must be examined by viewing in their totality all the proceedings that preceded those before the Constitutional Court, irrespective of the type of proceedings (administrative, judicial) and the bodies that conducted them (social welfare bodies, courts).

The Constitutional Court noted the very complex and sensitive nature of the case, both from the perspective of the right to respect for family life of the members of the family affected by the tragic event, and from the perspective of the state's obligations to ensure the child's best interests without thereby damaging the balance in the realisation of the right to family life of the mother and maternal grandmother, on one side, and the paternal grandparents, on the other, in relation to their child/grandchild, or the balance between their individual interests and those of society (the protection of the best interests of the child).

The Constitutional Court found that at the time when the mother was detained a family life existed between her and her child in the meaning of Article 35 of the Constitution

and Article 8 ECHR, and it pointed out the duty on the competent bodies to ensure meetings and companionship between the mother/detainee (later prisoner) and her child in accordance with the law, pursuant to a legitimate goal (respect for the family life of the mother and child), with the possibility of proportional restriction of these meetings to the extent necessary in a democratic society. In this context, it also stressed that mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that measures preventing such enjoyment amount to an interference with the right protected by Article 35 of the Constitution and Article 8 ECHR, except in cases where such measures are prescribed by law, pursue a legitimate aim and are necessary in a democratic society.

Therefore, the Constitutional Court had to examine the alleged violations of the applicant's right to respect for her family life in the part referring to her meetings and companionship with her minor child during her stay in detention/prison, by subjecting the proceedings and measures of the competent bodies that decided on the applicant's above rights to the test of justification.

Starting from all particular circumstances of the case – the serious judicial measure of an injunction on meetings and companionship between the applicant of the constitutional complaint and her child (28 March 2008), which was preceded by several years when it was not made possible for the applicant to meet and spend time with her child (since 13 September 2005) in combination with the actual life of the child with his paternal grandparents from the day of the tragic event of the murder of their son and the child's father (19 March 2005) to the present, with the failure to bring court expertise to bear on the situation at an earlier stage, and with the failure of examining in any way (because the child's paternal grandmother had been appointed as his guardian), whether it was necessary to appoint a special-case guardian for the child while he was undergoing psychotherapy to "work through" an event that was tragic and extremely traumatic for the child, but also for his grandmother/guardian. The Constitutional Court noted that the control expertise recommended by the court experts was not carried out, and the delay in the proceedings by the competent bodies in deciding on the meetings and companionship of the mother and child had objectively made it possible to influence the child's attitude to his mother, which resulted in the child categorically refusing to see her. It therefore found that the conduct of the competent bodies, viewed as a whole, had violated the applicant's right to respect for her family life guaranteed by Article 35 of the Constitution and Article 8 ECHR, in the part concerning meetings and companionship between the applicant as the biological mother and her child.

The Constitutional Court quashed the court injunction on meetings and companionship between the applicant and her child. In so doing, it has opened up possibilities, but has also created an obligation for the social welfare bodies to engage the appropriate experts and to perform, within the framework of their statutory powers, all the necessary actions and procedures to efficiently prepare the applicant and her child for a family reunion.

#### *Cross-references:*

##### European Court of Human Rights:

- *Kosmopoulou v. Greece*, no. 60457/00, 05.02.2004;
- *McMichael v. the United Kingdom*, 24.02.1995, *Bulletin* 1995/1 [ECH-1995-1-004];
- *Johansen v. Norway*, no. 17383/90, 07.08.1996;
- *H. v. the United Kingdom*, 07.08.1987;
- *Amuur v. France*, 25.06.1996, *Bulletin* 1996/2 [ECH-1996-2-011];
- *Dalban v. Romania [GC]*, no. 28114/95, 28.09.1999;
- *Rotaru v. Romania [GC]*, no. 2834/95, 04.05.2000.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-3-011

- a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 29.09.2010 /  
**e)** U-I-4170/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 123/10 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State**.

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

#### *Keywords of the alphabetical index:*

Disability, discrimination / Disabled person, benefit, right / Disabled person, social assistance, entitlement, conditions.

### **Headnotes:**

Limiting the exercise of the right to a personal disability allowance by the recipient's age has no objective and reasonable justification. This legal situation causes inequality among recipients with the same status. The legal provision which introduced it is therefore discriminatory. This different treatment is also contrary to the public interest and diminishes the importance of the principles protected by the Constitution.

Since the right to a personal disability allowance and the right to an assistance and care allowance are exercised on the same legal grounds (a degree of disability) and have the same purpose (monetary aid due to increased needs in satisfying the basic activities of everyday life), the prohibition of their cumulation is reasonable and justified. This does not lead to discrimination against "severely ill persons". These are two different monetary rights, which, under the legislation in dispute, are not exercised under the same conditions.

### **Summary:**

I. The applicant, a natural person, asked the Constitutional Court to assess the constitutional compliance of Article 55 of the Social Welfare Act (hereinafter, "SWA"). The Constitutional Court accepted his request, and repealed that part of Article 55 which reads "insofar as the onset of such an impairment or condition preceded the individual's 18<sup>th</sup> birthday". It did not accept his request for a constitutional review of Article 57 SWA.

The sector of the social welfare system which deals with disabled persons grants them the right to certain kinds of financial aid to help them overcome the difficulties resulting from their physical and health condition. Examples include one-off assistance, allowance for assistance and care, personal disability allowance and jobseeker's allowance. They are also entitled to certain social welfare services, including the right to care from outside their own families, assistance and care at home, counselling and help with tackling specific problems. Other types of assistance are available in accordance with the applicable regulations.

Article 55 SWA stipulates the conditions a disabled person must meet in order to exercise the right to a personal disability allowance, namely a severe physical or mental disability or severe permanent changes in health which manifest themselves before the individual's eighteenth birthday. The recipient must not already be availing him or herself of this right on other grounds.

Article 57 SWA precludes somebody already in receipt of personal disability allowance from receiving an allowance for assistance and care at the same time.

The applicant expressed concerns over the constitutionality of the regulation of the right to a personal allowance in Article 55 SWA, suggesting that it was discriminatory to restrict it in terms of the recipient's age, so that it could only be exercised by persons whose disability had appeared before they reached the age of 18. If their disability appeared after that, they were excluded. The applicant argued that the regulation could lead to inequality in the exercise of this right.

In support of his argument that Article 57 ran counter to the Constitution as it was not possible to concurrently exercise the right to a personal disability allowance and the right to an allowance for assistance and care, the complainant described the purpose of the personal disability allowance. He did not, however, give a fuller explanation of his view that the "meaning of the right to an allowance for assistance and care" is completely different. Finally, he contended that the impossibility of the cumulation of the two rights constituted "discrimination against severely ill persons".

### **Article 55 of the SWA**

This is not a "classic" case of discrimination based on disability. It is not a case of inequality between disabled and non-disabled persons, but of inequality within the same group of disabled persons with the same degree of disability. The only differentiating factor, in terms of the exercise of this right, is the timing of the onset of the disability (i.e. age).

II. The Constitutional Court began its review by examining the nature of the personal disability allowance. It noted that, under the SWA, this is a monetary benefit which can be claimed by someone with severe disabilities who, due to physical impairment or permanent changes in their health, needs increased social care and therefore belongs to a socially threatened group. It is strictly personal to its recipient; it cannot be transferred to another person or inherited. It is justified and reasonable to expect that individuals in an identical legal and actual situation will be in the same legal position in exercising this right.

The Constitutional Court held that the State has the legitimate right to regulate the social welfare system within the framework of its social policy and strategy, and that this system must comply with constitutional principles and obligations in formal and substantive law. Article 2.4.1 of the Constitution gives Parliament the power to take independent decisions on the regulation of national economic, legal and political relations. In establishing these relations the legislator must respect

the demands laid down by the Constitution, especially those emerging from the principle of the rule of law and those protecting certain constitutional standards and values. In this case these are equality, social justice, respect for human rights and the prohibition of discrimination.

However, the legitimate aim which Article 55 of the SWA was to have realised in recognising the right to a personal disability allowance (financial assistance granted by the State, as part of the constitutionally guaranteed special and increased care for disabled persons, helping those with severe disabilities to satisfy their basic everyday needs and assisting with their inclusion in society) was objectively not achieved. The disputed regulation prevented all individuals with the same degree of disability stipulated in Article 55 from exercising the right to a personal disability allowance.

The Constitutional Court found that part of Article 55 SWA which read “insofar as the onset of such impairment or condition preceded the individual’s 18<sup>th</sup> birthday” to be in breach of Article 14 in conjunction with Article 58 of the Constitution.

#### Article 57 of the SWA

Articles 43 to 49 of the SWA define the circle of recipients of the assistance and care allowance and the conditions for its realisation. It may be granted to individuals who require full-time care and assistance from another person as they are unable to fulfil their everyday needs on their own, provided that they are not eligible for a care and assistance supplement on any other grounds. The need for full-time assistance and care from another person may result from physical or mental disabilities, permanent changes in health conditions or advanced age. The allowance may also be granted to individuals needing full-time care and assistance from another person due to temporary changes in their health condition.

The Constitutional Court found that the applicant’s contention that Article 57 of the SWA is in breach of the Constitution was not well founded. Since the right to a personal disability allowance and the right to an assistance and care allowance are exercised on the same legal grounds (a degree of disability) and have the same purpose (financial assistance due to increased needs in satisfying the basic activities of everyday life), the Constitutional Court held that the prohibition of their cumulation was reasonable and justified; the exercise of one right excludes the exercise of the other.

The Constitutional Court held that the provision did not result in discrimination against “severely ill persons”, in the meaning of the applicant’s submission, as Articles 55 and 57 of SWA grant two different monetary rights to disabled persons on the grounds of their disability. Under the provisions of the SWA, they are not exercised under the same conditions.

Therefore, the Constitutional Court did not accept the proposal for the constitutional review of Article 57 SWA.

#### Cross-references:

European Court of Human Rights:

- *Van der Mussele v. Belgium*, no. 8919/80, 23.11.1983, Vol. 70, Series A; *Special Bulletin Leading Cases – ECHR* [ECH-1983-S-004];
- *Abdulaziz Cabales and Balkandali v. The United Kingdom*, nos. 9214/80, 9473/81 and 9474/81, 28.05.1985, Vol. 94, Series A; *Special Bulletin Leading Cases – ECHR* [ECH-1985-S-002];
- *Stec and others v. The United Kingdom*, nos. 65731/01 and 65900/01, Judgment [GC] of 12.04.2006, *Reports of Judgments and Decisions* 2006-VI.

#### Languages:

Croatian, English.



*Identification: CRO-2010-3-014*

**a) Croatia / b) Constitutional Court / c) / d) 03.11.2010 / e) U-III-64744/2009 / f) / g) Narodne novine (Official Gazette), 125/10 / h) CODICES (Croatian, English).**

#### Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

**Keywords of the alphabetical index:**

Detainee, rights / Prisoner, treatment, inadequate conditions / Disabled prisoner, rights.

**Headnotes:**

The state must ensure, when implementing prison sentences and measures depriving people of their freedom, that the person in custody is placed in prison or detention under conditions that ensure respect for his or her human dignity.

**Summary:**

I. The applicant lodged a constitutional complaint for inhuman treatment in the Prison Hospital in Z. (the "Prison Hospital") during his detention on remand from 4 September 2008 until the Judgment of the Pula County Court of 17 February 2009 became final and he was sentenced to four years of imprisonment for a criminal offence under Article 173.2 of the Criminal Act. This decision was upheld by the Supreme Court in its Judgment of 7 July 2009, at which point he was sent to prison in Z.

The applicant argued that his treatment violated his human dignity, guaranteed in Articles 25 and 35 of the Constitution, and Article 3 ECHR.

The applicant is severely disabled, having been diagnosed with spastic paraparesis after injuries sustained in a traffic accident in 1998. He was in prison in P. from 4 September 2008, but as it had no facilities for prisoners with special needs, he was sent to the Prison Hospital, which was the only prison hospital in the Croatian system of prisons and penitentiaries. However, he was soon placed on the second floor. There was no lift, so he could not get out of the building; he mentioned he had no sun or air for 15 months. He went on to say that he was in a room of 18-20 m<sup>2</sup> in which there were six patients and six beds, and that there was not enough room for him to turn around in his wheelchair. He emphasised that he had been able to function normally before his sojourn in the Prison Hospital, travelling two or three kilometres each day in his wheelchair. He could not do this there; instead, he was forced to lie on the bed in the Prison Hospital. His health deteriorated greatly as a result. He argued that the Prison Hospital is not equipped for persons with special needs such as himself.

Articles 23.1 and 25.1 of the Constitution contain one of the fundamental values of a democratic society. They absolutely prohibit torture or inhuman or degrading treatment or punishment, regardless of the circumstances or the behaviour of the victim. When

implementing prison sentences and measures depriving people of freedom the State must ensure that the person in custody is placed in prison or detention under conditions that ensure respect for his or her human dignity.

Article 3 ECHR also prohibits torture and inhuman or degrading treatment or punishment.

II. The Constitutional Court found that the statements by the Head of the Prison System Department and the director of the Prison Hospital at the preliminary meeting of 14 June 2010, held at the Constitutional Court in accordance with Article 69.2 of the Constitutional Act on the Constitutional Court, showed that the quality of the medical aid provided for the applicant was at a satisfactory level. However, they also showed that the applicant, who was a tetraplegic, was placed on the second floor of the hospital building without a lift, that there were so many beds in his room that it was almost impossible for him to use his wheelchair, that he was often left to the mercy and help of other inmates in that room to perform his basic needs such as washing, shaving, dressing and relieving himself (up to the point at which the applicant, according to the governor of the Prison Hospital, "got used to" the hospital regime of the "reflex bowel movement") and that he could only go out of doors if the hospital staff or fellow inmates physically carried him in his wheelchair.

The Constitutional Court observed that this situation, which lasted for a long time, from 5 September 2008 to 5 March 2010, would have made the applicant feel humiliated, due to his total dependence on others. Furthermore, it was an objective expression of inhuman treatment. Therefore the Constitutional Court found that the applicant's constitutional rights in Articles 23 and 25.1 of the Constitution and Article 3 ECHR had been breached.

In its decision, the Constitutional Court instructed the government to establish efficient supervision over the quality of health protection in the prison system as a whole, to enable, within an appropriate time span lasting no more than three years, the unhindered movement of persons with special needs, and to release sufficient funds for the installation of a lift in the Prison Hospital, as there was an obvious need for this.

**Cross-references:**

Constitutional Court:

- nos. U-III-4182/2008 and U-III-678/2009, 17.03.2009, *Bulletin* 2009/1 [CRO-2009-1-003].

European Court of Human Rights:

- *Kudla v. Poland [GC]*, no. 30210/96, 26.10.2000, *Reports of Judgments and Decisions* 2000-XI;
- *Hirst v. the United Kingdom [GC]*, no. 74025/01, 06.10.2005, *Reports of Judgments and Decisions* 2005-IX; *Bulletin* 2005/3 [ECH-2005-3-004];
- *Price v. the United Kingdom*, no. 33394/96, 10.07.2001, *Reports of Judgments and Decisions* 2001-VII;
- *Engel v. Hungary*, no. 46857/06, 20.05.2010;
- *Farbuhs v. Latvia*, no. 4672/02, 02.12.2004;
- *Mouisel v. France*, no. 67263/01, 14.11.2002, *Reports of Judgments and Decisions* 2002-IX;
- *Testa v. Croatia*, no. 20877/04, 12.07.2007;
- *Cenbauer v. Croatia*, no. 73786/01, 09.03.2006, *Reports of Judgments and Decisions* 2006-III;
- *Slawomir Musial v. Poland*, no. 28300/06, 20.01.2009.

*Languages:*

Croatian, English.



*Identification:* CRO-2011-2-005

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 06.04.2011 /  
**e)** U-I-3843/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 48/11 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

- 3.9 General Principles – **Rule of law**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

*Keywords of the alphabetical index:*

Prisoner, money, right to receive / Prisoner, treatment.

*Headnotes:*

The legislation contained no guidance whatsoever to assist a prison warden in deciding whether it would be reasonable to authorise a particular inmate to receive money from a person outside his or her family or to send money to such a person. This could give rise to

potential for arbitrary behaviour on the part of the administrative authority (the prison warden in this case), which is unacceptable in a democratic society based on the rule of law.

#### *Summary:*

The Constitutional Court accepted (in part) a proposal from a prison inmate for a review of the constitutionality of Article 127.1 of the Execution of Prison Sentences Act (hereinafter, the "Act"). It repealed the first sentence, which read "on approval of the warden". It did not, however, accept that part of the applicant's proposal relating to the second sentence of the same article of the Act.

In its review of the grounds for the proposal, it took note of Articles 3, 14 and 16 of the Constitution, Article 14 ECHR and Article 1 Protocol 12.

The Act regulates the execution of prison sentences. Article 127 of the Act regulates the manner in which inmates send, receive and spend money, and make payments and conduct other transactions.

The Constitutional Court began by examining the first sentence of Article 127.1. It stipulates that prison inmates are entitled to send and receive money to and from family members, via the penitentiary or prison, and to and from other persons upon the approval of the warden.

The applicant argued that this provision discriminated against inmates without a family. Such inmates were dependent on the warden's decision in terms of the exercise of their right to send and receive money, but this did not apply to inmates with family.

The Constitutional Court found that the aim Article 127.1 sought to achieve was undoubtedly legitimate; it was aimed at preventing unlawful activities by inmates within the prison system, in the first instance amongst themselves.

The measure did not, in the Constitutional Court's opinion, discriminate against those inmates who did not have family by comparison with those who did.

Inmates without family could not, of course, be in a situation of receiving money from family members or sending it to them, in fact or in law. Such inmates were in a different position, in a legal situation that could not be compared with that of inmates with family, who were, both in fact and in law, in a situation where they could send money to family members or receive it from them.

However, the part of the first sentence of Article 127.1 of the Act which provides that inmates may, upon the warden's approval, send money to or receive it from other persons (apart from family members) applied to all inmates equally, irrespective of whether they had family. Since all the inmates were in the same legal position as this rule applied to them, irrespective of whether they had family, the Constitutional Court found that there was no basis to the applicant's contention that inmates with no family suffered discrimination.

However, it noted that the warden had legal authority to approve the right of inmates to receive money from or send it to persons outside the family. This statutory power on the part of the warden was not expanded upon in the Act or in the Ordinance on Disposing with Money. It found this to be a case of "legalised arbitrariness" rather than discretionary assessment. No guidance was given in the legislation to assist wardens in assessing whether it would be reasonable to allow a particular inmate to receive money from someone outside the family or to send it to them.

This could pave the way for arbitrary behaviour on the part of an administrative authority (the prison warden in this case), which is unacceptable in a democratic society based on the rule of law.

The Constitutional Court therefore held that the part of the first sentence of Article 127.1 of the Act, which reads: "on the approval of the warden" contravenes the requirements placed on statutes by the principle of the rule of law (Article 3 of the Constitution).

It then proceeded to examine the second sentence of Article 127.1, the conformity of which with the Constitution the applicant had also disputed. This stipulates that the monthly sum of money inmates may send and receive is to be established in the Ordinance.

The applicant had put forward the view that this provision restricted the right of all citizens to freely dispose of money because it prevented them from sending money to persons serving prison sentences; inmates were not allowed to receive it and the money would be returned to the sender with a note endorsed 'refuses receipt'.

The Constitutional Court found the applicant's claims to be ill-founded; the conditions and requirements of life inside prison are by the nature of things different from those outside it. The special features of prison life dictate that the community and all its members must respect the regulations in public law to which inmates' lives are subject.

The legal rule preventing citizens from freely sending inmates unlimited quantities of money cannot from any constitutional perspective be perceived as a restriction on their right to dispose freely of their own property. Similarly, this legal rule cannot be viewed from the inmates' perspective as a restriction on their right to receive unlimited quantities of money from citizens who have not been deprived of freedom.

The Constitutional Court reiterated that this is a special regulation under public law within the prison system from which specific objective rules of behaviour result, which are compulsory for all. It did not, therefore, accept the applicant's arguments that the second sentence of Article 127.1 of the Act contravened Articles 3, 14 and 16 of the Constitution.

#### Cross-references:

Federal Constitutional Court of Germany:

- no. 1 BvR 370/07, 27.02.2008, *Bulletin* 2008/1 [GER-2008-1-006].

European Court of Human Rights:

- *Orsus and Others v. Croatia*, no. 15766/03, 17.03.2010;
- *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, no. 9214/80, 9473/81 and 9474/81), Judgment of 28.05.1985, *Special Bulletin – Leading cases ECHR* [ECH-1985-S-002];
- *Unal Tekeli v. Turkey*, no. 29865/96, 16.11.2004;
- *Beian v. Romania*, no. 30658/05, 06.12.2007.

#### Languages:

Croatian, English.



*Identification: CRO-2011-2-007*

- a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 06.07.2011 / **e)** U-I-295/2006, U-I-4516/2007 / **f)** / **g)** Narodne novine (Official Gazette), 82/11 / **h)** CODICES (Croatian, English).

**Keywords of the systematic thesaurus:**

**1.6.2 Constitutional Justice – Effects – Determination of effects by the court.**

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

3.9 General Principles – **Rule of law.**

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

**Keywords of the alphabetical index:**

Freedom of assembly, restrictions / Public assembly, place, designation.

**Headnotes:**

Where the legislator decides to pass separate legislation restricting public assembly, specific requirements must be complied with, in terms of its content. In particular, three principles deriving from general constitutional values must be respected; a positive presumption in favour of holding public assemblies, a positive obligation on the part of the state to protect the right to freedom of public assembly, and the principle of proportionality in restricting the right to freedom of public assembly.

**Summary:**

I. Proceedings were commenced at the Constitutional Court to review the constitutionality of Article 1.3 and 1.4 of the Public Assembly (Amendments and Revisions) Act (hereinafter, the “Amendments to the Act”), when it became apparent that the part of the Act which referred to the premises of the Croatian Parliament, Government and Constitutional Court, would lose its force with effect from 15 July 2012.

The applicants challenged the constitutionality of Article 1.3 and 1.4 this being the statutory ban on holding peaceful assemblies or public protests in places within one hundred metres of the location of premises where the Croatian Parliament, the President of the Republic, the Government and the Constitutional Court have their seats or hold sessions, as well as the extension of the ban to groups of less than twenty persons (i.e. any group of persons, regardless of their

number, if they have gathered in an organised fashion to publicly express and promote political, social and national beliefs).

II. The Constitutional Court examined the applicants’ arguments against the background of Articles 42 and 38.1 and 38.2 taken with part of Article 1.1 and Articles 3, 14 and 16 of the Constitution, together with Article 11 ECHR, Article 21 of the International Covenant on the Civil and Political Rights and Article 20.1 of the Universal Declaration on Human Rights.

These particular constitutional proceedings were not concerned with the constitutional compliance of the general legal framework of the Public Assembly Act (hereinafter, the “Act”). The subject of the review was limited to two specific provisions of the Act providing for exemptions from the general legal rules for the exercise of the right of citizens to freedom of public assembly, namely the prohibition on holding public assemblies, defined within the meaning of Article 4.1 of the Act, within one hundred metres from the premises where Parliament, the President of the Republic, Government and the Constitutional Court had seats or held sessions. Groups of less than twenty persons were also banned from carrying out such activities in these locations, and so the ban extended to any groups, regardless of number, who were gathered in an organised manner to publicly express and promote political, social and national beliefs.

This resulted in a ban on the exercise of the right to freedom of assembly in these areas, which in practice resulted in the abolition of the right. However, viewed in the context of the legal regulation of the right to freedom of public assembly as a whole, and in view of the specific territorial definition, the ban was found to be an isolated case of territorial limitation of the right.

The Constitutional Court found that an individual protest (a protest by a single person) was not the subject of regulation of the Act, as it was covered by rules set out in other relevant legislation, which are mainly implemented by the police authorities within their remit of maintaining public order and public safety.

It also found that that part of Article 1.3 of the Amendments to the Act which vetoed public assemblies within the meaning of Article 4.1 of the Act within one hundred metres of the buildings in which the Parliament, the President of the Republic, Government and the Constitutional Court held sessions did not comply with Article 42 of the Constitution, because, in relation to any *a priori* unknown concrete location and object, it cancelled the essence of the constitutional right to the freedom of public assembly for no acceptable reason under constitutional law.

The legal ban on public assembly within the meaning of Article 4.1 of the Act in the area within one hundred metres of buildings accommodating the President of the Republic had no legitimate aim or reasonable and objective justification. It therefore constituted *prima facie* violation of the right to freedom of public assembly guaranteed in Article 42 of the Constitution.

However, according to the Constitutional Court, the legal ban on public assembly within the meaning of Article 4.1 of the Act in the area within one hundred metres of the buildings accommodating the Parliament, Government and the Constitutional Court (St. Mark's Square in Zagreb) did have a legitimate aim. The area was highly inappropriate for holding public assemblies, which indicated the proportionality of the disputed legal ban. Nonetheless, the ban was not "necessary in a democratic society" as there was no "pressing social need" for its existence within the meaning of Article 11.2 ECHR. This was so because in this area, public events are permitted which require special security measures (Article 4.2 of the Act) as well as other forms of gatherings aimed at realising economic, religious, cultural, humanitarian, sports, entertainment and other interests (Article 4.3 of the Act). If public assemblies are singled out for prohibition which are aimed at publicly expressing political, social and national beliefs and interests, these beliefs and objectives become grounds for discrimination with no objective and reasonable justification, which is in breach of Articles 3 and 14 of the Constitution.

In view of the unique quality of the area where the buildings of the Croatian Parliament, Government and the Constitutional Court are located (St. Mark's Square in Zagreb), the Constitutional Court found it reasonable to give the legislator a wider margin of appreciation in regulating the prerequisites for holding all forms of public gatherings in this location. This view did not, in the Constitutional Court's opinion, breach the legal principle adopted by the European Court, which emphasised in *Christian Democratic People's Party v. Moldova* (no. 2) (2010) that in determining whether a necessity within the meaning of Article 11.2 ECHR exists, Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision (§ 24.). The Constitutional Court observed that in these particular proceedings, the specific and unique circumstances of the specific case allowed for the "limited margin of appreciation" to be wider, going hand in hand with rigorous national and European supervision.

The legal prerequisites for holding public assemblies in proximity to the premises of the Croatian Parliament, the Government and the Constitutional Court could legitimately be more rigorous than those applying to public assemblies in other places. Provided those

restrictions satisfied the limits of proportionality and necessity, they could relate to time, location of fences and barriers, and to the manner of holding assemblies (including the number of participants).

The Constitutional Court noted that the above statements only related to peaceful public assemblies; only they enjoyed constitutional protection. The nature of a particular assembly is assessed on a case by case basis in a legal process, along with evaluation of its acceptability from the perspective of Article 16 of the Constitution, and from the aspect of national security and all other security aspects, including protection from terrorism, but also from the aspect of the potential for violation of the rights and freedoms of others and for damage to the most valuable cultural and historical heritage in the historic quarters of Zagreb. These police powers regularly include giving relevant orders and setting out conditions depending on the circumstances of each but also the judicial supervision of the final decision.

In view of the time needed to evaluate the situation, to prepare a proposal for a regulatory measure in line with the legal views in this decision and the duration of the legislative procedure for amending the Act, the Constitutional Court postponed the loss of legal force of Article 1.2 and 1.3 of the Amendments to the Act until 15 July 2012. In calculating the duration of the postponement period the Constitutional Court took account of the period during which Parliament would not be holding sessions, due to the forthcoming parliamentary elections.

#### Cross-references:

##### Constitutional Court:

- no. U-I-241/1998, 31.03.1999, *Bulletin* 1999/1 [CRO-1999-1-004];
- no. U-II-242/1998, 14.04.1999;
- no. U-I-3307/2005, U-I-3309/2005, U-I-3346/2005, U-I-3359/2005, 23.11.2005, *Bulletin* 2005/3 [CRO-2005-3-011].

##### Federal Constitutional Court of Germany:

- no. 1 BvQ 22/01, 05.01.2001;
- no. 1 BvR 699/06, 22.02.2011, *Bulletin* 2011/1 [GER-2011-1-006].

##### Constitutional Court of Latvia:

- no. 2006-03-0106, 23.11.2006, *Bulletin* 2006/3 [LAT-2006-3-005].

European Court of Human Rights:

- *Rassemblement jurassien and Unite jurassienne v. Switzerland*, no. 8191/78, 10.10.1979;
- *Christians against Racism and Fascism v. The United Kingdom*, no. 8440/78, 16.07.1980;
- *Pendragon v. The United Kingdom*, no. 31416/96, 19.10.1998;
- *Rai, Allmond and "Negotiate Now" v. The United Kingdom*, no. 25522/94, 06.04.1995;
- *Éva Molnár v. Hungary*, no. 10346/05, 07.10.2008;
- *Patyi and Others v. Hungary*, no. 5529/05, 07.10.2008;
- *Nurettin Aldemir and Others v. Turkey*, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02), 18.12.2007;
- *Association of Citizens Radko & Paunkovski v. The Former Yugoslav Republic of Macedonia*, no. 74651/01, 15.01.2009;
- *Stankov and The United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 02.10.2001, *Reports of Judgments and Decisions 2001-IX, Bulletin 2002/1 [ECH-2002-1-001]*;
- *Baczkowski and Others v. Poland*, no. 1543/06, 03.05.2007;
- *Plattform "Arzte für das Leben" v. Austria*, no. 10126/82, 21.06.1988;
- *Christian Democratic People's Party v. Moldova* (no. 2), no. 25196/04, 02.02.2010;
- *Makhmudov v. Russia*, no. 35082/04, 26.07.2007;
- *Ashughyan v. Armenia*, no. 33268/03), 17.07.2008;
- *Balçık and Others v. Turkey*, no. 25/02, 29.11.2007;
- *Oya Ataman v. Turkey*, no. 74552/01, 05.12.2006;
- *Incal v. Turkey*, no. 22678/93, 09.06.1998.

*Languages:*

Croatian, English.



*Identification:* CRO-2011-2-008

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 29.07.2011 / **e)** U-I-120/2011 et al / **f)** / **g)** *Narodne novine* (Official Gazette), 93/11 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

3.3.3 General Principles – Democracy – **Pluralist democracy.**

3.9 General Principles – **Rule of law.**

3.16 General Principles – **Proportionality.**

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities.**

*Keywords of the alphabetical index:*

Election, parliamentary / Minority, representation, additional vote.

*Headnotes:*

The objective of all the positive measures for national minorities in electoral proceedings is to ensure their representation in the Croatian Parliament, so as to integrate them into national political life. This does not include their usage for other purposes, for example, to obtain a larger number of parliamentary seats in order to guarantee certain positions in Parliament and executive bodies.

*Summary:*

The Constitutional Court initiated proceedings to review the conformity with the Constitution of Articles 1, 5, 6, 7, 8, 9 and 10 of the Election of Representatives to the Croatian Parliament (Amendments) Act (hereinafter, the "Amendments to the Act"). It repealed them and ordered that pending regulation of the issues in the repealed articles, the relevant rules from the Election of Representatives to the Croatian Parliament Act (hereinafter, the "Act") that were previously in force would apply.

The applicants challenged the constitutionality of Articles 1, 5, 6, 9 and 10 of the Amendments. One applicant disputed the Amendments as a whole.

In its review of the applicants' proposals, the Constitutional Court found Article 1, parts of Article 3, Articles 14, 15, 16, 45.1, 70, 71 and 74.1 of the Constitution, together with Articles 4.2, 4.3 and 21 of the Framework Convention for the Protection of National Minorities of the Council of Europe to be of relevance.

At issue here were the provisions of the Amendments to the Act regulating electoral procedures for voters/members of national minorities in elections for representatives to the Croatian Parliament.

Under the Amendments, voters belonging to national minorities making up less than 1.5 % of the national population enjoyed special voting rights in parliamentary elections (Article 1). National minorities which, on the date of entry into force of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities, made up more than 1.5% of the national population were guaranteed at least three parliamentary seats for members of that national minority (Article 5). National minorities representing less than 1.5 % of the population could elect five national minority representatives in a special constituency consisting of the entire national territory (Article 6). Political parties and voters from the Serb national minority nominated lists of candidates in all ten constituencies with the same candidates (Article 9). If the candidates from the Serb national minority did not win three seats in Parliament in the elections, parliamentary seats up to the number guaranteed were determined on the grounds of the total number of votes won by each list of candidates in all constituencies (Article 10).

The Constitutional Court found an intrinsic link between Articles 1, 5, 6, 9 and 10 of the Amendments to the Act and Article 1 of the Constitutional Act on Amendments to the Constitutional Act on the Rights of National Minorities ("the Amendments to the Constitutional Act"), which the Constitutional Court repealed on the grounds of unconstitutionality in Decision no. U-I-3597/2010 *et al.*, of 29 July 2011 (see Decision, *Bulletin* 2011/2 [CRO-2011-2-009]). The reasons for which it found Article 1.2 and 1.3 of the Amendments to the Constitutional Act to contravene the Constitution also applied to the finding that Articles 1, 5, 6, 9 and 10 of the Amendments to the Act contravened the Constitution.

The Constitutional Court found the electoral rules in Articles 9 and 10 of the Amendments to the Act to be out of line with constitutional law as they were not grounded on the precepts of proportional representation that underpin the general electoral system and directly contravened the values of political pluralism.

Articles 9 and 10 of the Amendments to the Act elaborated the legal framework of Article 1.2 of the Amendments to the Constitutional Act in relation to the rules of electoral procedure for the exercise of the right to vote of members of the Serb national minority.

Under Article 9 of the Amendments to the Act, the political parties and voters of the Serb national minority nominated "their" lists of candidates in all the general constituencies, as did all other authorised nominators. However, the political parties and voters of the Serb minority nominated the same candidates on their lists of candidates in all ten general constituencies. The Constitutional Court identified a clear lack of

proportionality in this statutory measure, and found it to be a legalised favouring of one group of voters, impinging excessively on the equality of suffrage within the general electoral system.

In terms of Article 10 of the Amendments to the Act the Constitutional Court did not find it necessary to qualify the type of electoral system regulated by the distribution of votes in the article under dispute but noted that it could not be qualified as "proportional".

In the Constitutional Court's opinion, for the purposes of this constitutional review, it sufficed to find that the distribution of votes to parliamentary seats guaranteed and reserved in advance, the votes being given to the Serb minority lists of candidates by Croatian citizens (not only members of that minority), deviated considerably from the effect of the proportional electoral system on which the elections in the ten general constituencies were founded under positive law.

The Constitutional Court concluded that the mechanisms in Article 10 of the Amendments to the Act were not acceptable in the national constitutional order. They not only deviated from the legal standards inherent in the system of proportional representation, but also failed to comply with the values of political pluralism on which a democratic society is based. These mechanisms could not be considered positive measures for the integration of the Serb national minority in national political life; rather they constituted impermissible favouritism in the electoral process.

The applicants did not dispute the constitutionality of Articles 7 and 8 of the Amendments to the Act, and the Constitutional Court did not find them to be in breach of the Constitution. However, Articles 7 and 8 provided for a more limited circle of people empowered to nominate candidates for national minority representatives and their deputies than did the former provisions of the Act (Article 18.1). Specifically, they did not give associations of national minorities the right to nominate candidates for the representation of national minorities. Having decided that pending the resolution of the issues in the repealed articles of the Amendments the relevant rules from the Act would apply, the Constitutional Court resolved to allow associations of national minorities to nominate candidates for the representation of national minorities and their deputies, in the special 12<sup>th</sup> constituency, in accordance with the rules in force before the entry into force of the Amendments to the Act.

The Constitutional Court ruled that these electoral rules for minorities would not apply at the forthcoming elections. The repealed articles of the Amendments would lose their legal force on the date this decision was published in the "Narodne novine". Pending regulation of the issues in the repealed articles, the rules from the provisions of the Act that were formerly in force would apply.

#### *Cross-references:*

Constitutional Court:

- no. U-I-3597/2010 et al, 29.07.2011, *Bulletin* 2011/2 [CRO-2011-2-009].

European Court of Human Rights:

- *Young, James and Webster v. The United Kingdom*, nos. 7601/76 and 7806/77, 13.08.1981, *Special Bulletin – Leading cases ECHR* [ECH-1981-S-002].

#### *Languages:*

Croatian, English.



## **Czech Republic Constitutional Court**

### **Important decisions**

*Identification:* CZE-1999-2-008

**a) Czech Republic / b) Constitutional Court / c) Plenary / d) 01.01.1998 / e) Pl. US 29/98 (date incorr.) / f) The Right of Aliens to Judicial Review of Detention pending Deportation / g) h) CODICES (Czech).**

#### *Keywords of the systematic thesaurus:*

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review**.

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.

5.3.13.3.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **Habeas corpus**.

#### *Keywords of the alphabetical index:*

Foreigner, detention / Judicial review, meaning.

#### *Headnotes:*

Article 5.4 ECHR and Article 36.2 of the Charter of Fundamental Rights and Basic Freedoms (right to judicial review of administrative decisions) in conjunction with Article 8.2 of the Charter (guarantee that personal liberty may be restricted only in cases provided for by law) place upon the legislature, in all cases where an individual is deprived of personal liberty by state authorities, the duty to ensure that the case is subject to independent, effective judicial review. Hence, the inclusion of judicial review is an indispensable part of each and every statutory scheme regulating the deprivation of liberty and without which, due to conflict

with the above-mentioned provisions of the European Convention of Human Rights and the Charter, the statutory scheme in question may not be sufficient.

### **Summary:**

In a 1997 Decision of the Alien and Border Police made pursuant to § 14.1.f of the Residence of Foreigners Act (which provision the Court declared unconstitutional in an unrelated 1998 judgment, see Cross-references below), the complainant, a foreigner, was prohibited from residing in the Czech Republic for a total of ten years. Subsequently, pursuant to §§ 15.2.c and 15.3 of the Czech Police Act (which allows a foreigner to be taken into custody for up to 30 days "where there is reason to suppose that they are remaining in the Czech Republic without authorisation"), the complainant was taken into custody for 30 days for the purposes of establishing his identity so that a deportation proceeding could be initiated against him. He challenged this internment, first unsuccessfully before ordinary courts and then before the Constitutional Court, and in conjunction therewith he contested the constitutionality of §§ 15.2.c and 15.3.

This judgment was concerned exclusively with the abstract issue of the constitutionality of those provisions. The complainant's individual case was considered separately and subsequently.

The Court noted that the European Court of Human Rights has interpreted Article 5.4 ECHR as applying to all deprivations of liberty because the general aim of that provision is to provide effective control of the legality of that deprivation (*De Wilde Case*, see Cross-references below).

In addition to Article 5.4 ECHR, Articles 8.2 and 36.2 of the Charter also apply to all deprivations of liberty.

In this regard, it is irrelevant how the statute in question designates a particular act; what is decisive is that the act of a state authority deprives a person of his liberty. The Court framed the issue as whether the provisions of the Civil Procedure Code concerning judicial review of administrative decisions can be considered to be judicial review in the sense meant by Article 5.4 ECHR and Article 36.2 of the Charter. It determined that they could not, as they do not meet the requirements contained in those articles concerning the speediness of such decisions. This is all the more obvious when the provisions of the Civil Procedure Code are compared with analogous statutory provisions concerning the taking of an accused into custody or the placement of a person into a medical institution without his consent.

In order to give the Parliament sufficient time to revise the relevant statutory provisions, the Court thus annulled § 15.2.c as of 31 May 2000. The Court decided not to annul § 15.3 as it related also to other provisions the constitutionality of which was not before the Court.

### **Cross-references:**

The Constitutional Court annulled § 14.1.f of the Residence of Foreigners Act by its Decision of 13.05.1998, Pl. ÚS 25/97 (*Bulletin* 1998/2 [CZE-1998-2-007]).

### **European Court of Human Rights:**

- *De Wilde, Ooms and Versyp v. Belgium*, 18.06.1971, Series A, no. 12; *Special Bulletin – Leading cases ECHR* [ECH-1971-S-001].

### **Languages:**

Czech.



### **Identification:** CZE-2000-1-005

- a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 08.02.2000 / **e)** I. US 156/99 / **f)** Freedom of expression and right to express one's view / **g)** / **h)** CODICES (Czech).

### **Keywords of the systematic thesaurus:**

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.
- 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

### **Keywords of the alphabetical index:**

Politician, defamation / Information, accurate, requirement.

### *Headnotes:*

The freedom of expression and the right to express one's views is limited by the rights of others, whether these rights arise from the constitutional order of the republic or from other statutorily protected general societal interests or values. In addition, the right to express one's views may lose its constitutional protection on formal as well as on conceptual grounds, for even the form in which views are expressed is closely tied with the constitutionally guaranteed right. If published opinions deviate from the rules of propriety generally recognised in a democratic society, they lose the character of correct judgment (news report, commentary), and as such generally fall outside of the bounds of constitutional protection. Furthermore the freedom of expression, in principle, stands on an equal footing with the basic right to the protection of personal honour and good reputation, and it is primarily a matter for the ordinary courts, in consideration of the circumstances of each particular case, to weigh whether one of these rights was not given priority over the other.

It is necessary to consider whether published information can in principle be considered as truthful or not and each case of an alleged violation of the freedom of expression must be judged by taking into consideration all specific circumstances. Above all, the complete context in which the information was published cannot be overlooked.

In a particular case it is always necessary to review the degree of the alleged violation of the basic right to the protection of personal honour and reputation, particularly in connection with the freedom of expression and the right to information, and with due consideration of the requirement of proportionality in the assertion of these rights (and their protection).

Whereas an infringement of the right to the protection of personal honour and reputation may occur even without any fault on the part of the perpetrator, nonetheless, not every publication of false information automatically represents an unjustified infringement of the right of personhood; such an infringement is found only if there exists a causal connection between the intrusion into a person's private life and the infringement of their right to personal honour and if in a specific case this intrusion exceeded the degree which can be tolerated in a democratic society.

It is necessary to respect certain specific features of the common periodic press, which is intended to inform the general public (in contrast, for example, with expert or professional publications), and which must in certain cases resort to a degree of simplification. It cannot be said that every simplification (or distortion) must

necessarily, without more, lead to an infringement of the rights of personhood of the affected persons. Thus, it is almost impossible to insist upon absolute precision as to the facts and, in consequence, to place upon journalists requirements that they cannot meet. What is always important is that the overall tenor of particular information corresponds to the truth.

As the case-law of the European Court of Human Rights indicates, in the case of a politician, due to his status as a public personality, there are broader limits to permissible criticism than those that apply in the case of private persons. In addition, it is necessary to distinguish very carefully between facts and personal assessments. The existence of facts can be proven, whereas the truthfulness of the evaluation made of those facts is not amenable to evidence. In relation to evaluative judgments, then, the requirement that their truthfulness be demonstrated cannot be met, and such a requirement itself violates the freedom of opinion.

### *Summary:*

The complainants had published an Article critical of a former entertainer and politician, PD, concerning a 1977 prosecution of him for the misappropriation of funds, a prosecution which was later dropped. The Article cited statements by PD's former associates that he had close connections with regional Communist Party leaders and referred to the fact that dismissals of prosecutions at that time were "highly irregular", undoubtedly to suggest that he had collaborated with the former regime. He brought a court action claiming that the Article was based on false assertions, so that his right to honour and good reputation had been violated. The ordinary courts found that he had suffered an unjustified encroachment upon this right, and ordered the complainants to publish an apology and to pay 25,000 Kč each in damages. The complainants lodged a constitutional complaint, and the Constitutional Court decided it was well founded.

In light of the general criteria concerning freedom of expression which it outlined in the opinion, the Court examined the three allegedly false assertions that the ordinary courts considered had unjustifiably intruded upon PD's right to personal honour and good reputation:

1. the authors' claim that they were members of a commission (when they were, in fact, not members) to add to the credibility of the views expressed in their article;
2. the assertion that PD had been charged with gaining 140,000 Kč for his own benefit, when in fact he had gained only 96,673 Kč for the benefit of a group;

3. the assertion that PD had close ties to the former leadership of the Regional Committee of the Communist Party and that the dismissal of his criminal prosecution was highly irregular.

As for the first assertion, the complainants admitted it was a misstatement, but claimed it was not a material one. The Court considered that they had mechanically borrowed from another source, without attribution, an entire sentence, including the introductory phrase, "some of the information we at the commission received". While such action constitutes a professional error, it was not done for the purpose of misinforming or of adding to the authors' credibility. Since the commission in question had in fact received the information alluded to and the information was true, in the overall context of the article, the faulty formulation did not reach the degree of intrusion required for a finding of violation of the right to personal honour and good reputation.

Concerning the second assertion, the information contained therein cannot be characterised as false. PD had been prosecuted for the mentioned crime, and the prosecution's resolution dropping the charges stated that he had obtained funds but that intent to defraud could not be proved. The assertion simply reproduced this information. In any case, it cannot be justly expected of the general press that they, as a rule, print fuller, more detailed information. Moreover, the Article conditioned the assertion with the term, "roughly". The Article contained no assertion that the money had been exclusively for PD's benefit. The named sum does not constitute false, rather inexact, information. Only certain minor details can be designated as inexact, but not the overall tenor of the assertion.

In relation to the third assertion, its precise wording clearly indicates it is an evaluative judgement, not a statement of fact. The statement was to the effect that the authors cannot avoid the feeling that declarations concerning his close ties to the communist party leadership, made by former members of his group of entertainers, have some justification. The authors considered facts (the prosecution, the dismissal, declarations by associates concerning his ties to prominent communists), and on the basis of them they came to their own opinion that the assertions of associates had some justification and that the dismissal of the prosecution had been highly irregular. In such circumstances, the published evaluation cannot be considered incorrect or as deviating from the generally applicable principles of propriety, either as regards form or content.

Finally, the Court concluded that the ordinary courts had failed to respect the principle that constitutionally guaranteed fundamental rights must be balanced.

Neither the information nor the personal opinions contained in the Article at issue were of such a nature as to depart from the bounds of the protection of the constitutionally guaranteed freedom of expression and right to disseminate information. Thus, the conditions for placing restrictions on the freedom of expression were not met in this case as such restrictions cannot be considered necessary in a democratic society.

#### *Cross-references:*

##### European Court of Human Rights:

- *Lingens v. Austria*, 08.07.1986, Series A, no. 103; *Special Bulletin – Leading cases ECHR* [ECH-1986-S-003].
- *Oberschlick v. Austria* (no. 2), 01.07.1997, *Reports 1997-IV; Bulletin 1997/2* [ECH-1997-2-012].

##### *Languages:*

Czech.



#### *Identification:* CZE-2001-1-003

- a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.01.2001 / **e)** II. US 502/2000 / **f)** Protection of telephone communications / **g)** / **h)** CODICES (Czech).

##### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.

##### *Keywords of the alphabetical index:*

Evidence, illegally obtained / Telephone, conversation, confidentiality / Telephone, tapping, evidence / Telephone, mobile, hacking.

### Headnotes:

Article 13 of the Charter of Fundamental Rights and Freedoms protects everyone's privacy not only concerning the content of telephone communications but also concerning the data related to numbers called, the date and time of a call, its duration and, for mobile telephones, the base stations used in making calls. This protection may be breached only in the interest of protecting democratic society, possibly in the interest of the constitutionally guaranteed fundamental rights and freedoms of others, and the interference must be necessary.

It is possible to obtain or acquire "other" data, following the rules set for telephone tapping and recording of telecommunications.

### Summary:

The complainant objects that the evidence of extracts from telephone bills was obtained in conflict with the Criminal Procedural Code. The Court ascertained that a list of calls made in a certain time period, including the numerical codes of base stations through which the calls were made, date and start time of calls, the length of calls in seconds, the number of the base station where the call started and the number of the base station where the call ended, was sent to the Police.

The right to protection of the secrecy of telephone communications by its nature and significance is a fundamental human right and freedom. It concerns the personal sphere of an individual whose integrity must be respected and rigorously protected as an entirely necessary condition for the individual's dignified existence and the development of human life.

In this case the extract from the complainant's telephone bill was obtained without his approval. The Court agrees with the Judgment of the European Court of Human Rights, in the matter of *Malone v. United Kingdom* of 2 August 1984 (*Special Bulletin – Leading cases ECHR* [ECH-1984-S-007]). The above-mentioned data, and especially the numbers called, must be considered an inseparable part of telephone communications.

Article 13 of the Charter also establishes the protection of the secrecy of numbers called and other related data. If the constitutional order of the state allows a breach in this protection, it is done only and exclusively in the interest of protecting democratic society, or possibly in the interest of the constitutionally guaranteed rights of others. This includes primarily the general interest in the protection of society against crime. Interference in fundamental human rights or freedoms by the state is

acceptable only if the interference is necessary in the above-mentioned sense. In order not to exceed the limits of necessity, there must be a system of adequate and sufficient guarantees consisting of appropriate legal regulations and effective supervision of their observance. This legal regulation must be precise in its formulation, in order to give citizens sufficient information of the circumstances and conditions under which state bodies are authorised to interfere in privacy; the powers conferred on the relevant bodies and the manner in which they are implemented must also be precisely defined, in order to protect individuals against arbitrary interference. If these rules are not respected by the state, interference in the cited fundamental right is barred, and if it occurs it is unconstitutional.

Current legal regulations do not recognise the institution of providing or obtaining evidence of telecommunications operations for the purposes of criminal prosecution or performing the job of the police. This does not mean that the relevant state bodies are not entitled, under any circumstances, to obtain or request this evidence. There are rules for tapping and recording telecommunications operations by these bodies, and therefore it is possible to also use these rules when obtaining or acquiring "other" data (tracking telecommunications operations). Thus, when obtaining or acquiring records of telecommunication operations, criminal prosecution bodies, or the police before criminal prosecution begins, are required to proceed appropriately under § 88 of the Criminal Procedural Code, in such a way that the term "record" also relates to the data obtained by tracking telecommunication operations in relation to a particular person or persons. This constitutional interpretation of the cited provisions makes it possible to achieve effective control against unauthorised interference by state bodies in the given fundamental right, where at the same time the ability of these bodies to obtain a type of evidence often undoubtedly necessary for performing their jobs is not ruled out.

The evidence in question has been obtained illegally for the purposes of criminal proceedings, and therefore it is constitutionally inadmissible.

The settled case-law of the Court indicates that under Article 36 of the Charter of Fundamental Rights and Freedoms, a basic prerequisite for the proper administration of justice in a democratic state governed by the rule of law is the observance of not only constitutional but also statutory limits for obtaining and presenting evidence. Therefore, the conduct of any body active in criminal proceedings which deviates from the framework of procedural regulations in this respect is in conflict with the constitutionality of the state and its consequences also devalue the very purpose of criminal proceedings.

Therefore the Court annulled the contested decision.

*Languages:*

Czech.



*Identification:* CZE-2003-1-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 26.03.2003 / **e)** Pl. ÚS 42/02 / **f)** Freedom of conscience / **g)** Sbírka zákonu (Official Gazette), no. 106/2003 / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force before the entry into force of the Constitution**.

2.3.8 Sources – Techniques of review – **Systematic interpretation**.

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

*Keywords of the alphabetical index:*

Conscientious objection, religious grounds / Old law, interpretation.

*Headnotes:*

Freedom of conscience is manifested in decisions made by an individual in particular situations. Aside from its correlation to the norm, conscience involves the personal experience of an unconditional obligation.

Freedom of conscience is one of the “fundamental absolute rights” that cannot be restricted by ordinary law. Where a legal norm is in conflict with the specific freedom of conscience being asserted, it must be considered whether the assertion of freedom of conscience will not interfere with the fundamental freedoms of third parties, or whether the assertion of

freedom of conscience is not precluded by other values of principles contained in the constitutional order of the Czech Republic.

In a democratic legal state, “old law” cannot be interpreted in accordance with current case law. When evaluating the lawfulness of the original decision, the fundamental rights and principles that are entrenched in the Czech constitutional order and have been interfered with by the contested decision need to be taken into account. If the principle of legal continuity is not to have a destructive effect on the Czech constitutional statehood, one must insist consistently on the discontinuity of values in the application of “old law” and ensure that such approach is reflected in court rulings.

*Summary:*

The complainant lodged a constitutional complaint challenging a Supreme Court decision dismissing his complaint against a breach of the law.

The complainant was sentenced in 1954 for avoiding mandatory military service: objection to mandatory military service on religious grounds.

The Supreme Court panels hold two different opinions. The first panel was of the opinion that to sentence a person for the criminal act of avoiding mandatory service could not be deemed incompatible with democratic and legal principles. The second panel was of the opinion that that was not a criminal act. When the matter was brought before the grand tribunal, the former opinion prevailed.

According to the Minister of Justice, a violation of the law occurred.

The constitutional complaint satisfies all the formal requirements and was filed in a timely manner.

In proceedings regarding a complaint against a violation of the law, the Supreme Court looks to the factual and legal status at the time when the contested ruling was rendered. New facts and evidence are not allowed.

The interpretation of criminal law norms, where the consequences interfere with the personal sphere of the person concerned, must take into account the current and applicable constitutive values and principles of the legal state, as expressed in the constitutional order of the Czech Republic. Any understanding of continuity with “old law” must be restricted in that way and discontinued in terms of values (Pl. US 19/93).

The Constitutional Court referred to the European Court of Human Rights Decision in *Streletz, Kessler, Krenz v. the Federal Republic of Germany*, and the opinion of judge Levits. The Constitutional Court identified in particular with the following comment made by judge Levits: "... [t]he interpretation and application of the law depend on the general political order, in which law functions as a sub-system.... [t]he question whether, after a change of political order from a socialist to a democratic one, it is legitimate to apply the "old" law, set by the previous non-democratic regime, according to the approach to interpretation and application of the law which is inherent in the new democratic order.... Democratic States can allow their institutions to apply the law – even previous law,... only in a manner which is inherent in the democratic political order.... Using any other method of applying the law... would damage the very core of the "ordre public" of a democratic State.... [t]he interpretation and application of... legal norms according to socialist or other non-democratic methodology... should from the standpoint of a democratic system be considered wrong."

Freedom of conscience has a constitutive importance for a democratic legal state respecting the idea of respect for the rights of man and citizens. Totalitarian political regimes on the other hand attempt to suppress the freedom of the individual's conscience, using repressive criminal enforcement policy in the process. This is shown by developments in the Czech Republic – the 1920 Constitution did not presuppose the possibility of limiting by law the freedom of conscience, expressly laid down by the Constitution. The 1948 Constitution declared freedom of conscience. The same did not constitute a ground on which the satisfaction of a civic obligation could be denied. The 1960 Constitution made absolutely no reference to the freedom of conscience.

Freedom of conscience is not interchangeable with the freedom of faith or freedom of religion. A decision dictated by one's conscience is always specific because it deals with specific behaviour in a specific situation. The situation is individualised by time, place and specific circumstances. What is essential is that a serious, moral decision regarding good and evil is involved that the individual experiences as a binding obligation or an unconditional order to act in a certain fashion.

The specific moral character and its relation to personal moral truthfulness or authenticity that lend the decision its unconditionality, determine the difference between a decision made by reference to political or ideological motivation, and one made by reference to a state of mind.

The freedom of conscience cannot be limited by an ordinary law. Each act of law expresses public interest by formulating the moral conviction of the parliamentary majority. The conflict between an individual's conscience and a particular legal norm creates no prejudice to its binding effect. Freedom of conscience may affect its enforceability in relation to those who are against it. Where the legal norm is in conflict with a specific freedom of conscience being asserted, it needs to be considered whether such decision would not interfere with third party fundamental rights, or whether the assertion of such freedom of conscience is not precluded by other values or principles contained in the constitutional order of the Czech Republic as a whole.

Only the Supreme Court decides whether a violation of the law occurred. The Constitutional Court determines whether the interpretation of statutory provisions chosen by the court infringes the complainant's fundamental rights and freedoms.

The constitutional complaint is well-founded because the impugned decision of the Supreme Court neglected to consider, to an appropriate extent, the complainant's fundamental right to the freedom of conscience.

The Constitutional Court has already adjudicated on the conflict of the obligation to report for mandatory military service and fundamental rights, which arises from the conflict of the said duty and freedom of religion (II. ÚS 285/97; II. ÚS 187/2000). The Constitutional Court examined the relationship of the impugned decisions and the freedom of conscience. According to the Court, one may refuse to report for mandatory military service for reasons unrelated to religious faith.

The Supreme Court failed to take into account Article 15.1 of the Charter. The fact that the "9 May Constitution" denied the nature of an absolute right to the freedom of conscience was a result of the very nature of the political regime installed in February 1948. The new restriction of the freedom of conscience disrupted the continuity of perception of the freedom of conscience as an absolute right, as protected by the 1920 Constitution. The constitutional construction of freedom of conscience adopted after the February coup deviates in terms of legal philosophy from the developments in the area of fundamental rights that commenced with the Nuremberg trials and continued by the adoption of the Universal Declaration of Human Rights.

The Supreme Court's interpretation was found to be restrictive. Consequently, the Constitutional Court did not consider the issue of its conflict with other fundamental freedoms. The contested ruling was quashed.

**Cross-references:****European Court of Human Rights:**

- *Streletz, Kessler, Krenz v. the Federal Republic of Germany*, nos. 34044/96, 35532/97 and 44801/98, 22.03.2001, *Bulletin* 2001/1 [ECH-2001-1-002].

**Languages:**

Czech.



**Identification:** CZE-2004-2-010

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 14.07.2004 / **e)** I. US 185/04 / **f)** A legitimate expectation as a fundamental right / **g)** / **h)** CODICES (Czech).

**Keywords of the systematic thesaurus:**3.10 General Principles – **Certainty of the law**.4.7.1 Institutions – Judicial bodies – **Jurisdiction**.5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status**.5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract**.**Keywords of the alphabetical index:**

*Pacta sunt servanda* / Contract, parties, acquired rights / Contract, termination, benefit.

**Headnotes:**

The courts and the judiciary in general must ensure the protection of the rights of individuals in a law-based state as well as the protection of fundamental rights. Not all fundamental rights are directly enforceable rights that operate immediately in relation to the individual. Some rights operate through individual rules of ordinary law in the sense that they "radiate" through the ordinary law. Such is the case in horizontal relations between private subjects. When interpreting and applying

ordinary law to such relations, the courts are obliged to carefully weigh and take into consideration this radiation, so that they may simultaneously respect the obligation to ensure protection both of the rights on the level of ordinary law and of the fundamental rights.

A legitimate expectation as a fundamental right does not operate horizontally, but rather in relation to the state authorities, that is, to a court, which is bound by the duty to provide the protection of such a legitimate expectation, and to do so by means of the interpretation and application of the relevant rules of ordinary law.

**Summary:**

In a constitutional complaint, the complainant challenged decisions of ordinary courts dismissing his action on the merits against commercial Firm X for the payment of a certain sum. The Municipal Court had rejected the complainant's appeal and upheld the first instance court's judgment. The Supreme Court of the Czech Republic had ruled that the complainant's subsequent extraordinary appeal against the Municipal Court's judgment was inadmissible.

The heart of the dispute before the ordinary courts concerned the claim for remuneration agreed upon with Firm X, following from the part of the agreement designated as the "addendum on target remuneration". The defendant firm and the complainant had entered into an agreement, under which the complainant would be entitled to remuneration dependent on the profit of a project overseen by the complainant. Despite the fact that all the conditions for payment of that agreement were fulfilled, Firm X did not pay.

The view of the ordinary courts was that the defendant firm was not obliged to pay the complainant the agreed remuneration because it followed from "addendum on target remuneration" that "completion of the project" was understood to be "a decision of the managing board on the completion of the project". The managing board had not adopted any such decision. In the complainant's opinion, the above-mentioned bilateral legal transaction could not be interpreted in such a way that even though all conditions for payment had in fact been met, Firm X was not obliged to pay the complainant the agreed remuneration as long as the managing board of the defendant firm remained inactive and did not take the purely formal decision on the completion of the project.

The complainant was, therefore, of the view that the ordinary courts' decisions constituted encroachments upon his constitutionally guaranteed rights, in particular, on his right to fair remuneration for work. He asked the Constitutional Court to quash the contested decisions.

At the Constitutional Court's request, the District Court, the Municipal Court and the Supreme Court of the Czech Republic gave their views on the constitutional complaint. The District Court and Municipal Court informed the Constitutional Court that they considered the complaint unfounded. The Supreme Court of the Czech Republic stated that the complainant made what he knew to be an erroneous personal assessment of the factual circumstances of the case and, on that differing basis, constructed a differing view of the law applicable to the matter. Firm X proposed that the Constitutional Court reject the complaint on the merits in its entirety.

The Constitutional Court declared that the constitutional complaint was well-founded, although on different grounds than those advanced by the complainant.

The Constitutional Court reviewed, first and foremost, whether the contested decision encroached upon the complainant's basic right guaranteed by Article 1 Protocol 1 ECHR, and specifically upon the right to the protection of property, with consideration given to the legitimate expectation that his property claim would not be ignored. According to case-law of the European Court for Human Rights (Judgment in the matter of *Beyeler v. Italy*, 1996 (*Bulletin* 1999/3 [ECH-1999-3-012]; *Reports of Judgments and Decisions* 2000-I), *Zwierzynski v. Poland*, 1996 (*Reports of Judgments and Decisions* 2001-V), *Broniowski v. Poland*, 2002, etc.) and that of the Constitutional Court of the Czech Republic (for example, Pl. ÚS 2/02), such a legitimate expectation is an integral part of the protection of property rights.

The protection of legitimate expectations is reflected in the individual rules of ordinary law, in the given case, those of labour law. A legitimate expectation did not operate directly between the complainant and Firm X (i.e. between private law subjects), rather it was a constitutionally-guaranteed basic right which operated on the complainant's relations toward state authorities, i.e. towards a court.

In the course of the proceedings before the ordinary courts, evidence had been adduced showing that the project had been completed and that Firm X profited from it. If the actual conditions for a claim to performance arose, then in the Constitutional Court's view, a decision of Firm X's managing board had to be considered as a merely formal confirmation that those conditions existed, and not as an actual condition in itself. The fact that Firm X had not yet decided upon those facts and its failure to do so appeared arbitrary. The coming into being of the claim could not be tied to such a decision, precisely due to the fact that such an attitude on the part of the second party could be considered as the abuse of the exercise of a right and

its status in its labour law relations. The Constitutional Court considered that such conduct was also subject to the provisions of the Labour Code laying down that a legal transaction must be considered as unconditional where one of the parties thereto, and whom the failure of the condition benefits, intentionally thwarts its fulfilment. Such conduct also violated the legal principle of "pacta sunt servanda".

That being so, the Constitutional Court reached the conclusion that by adopting the interpretation of ordinary law, those courts had failed to respect their obligation to protect the complainant's basic rights in the form of his legitimate expectation in obtaining the performance that he demanded from Firm X on the basis of the "addendum on target remuneration", and those courts had thus encroached upon the complainant's basic right under Article 1 Protocol 1 ECHR. The Constitutional Court allowed the above-mentioned constitutional complaint and quashed the contested decisions.

#### *Languages:*

Czech.



*Identification:* CZE-2007-1-002

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 20.02.2007 / **e)** II. US 568/06 / **f)** / **g)** Sbírka zákonů (Official Gazette), 94/2007 / **h)** CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

#### *Keywords of the alphabetical index:*

Child, right of access / Child, custody, biological parent / Child, custody, spouse of mother / Family, blood relation / Family, notion / Fundamental right, core right / Parental rights / Social right, nature / Soft law.

### **Headnotes:**

Under the Charter of Fundamental Rights and Basic Freedoms, parenthood and the family enjoy the protection of the law. Children and adolescents enjoy special protection. Parliament has to respect this. These provisions do not themselves contain a fundamental right. They are subject to the reservation of a statute; the Charter provides that such rights can only be asserted within the confines of the laws implementing them. The provisions are also classified as social rights, which are considered to be part of constitutional "soft law", in contrast to classic fundamental rights ("core rights").

The Charter and the European Convention mention the protection of and respect for family life in general terms, but do not define the term, "family life". The interpretation of these provisions must, therefore, proceed from the fact that the family represents, firstly a biological tie, then a social institution, which is only subsequently enshrined within legislation. When interpreting these concepts, it is necessary to take biological ties into account, as well as the social reality of the family and family life, which has undergone radical changes over the past century.

"Family" can be defined as a community of close persons, with close ties of kinship, as well as psycho-social, emotional, economic, and other ties. The concept of family life within today's society is unsettled and continues to evolve. All the same, one cannot ignore the fact that at the basis of family ties are the traditional biological bonds linking family members.

Those who live outside the institution of marriage or who are not blood relations, but who have emotional and other bonds (examples are common law spouses, those living with children born to one of the partners from another relationship) may also enjoy legal protection as a family. This is underlined by jurisprudence from the European Court of Human Rights.

### **Summary:**

The case concerned custody rights to a four year old girl who was left an orphan by the death of her mother and biological father, who were never married. Her mother, both at the time of the girl's birth and her own death, was married to another man. He was therefore presumed to be her father (he is referred to here as "the presumed father") and was granted temporary custody of the girl following her biological parents' death. The girl's grandmother (the mother of her biological father) sought custody of her. She was declared the girl's guardian following paternity proceedings which

demonstrated that the girl's presumed father was not her biological father and which confirmed the paternity of her biological father. However, the court decided that the presumed father, who had had custody of the girl between the time of her mother's death and the end of the paternity proceedings, could have custody for two days per week. The grandmother lodged a constitutional complaint contesting these decisions as being in breach of Article 32.1 of the Charter, under which the family enjoys the protection of the law and children and adolescents have special protection.

Consideration was given to jurisprudence from the European Court of Human Rights regarding biological ties as opposed to emotional and social ones. In the Judgment it handed down in *Kroon and others v. The Netherlands*, the European Court gave preference to biological ties between children and their father, and denied the paternity of the mother's husband: on the basis that "Respect for family life requires that biological and social reality prevail over a legal presumption". See paragraph 40 of *Kroon*.

The Constitutional Court did not find an infringement of Article 32 of the Charter. Nonetheless, it upheld the constitutional complaint on other grounds. The court decisions in question had violated the right to the protection of family life as guaranteed by Article 10.2 of the Charter and Article 8 ECHR.

The Court's decision was based on the following considerations. The complainant was the biological and, following the decision determining paternity, the legally recognised grandmother of the girl. However, the interests of the presumed father, husband of the girl's deceased mother, who was awarded custody of the girl for a period of time, first as her legal representative then on the basis of the court's provisional measure, were also considered.

From the perspective of the protection of family life, relations between grandparents and grandchildren enjoy comparable protection to relations between parents and children. All of the biological bonds exist between the complainant and the girl, which in the aggregate form the basis of family life. At the present time, the relations between the girl and her presumed father can only be based on emotional ties. Naturally, greater weight must be given to the provision a child's biological family can make than to the upbringing and care which can be provided by a person who is not a blood relation, even if they have established emotional and social bonds with the child. As soon as the existence of a family relationship is proven, the state must act to allow this relationship to develop, it must adopt suitable measures aimed at uniting the child's biological family, and it has the duty to accord such relationships specific protection. The State is not

permitted, by means of legal instruments, to create a situation where the quality, and even the integrity, of a child's family life are weakened and the child's relationships with its family are disturbed. The regional court adopted just such an approach by ordering regular access visits with the girl's presumed father.

#### *Cross-references:*

European Court of Human Rights:

- *Kroon and others v. The Netherlands*, Series A, no. 297-C, *Bulletin* 1994/3 [ECH-1994-3-016].

#### *Languages:*

Czech.



## **Denmark Supreme Court**

### **Important decisions**

*Identification:* DEN-1989-S-001

**a)** Denmark / **b)** Supreme Court / **c)** / **d)** 13.02.1989 / **e)** 279/1988 / **f)** / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1989, 399.

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.17 General Principles – **Weighing of interests.**

5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

*Keywords of the alphabetical index:*

Defamation, racial / Media, broadcasting, racially derogatory statement / Racial discrimination, protection, principle / Racial hatred, incitement / Racial hatred, aiding and abetting.

#### *Headnotes:*

Two persons employed at the Danish Broadcasting Corporation had infringed the Danish Penal Code by broadcasting statements of a racially derogatory nature made by three youths. The majority of the Supreme Court found that the principle of freedom of expression did not outweigh the right to protection against such racially derogatory statements.

#### *Summary:*

In 1985 an interview with three members of a group of youths known as "the Greenjackets" by the Danish Broadcasting Corporation (*Danmarks Radio*) was broadcast nationwide. During the interview the three

persons made abusive and derogatory remarks about immigrants and ethnic groups in Denmark, *inter alia*, comparing various ethnic groups to animals.

The three youths were subsequently convicted under Article 266.b of the Penal Code for having made racially derogatory statements. The City Court of Copenhagen and the Eastern Division of the High Court also convicted the journalist, who had initiated the interview, and the head of the news section of *Danmarks Radio*, who had consented to the broadcast, under Article 266.b in conjunction with Article 23 of the Penal Code for aiding and abetting the three youths. Both courts reasoned, *inter alia*, that the journalist had taken the initiative to make the programme while aware of the nature of the statements likely to be made during the interview and that he had encouraged "the Greenjackets" to express their racist views. The head of the news section was convicted because he had approved of the broadcasting of the programme though aware of the content.

A majority of the Supreme Court (4 members) voted in favour of confirming the High Court sentence. By broadcasting and thus making public the racially derogatory statements, the journalist and the head of the news section of *Danmarks Radio* had infringed Article 266.b in conjunction with Article 23 of the Penal Code. In this case, the principle of freedom of expression in matters of public interest did not outweigh the principle of protection against racial discrimination.

One dissenting judge voted in favour of the acquittal of the journalist and the head of the news section of *Danmarks Radio*. The judge noted that the object of the programme had been to make an informative contribution to an issue of sometimes emotional public debate and the programme had offered an adequate coverage of the views of "the Greenjackets". Even though "the Greenjackets" only made up a small number of people, the programme still had a reasonable news and information value. The dissenting judge concluded that the fact that the journalist had taken the initiative with regard to the interview did not imply that the journalist and the leader of the news section should be found guilty.

In accordance with the view of the majority, the defendants' appeal was dismissed by the Supreme Court.

#### Cross-references:

Following the judgment by the Supreme Court, the journalist, Mr Jersild, lodged an application against Denmark with the European Commission of Human Rights on the grounds that his conviction violated his right of freedom of expression under Article 10 ECHR.

On 23 September 1994 the European Court of Human Rights, by twelve votes to seven, decided that there had been a violation of Article 10 (*Publications of the European Court of Human Rights*, Vol. 298, *Bulletin* 1994/3 [ECH-1994-3-014]).

#### Languages:

Danish.



*Identification: DEN-1996-1-001*

**a) Denmark / b) Supreme Court / c) / d) 16.11.1995 / e) I 36/1995 / f) / g) / h) Ugeskrift for Retsvæsen, 1996, 234.**

#### Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments**.

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial**.

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.

#### Keywords of the alphabetical index:

Judge, acting / Criminal proceedings.

#### Headnotes:

The judgments of the district court (*byret*) and of the High Court (*Landsret*) in a criminal case were quashed and the case remitted for retrial before the district court because in the circumstances of the case an order for detention in custody based on an especially confirmed suspicion – made during the trial before the district court – disqualified the court from trying the case.

### **Summary:**

A person charged with rape had been detained pending trial of the case before the court, as in the circumstances of the case there were specific reasons to believe that the accused would render difficult the prosecution of the case. The judge found that the detention could not be based on an especially confirmed suspicion.

During the trial before the district court, an order was made to maintain the detention, but now based on the establishment of an especially confirmed suspicion. At the time of this order, the court had examined the accused and six witnesses in the trial. The witness examination was not concluded, and counsel for the defence had not yet made his closing speech.

The accused claimed that the court had disqualified itself through the order for detention, and that the continued trial was an infringement of Article 6.1 ECHR.

The presuppositions for the rules on disqualification as declared by the legislator in the Danish Administration of Justice Act (*retsplæjeloven*), and the relationship of these rules to detention pending trial, were expressed in the preparatory works of an amendment to the Act in 1990. This amendment was caused by the Decision of the European Court of Human Rights in the *Hauschildt* case (*Special Bulletin – Leading cases ECHR [ECH-1989-S-001]*). The preparatory works presupposed that no disqualification would arise pursuant to Article 6.1 ECHR caused by detentions based on an especially confirmed suspicion (not prior to, but) during the trial.

The Supreme Court stated that the present practice from the Convention bodies does not provide a basis for establishing that in all cases it will be compatible with the Convention provision that a judge participates in the adjudication of a case if he has ordered detention of the accused based on an especially confirmed suspicion during the trial.

The majority (three judges) of the Supreme Court found that, in the circumstances, the use of the provision on detention was suited to give the accused the impression that the question of guilt now had in fact been decided without his having had an opportunity to exercise his right of defence, cf. Articles 6.3.c and 6.3.d ECHR. Accordingly, these judges found that the case had presented circumstances which were suited to call in question the absolute impartiality of the court during the continued trial.

The minority (two judges) found that, although the production of evidence was not completely concluded and counsel for the defence had not yet had an opportunity to make his closing speech, disqualification

did not arise because by far the most important part of the production of evidence had been completed when the order was made.

The judgments of the district court and of the High Court were then quashed and the case was remitted for retrial.

### **Cross-references:**

The judgments of the district court and of the High Court are reported in *Ugeskrift for Retsvæsen* (Danish Law Reports) 1994, 225.

The decision refers to the Supreme Court order of 1 November 1989, reported in *Ugeskrift for Retsvæsen* 1990, 13, and to the Judgment of the European Court of Human Rights of 24 May 1989 in the *Hauschildt* case (Series A, no. 154), *Special Bulletin – Leading cases ECHR [ECH-1989-S-001]*.

### **Languages:**

Danish.



### **Identification:** DEN-1999-3-006

**a)** Denmark / **b)** Supreme Court / **c)** / **d)** 06.05.1999 / **e)** 66/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 1316.

### **Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions**.

### **Keywords of the alphabetical index:**

Agreement, closed shop / Trade union, membership, compulsory / Labour market.

### **Headnotes:**

A company cannot dismiss an employee for not belonging to a particular trade union if a closed shop agreement is concluded after the appointment of the employee, and if the employee is not a member of the concerned trade union at the time of the agreement.

### **Summary:**

The appellant had in September 1989 been hired by a company which in August 1990 concluded a closed shop agreement with a Danish trade union. The appellant joined the trade union in October 1990 but was expelled in January 1996. As a consequence, the appellant was dismissed from his job. The appellant, relying on the Freedom of Association Act taken together with the case-law of the European Court of Human Rights concerning the interpretation of Article 11 ECHR, claimed that the dismissal was unlawful.

The Supreme Court first addressed the general question of the compatibility of closed shop agreements with Article 11 ECHR. The Court noted that the European Court of Human Rights had not taken a position on closed shop agreements as such in the *Young, James and Webster v. United Kingdom Special Bulletin – Leading cases ECHR* [ECH-1981-S-002] and the *Sigurdur A. Sigurjónsson v. Iceland* [ECH-1993-S-005] Judgments (see below under Cross-references), nor in its subsequent case-law.

The Supreme Court then noted that the Freedom of Association Act was enacted in 1982 in order to protect the freedom from compelled membership of certain associations following the interpretation of the European Court of Human Rights of Article 11 ECHR in the *Young, James and Webster v. United Kingdom, Special Bulletin – Leading cases ECHR* [ECH-1981-S-002]. Pursuant to § 2.1 of the Act, an employee cannot be dismissed for not being a member of a particular trade union nor for not being a member of any trade union. The Act contains, however, certain exemptions from this rule; that is:

1. if an employee at the time of his appointment knew that membership of a particular trade union or membership of some trade union is a condition for employment (§ 2.2) or
2. if an employee who is a member of a trade union is informed after his appointment that the membership is a condition for his continuous employment (§ 2.3).

After making a contextual interpretation of the provision, the majority of the Supreme Court (5 judges) concluded that § 2.3 of the Freedom of Association Act does not allow the dismissal of an employee for not belonging to a particular trade union if a closed shop agreement is concluded after the appointment of the employee, and if the employee is not a member of the concerned trade union at the time of the agreement. The Court thereby set aside a mutual procedural declaration on a contrary interpretation of the provision made before the Court by both parties. The majority further noted that its understanding of § 2.3 of the Act was the understanding most in line with the *Young, James and Webster v. United Kingdom, Special Bulletin – Leading cases ECHR* [ECH-1981-S-002].

The dismissal of the appellant therefore contravened § 2.1 of the Freedom of Association Act. The company was thus ordered to pay compensation to the appellant.

In a dissenting opinion, the minority of the Supreme Court (4 judges) stated that as a result of the mutual procedural declaration, the parties had not further dealt with the question of the interpretation of § 2.3 before the Court. The minority further noted that the majority's interpretation of § 2.3 did not correspond well with the wording of the provision and the *travaux préparatoires*. The minority, therefore, did not find sufficient grounds for ruling that the dismissal contravened § 2.3 of the Freedom of Association Act. Thus, the minority voted in favour of the High Court decision to dismiss the appellant's claim.

### **Cross-references:**

In this Judgment the Supreme Court referred to the Judgments of the European Court of Human Rights:

- *Young, James and Webster v. United Kingdom*, 13.08.1981, Series A, no. 44, *Special Bulletin – ECHR* [ECH-1981-S-002],
- *Sigurdur A. Sigurjónsson v. Iceland*, 30.06.1993, Series A, no. 264, *Special Bulletin – Leading cases ECHR* [ECH-1993-S-005].

### **Languages:**

Danish.



# Estonia

## Supreme Court

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### Important decisions

*Identification:* EST-2000-3-007

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 05.10.2000 / **e)** 3-4-1-8-2000 / **f)** Review of Section 18.1.3 of the Competition Act / **g)** Riigi Teataja III (Official Gazette), 2000, 21, Article 232 / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.2.2 Constitutional Justice – Jurisdiction – Type of review – **Abstract / concrete review.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.9 General Principles – **Rule of law.**

3.10 General Principles – **Certainty of the law.**

4.6.2 Institutions – Executive bodies – **Powers.**

*Keywords of the alphabetical index:*

Competition, public procurement, monopoly.

*Headnotes:*

An executive agency's statutory right to exercise supervision does not mean that the agency has competence to perform specific acts with regard to private law bodies. Ambiguity of legislation as to which agency is authorised to exercise supervision over a certain matter is incompatible with the principle of certainty of the law.

*Summary:*

According to a directive of the Competition Board, AS Eesti Telefon (a provider of telecommunication services) failed to comply with Section 18.1.3 of the Competition Act. Under this provision a company in the position of a natural monopoly or having exclusive rights in the market had to purchase items and order services according to the procedure provided for by the Public Procurement Act. Section 18.1.3 of the Competition Act also applied to companies that were

not legal entities under public law (AS Eesti Telefon was a private law entity).

AS Eesti Telefon filed a complaint against the directive with Tallinn Administrative Court, claiming that the directive was illegal and Section 18.1.3 of the Competition Act was in conflict with Articles 3, 10, 11, 13, 31 and 32 of the Constitution. The Administrative Court annulled the directive of the Competition Board but did not initiate constitutional review proceedings. This was done by Tallinn Circuit Court which reviewed the decision of the Administrative Court by way of appeal. The Court found that under the Public Procurement Act to which Section 18.1.3 of the Competition Act referred, a natural monopoly had to apply for permission or approval of the Public Procurement Office in several cases. The latter, however, had no competence to exercise control over a private law entity. Therefore, the Court concluded, it was unclear to a private law legal entity which provisions of the Public Procurement Act it should observe. This was found to be incompatible with the principle of the rule of law (Article 10 of the Constitution).

The Constitutional Review Chamber of the Supreme Court was of the opinion that under the Public Procurement Act issues concerning public procurement were within the competence of the Public Procurement Office. It was not up to the Public Procurement Office to protect competition. The Public Procurement Office had no authority to carry out supervisory activities with regard to subjects specified in Section 18.1.3 of the Competition Act (i.e. private law entities).

It was within the competence of the Competition Board to take measures to promote competition under the Competition Act (Sections 34.1 and 35.1 of the Act). According to the Supreme Court, the supervision of the Competition Board included supervision over whether subjects specified in Section 18.1.3 of the Competition Act observed the procedure for public procurement. The Court observed, however, that a statutory right to exercise supervision did not mean that the Competition Board had the competence to give permission, receive declarations, cancel tendering procedures and carry out other supervisory activities provided for by the Public Procurement Act. The Competition Act did not impose an obligation on the Competition Board to perform acts proceeding from the Public Procurement Act.

The Court concluded that neither the Public Procurement Office nor the Competition Board had competence to perform acts specified in the Public Procurement Act with regard to subjects specified in Section 18.1.3 of the Competition Act. The subjects

specified in this provision were left in uncertainty, since it was unclear what behaviour was lawful. Thus, Section 18.1.3 of the Competition Act was ambiguous and not in conformity with the principle of certainty of the law, derived from Article 13.2 of the Constitution. The Court declared Section 18.1.3 of the Competition Act null and void.

Chief Justice Uno Löhmus delivered a dissenting opinion. According to Mr Löhmus the petition of the Tallinn Circuit Court to review the constitutionality of Section 18.1.3 of the Competition Act was inadmissible. In the view of Mr Löhmus, the Circuit Court had exercised abstract, not concrete, review of constitutionality, since the outcome of the original administrative law case did not depend on the constitutionality of the disputed provision. The directive of the Competition Board was invalidated due to a violation of formal requirements. Under Article 15.1 of the Constitution and Section 5 of the Constitutional Review Court Procedure Act an ordinary court may only initiate concrete review of constitutionality.

Mr Löhmus observed that Section 18.1.3 of the Competition Act made a direct reference to the Public Procurement Act. Thus, the provisions of the latter formed a binding part of the Competition Act. With reference to the Decision in *Sunday Times v. the United Kingdom* of the European Court of Human Rights, Mr Löhmus found that Section 18.1.3 of the Competition Act as a reference provision and the Public Procurement Act as the provision referred to, form a sufficiently clear basis for solving the matter without any need to declare the referring provision invalid.

#### Cross-references:

##### Supreme Court:

- no. 3-4-1-1-99, 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001];

##### European Court of Human Rights:

- *Sunday Times v. the United Kingdom* of 26.04.1979; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-001].

#### Languages:

Estonian, English (translation by the Court).



*Identification:* EST-2001-1-002

**a) Estonia / b) Supreme Court / c) Constitutional Review Chamber / d) 22.02.2001 / e) 3-4-1-4-01 / f) Review of the petition of Tallinn Administrative Court to review the constitutionality of Section 231.6 of the Code of Administrative Offences / g) Riigi Teataja III (Official Gazette), 2001, 6, Article 63 / h) CODICES (English, Estonian).**

#### Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.10 General Principles – **Certainty of the law.**

3.16 General Principles – **Proportionality.**

3.17 General Principles – **Weighing of interests.**

3.18 General Principles – **General interest.**

3.20 General Principles – **Reasonableness.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.2 Fundamental Rights – **Equality.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

#### Keywords of the alphabetical index:

Offence, administrative / Offence, parking.

#### Headnotes:

The right of a person to a fair trial in the case of parking offences may be restricted in order to ensure an economic and effective procedure. Any person upon whom a parking fine has been imposed, however, have a possibility to challenge the decision concerning him in a court.

#### Summary:

A person subjected to a fine for a violation of parking regulations filed a complaint with the Tallinn Administrative Court, requesting the annulment of the fine. He argued that the fine was unlawful, since no report had been drawn up concerning the violation of parking regulations and he had not been invited to take part in the hearing of his case. According to the

complainant Section 231.6 of the Code of Administrative Offences was in conflict with Article 6 ECHR and the Constitution. Section 231.6 of the Code of Administrative Offences provided that in the case of parking offences no report of an administrative offence shall be drawn up but an official shall draw up a notice concerning the offence. The notice shall include *inter alia* data concerning the official, the agency on behalf of which he is acting, the description of the parking offence, data concerning the vehicle and the amount of the fine. Tallinn Administrative Court requested the Supreme Court to review the constitutionality of Section 231.6 of the Code of Administrative Offences. The Court found that this section of the code was in conflict with Articles 11, 12 and 14 of the Constitution, and with the principle of legal clarity. Section 231.6 of the code was found to enable the official not to observe the ordinary procedural provisions for hearing an administrative offence case (applicable in the case of other offences). The Administrative Court found this to violate the constitutional principle of equality (Article 12 of the Constitution). The Court also found that Section 231.6 of the code does not guarantee the enjoyment of the rights and freedoms of the offenders and is in conflict with Article 14 of the Constitution. The unclear wording was also found to violate the principle of legal clarity.

The Constitutional Review Chamber of the Supreme Court did not agree with the Tallinn Administrative Court. The Court was of the opinion that a fine is substantially a punishment for an administrative offence, which is issued without the ordinary procedure for administrative offences. The Court weighed the competing interests – the interest of the person to be heard and the public interest to cope effectively with a large number of similar offences. The Court noted that parking offences are committed frequently, they are usually minor and simple in terms of facts, but cause serious problems in some locations. It is difficult to establish the person of the offender, thus, it is presumed that the offender is the owner of the vehicle. The Court found this presumption to be justified. As a rule, the person does not have the possibility to submit explanations and objections before the decision to punish is made. Thus, the right to a fair trial is restricted, but this restriction is justified by the need for economic and effective proceedings in cases of parking offences. The Court concluded that Articles 11 and 14 of the Constitution had not been violated.

The Court also found that Article 6 ECHR had not been violated. A minor administrative offence may be decided and the offender may be punished by an official, given that the punished person has a right to appeal to a court. In this case the punished person could contest the notice with the Administrative Court.

The Court noted, however, that the procedure for making the decisions in parking offence cases should be improved and it should be ensured that persons upon whom a parking fine is imposed are informed of their punishment.

The Court rejected the alleged violation of Article 12.1 of the Constitution, the principle of equality. Different procedures for handling different administrative offences do not proceed from the person of the offender, but from the nature of the offence. A simplified procedure with regard to parking offences is reasonable and proportional. The Court found that the alleged unclarity of the provision of the Code of Administrative Offences can be overcome by way of interpretation. The Court rejected the request of the Tallinn Administrative Court.

#### Cross-references:

European Court of Human Rights:

- *Engel and Others v. the Netherlands*, 08.06.1976; *Special Bulletin – Leading cases ECHR* [ECH-1976-S-001];
- *Öztürk v. Germany*, 21.02.1984; *Special Bulletin – Leading cases ECHR* [ECH-1984-S-001];
- *Kadubec v. Slovakia*, 02.09.1998.

#### Languages:

Estonian, English (translation by the Court).



#### Identification: EST-2001-2-004

- a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 03.05.2001 / **e)** 3-4-1-6-01 / **f)** Review of the petition of Tallinn Administrative Court to declare Section 140.1 of the Family Act invalid / **g)** *Riigi Teataja III* (Official Bulletin), 2001, 15, Article 154 / **h)** CODICES (Estonian, English).

#### Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – European Court of Human Rights.

3.18 General Principles – General interest.

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – Ethnic origin.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

*Keywords of the alphabetical index:*

Name, surname / National identity, protection.

*Headnotes:*

It is unconstitutional to prohibit an Estonian citizen or a person with an Estonian surname from taking a non-Estonian surname.

*Summary:*

The applicant, Ms Arendi, wished her surname to be changed to Arendi Elita von Wolsky. The Minister of Internal Affairs refused her request. Ms Arendi contested the Minister's decision in the Tallinn Administrative Court, claiming that she wished to preserve the name of her family. The Court repealed the disputed decision and filed a petition with the Supreme Court to review the constitutionality of Section 140.1 of the Family Law Act.

According to that section, the provisions of the Surnames Act 1934 had to be applied upon change of name. The Surnames Act provided, *inter alia*, that a non-Estonian surname could not be requested, if the person concerned was of Estonian origin or had an Estonian name. The Administrative Court found that this provision of the Surnames Act discriminated against persons of Estonian origin based upon their ethnicity, and was in violation of Article 12 of the Constitution.

The Constitutional Review Chamber of the Supreme Court noted that Section 140.1 of the Family Law Act does not contain any rules concerning the changing of names and, therefore, cannot interfere with the fundamental rights of individuals. This Section only refers to the relevant provisions of the Surnames Act, including Section 11 of the Act, which is relevant to the case.

The Supreme Court observed that the right to change one's surname may fall within the sphere of protection of several provisions of the Constitution, e.g. Article 26 of the Constitution (right to inviolability of private and family life), Article 19 of the Constitution (right to freedom of self-realisation), etc. Since Ms Arendi argued in the Administrative Court that she wished to add her maiden name to her surname, the Supreme Court focused on the right to inviolability of private and family life.

The Supreme Court saw safeguarding of Estonian identity as the aim of the restriction imposed by Section 11 of the Surnames Act. According to the Preamble of the Constitution, the state shall guarantee the preservation of the Estonian nation and culture through the ages. The Court took notice of the great importance of the protection of national identity during the drafting of the Constitution. However, the Court noted that today the protection of national identity should not prevent the changing of names. This conclusion was supported by a comparative analysis of the practice of European countries as presented by the European Court of Human Rights in the case of *Stjerna v. Finland* (*Bulletin* 1994/3 [ECH-1994-3-019]). The Supreme Court concluded that Section 11 of the Surnames Act was disproportional and violated Article 26 of the Constitution.

The Supreme Court noted that the prohibition of Section 11 of the Surnames Act was also discriminatory with respect to non-Estonians who had Estonian surnames. The Act prohibited such individuals from changing their name to a non-Estonian one, while a non-Estonian who had a non-Estonian surname, could change it to another non-Estonian name. This differentiation was found arbitrary and in violation of Article 12.1 of the Constitution.

The Constitutional Review Chamber declared Section 11 of the Surnames Act partially invalid.

*Cross-references:*

Supreme Court:

- no. 3-4-1-6-2000, 28.04.2000, *Bulletin* 2000/1 [EST-2000-1-004];
- no. 3-4-1-10-2000, 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009].

European Court of Human Rights:

- *Sunday Times v. the United Kingdom* 26.04.1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-001];
- *Burghartz v. Switzerland* 20.02.1994, *Bulletin* 1994/1 [ECH-1994-1-001];
- *Stjerna v. Finland* 25.11.1994, *Bulletin* 1994/3 [ECH-1994-3-019].

*Languages:*

Estonian, English (translation by the Court).



## *Identification: EST-2002-3-007*

**a)** Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 28.10.2002 / **e)** 3-4-1-5-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of Section 7.3 of the Principles of Ownership Reform Act / **g)** *Riigi Teataja III* (Official Gazette), 2002, 28, Article 308 / **h)** CODICES (Estonian, English).

### *Keywords of the systematic thesaurus:*

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

3.12 General Principles – **Clarity and precision of legal provisions.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation.**

5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation.**

### *Keywords of the alphabetical index:*

Ownership, reform / Property, unlawfully expropriated, return / Person, resettled / International agreement, return of expropriated property.

### *Headnotes:*

In concrete review proceedings the Supreme Court reviews only the constitutionality of the provision relevant for resolving the initial case in the trial court. The provision is relevant if the trial court would have to make a different decision depending on whether the provision was found to be constitutional or unconstitutional. The Supreme Court is entitled to check whether the challenged provision is relevant for deciding the initial case. In so doing, the Supreme Court cannot assess whether the referring court correctly adjudicated the initial case.

The period of more than ten years of lack of certainty as to whether or not the unlawfully expropriated property of persons who resettled according to the treaties concluded with the German state was to be returned

violated the general prohibition of arbitrariness and the fundamental right to procedural fairness, and was contrary to the principle of legal certainty. Furthermore, the rights of the present users of the property had been violated, since their right to privatise the property depended on whether the persons who resettled had the right to the return of their property.

### *Summary:*

In 1992 Ms Kalle filed an application with Tallinn City Assets Agency for the return of unlawfully expropriated property, namely, a house and a plot in Tallinn. Before the expropriation the property belonged to the great-grandfather of the applicant. The Tallinn Committee for the return of and compensation for unlawfully expropriated property (hereinafter, the "Committee") made several decisions with regard to the property in question, eventually dismissing Ms Kalle's application for a declaration that she was entitled to lodge a claim for ownership reform, because according to Section 7.3 of the Principles of Ownership Reform Act (hereinafter, the "Act"), applications for the return of or compensation for unlawfully expropriated property, which had been in the ownership of persons who had left Estonia, which had been expropriated on the basis of agreements entered into with the German state, and which was located in the Republic of Estonia, shall be resolved by an international agreement. The Committee considered it proved that the applicant's great-grandfather had left Estonia in January or February 1941 on the basis of the agreement entered into between the Soviet Union and Germany on 10 January 1941.

Ms Kalle filed a complaint with Tallinn Administrative Court against the decision of the Committee. She also challenged the constitutionality of Section 7.3 of the Act. Tallinn Administrative Court allowed Ms Kalle's complaint, also declaring the disputed provision unconstitutional and initiating constitutional review proceedings with the Supreme Court. The Constitutional Review Chamber of the Supreme Court reviewed the case, and decided to refer the petition to the Supreme Court *en banc* for review.

First, the Supreme Court dealt with a procedural issue. It held that the Court of constitutional review is entitled to check whether the challenged provision is relevant to resolving the initial case. In so doing, the Supreme Court – within the constitutional review procedure – cannot assess whether the referring court correctly adjudicated the initial case. The Supreme Court found that the challenged provision was relevant to resolving the case in question in the Administrative Court.

The Supreme Court noted the legislative history of the disputed provision. First, the 1991 resolution of the Supreme Council concerning the implementation of the

Act contained essentially the same provision in a slightly different wording. In 1997 the Parliament (*Riigikogu*) amended the Act and transferred the provision from the implementing regulations to the main text of the Act. In spite of the disputed provision, Estonia never concluded any international agreement referred to in Section 7.3 of the Act. The Minister of Justice informed the Supreme Court that the Federal Republic of Germany had not taken any initiatives to conclude such an agreement, and had also sought to discourage Estonia from raising the issue.

The Supreme Court found that Section 7.3 of the Act required that the state, the government in particular, take measures in order to conclude an agreement concerning the return of property of persons who had resettled elsewhere. If this proved impossible because of the lack of will of the other party, then the regulation must be amended, so as to create clarity for persons having resettled and their successors, as well as for the present users of the unlawfully expropriated property, whose right to privatise the property depended on whether the persons who resettled had the right to the return of their property. Under the regulation as it stood, the property concerned could neither be returned nor privatised in favour of the present users. On the one hand, the individuals entitled to lodge claims for ownership reform had been given the hope that the relevant property would be returned or compensation paid; on the other hand, the current users of the property apparently had an indeterminate prospect of privatising the property in their use. The Supreme Court held that Article 13.2 of the Constitution (enshrining, *inter alia*, the principle of legal certainty) and Article 14 of the Constitution (the prohibition of arbitrariness and the right to procedural fairness), taken together, had been violated, since for a period of more than ten years the state had neither concluded the agreement referred to, nor changed the disputed provision of the Act.

The Supreme Court did not declare Section 7.3 of the Act invalid. The Court considered that if it declared the provision invalid, the property in question would have to be returned or compensation paid in accordance with the general procedure prescribed by the Act. The Court considered this to be a political decision not to be taken by the Court. It was up to the legislator to decide whether and under what conditions the property in question should be returned or compensation paid. Therefore, the Supreme Court declared Section 7.3 of the Act unconstitutional and ordered the legislator to bring the provision into conformity with the principle of certainty of the law.

#### *Supplementary information:*

Four justices out of seventeen delivered a dissenting opinion concerning the declaration of unconstitutionality. According to their view, the Supreme Court should have declared Section 7.3 of the Act invalid. The entry into force of the judgment of the Supreme Court should have been postponed for one year, in order to enable the legislator to enact new regulations.

#### *Cross-references:*

##### Supreme Court:

- no. 3-4-1-10-2000, 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009].

##### European Court of Human Rights:

- *Sunday Times v. the United Kingdom*, 26.04.1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-001].

#### *Languages:*

Estonian, English (translation by the Court).



#### *Identification:* EST-2002-3-010

- a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 24.12.2002 / **e)** 3-4-1-10-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of the last sentence of Section 8.31 of the Wages Act and of Regulation no. 24 of the Minister of Finance, dated 28 January 2002, entitled "The procedure for and conditions of disclosure of information concerning the wages of officials" / **g)** *Riigi Teataja III* (Official Gazette), 2003, 2, Article 16 / **h)** CODICES (Estonian).

#### *Keywords of the systematic thesaurus:*

- 3.4 General Principles – **Separation of powers**.
- 3.17 General Principles – **Weighing of interests**.
- 3.18 General Principles – **General interest**.
- 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

### 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

#### *Keywords of the alphabetical index:*

Company, management board, member / Information, obligation to provide / Wage, see also minimum wage, salary / Interest, economic.

#### *Headnotes:*

It is for the legislator to decide all issues relevant to the restriction of fundamental rights, and the legislator must not authorise the executive to regulate these matters. The executive may only clarify the restrictions of fundamental rights and liberties provided for by law. It must not impose additional restrictions.

The right to the inviolability of one's private life also protects persons from the collection, holding and disclosure of information concerning their business or professional activities which enables information concerning a person's property and economic interests to be revealed. The disclosure of information concerning the wages of members of supervisory boards representing private interests or of members of management boards of companies in which the state has a controlling interest violates a person's right to the inviolability of his or her private life. The same applies to the obligation imposed on the said individuals to submit declarations of their economic interests.

#### *Summary:*

According to Section 8.3 of the Wages Act, information concerning the wages of employees shall be confidential. Pursuant to Section 8.31 of the same Act, the confidentiality requirement shall not apply to information concerning the wages of officials specified in Section 4 of the Anti-Corruption Act. The Minister of Finance was empowered to establish the procedure for and conditions of disclosure of information concerning the wages of these officials. The list of officials laid down by Section 4 of the Anti-Corruption Act included members of the management and supervisory boards of partly publicly owned companies. Information concerning the wages of these persons had to be disclosed, regardless of the share of the company owned by the state, and regardless of whether the individual member of the supervisory board was a representative of the state. According to Section 14.7 of the Anti-Corruption Act, members of the management or supervisory boards of a partly publicly owned company had to submit declarations of their economic interests (including information concerning their property, proprietary obligations and other circumstances enabling their economic interests and

financial situation to be determined) to the minister in charge of the ministry exercising the state's shareholder rights in the company.

In 1995 66% of the shares of Estonian Air Ltd were privatised. The state retained 34% of the shares. In 2002 the Minister of Transport and Communications requested information concerning the wages of the members of the management and supervisory boards of Estonian Air Ltd in order to disclose this information. Declarations of economic interests were also requested. Several members of the management and supervisory boards not representing the state filed a complaint with Tallinn Administrative Court, requesting a declaration that the measures taken by the Minister were unlawful and that the relevant provisions of the Wages Act, Anti-Corruption Act and Regulation of the Minister of Finance were unconstitutional. The Administrative Court declared the provisions concerning the disclosure of information concerning wages unconstitutional, but dismissed the application concerning the requirement to submit the declarations of economic interests. The Court initiated constitutional review proceedings with the Supreme Court.

The Constitutional Review Chamber of the Supreme Court held that Article 26 of the Constitution, which protects the inviolability of private and family life, also protects persons from the collection, holding and disclosure of information concerning their business or professional activities which would enable information concerning a person's property and economic interests to be revealed.

The Supreme Court declared the last sentence of Section 8.31 of the Wages Act, empowering the Minister of Finance to establish the procedure for and conditions of disclosure of information concerning wages, as well as the Regulation issued by the Minister on the basis of this delegation of competence, to be unconstitutional and invalid. According to the Supreme Court, the delegating provision of the Wages Act was too broad, and the Regulation of the Minister of Finance imposed additional restrictions compared with those provided for by the Wages Act.

As to the substance, the Supreme Court held that the disclosure of information concerning the wages of members of supervisory boards who represent private interests (i.e. who are not representatives of the state) and members of management boards of companies in which the state has a controlling interest (i.e. companies in which the state holds stocks or shares representing a sufficient number of votes to preclude the adoption of resolutions concerning amendments to the Articles of association or increases in or the reduction of stock capital or share capital, or concerning the dissolution, merger, division or transformation of a

company at the general meeting of the company), and the requirement that these persons submit a declaration of economic interests, infringed their right to the inviolability of their private life.

The Court observed that the aim of requiring the disclosure of information concerning wages and the submission of declarations of economic interests – which was to guarantee the transparency of the use of state property and to prevent corruption – could be considered a legitimate aim of protecting public order and preventing criminal offences under Article 26 of the Constitution. The Court found, however, that a fair balance between the rights of individuals and the public interest had not been achieved. The Court considered the disclosure of information concerning wages to be a serious restriction on the right to inviolability of one's private life. Furthermore, the Court observed that the state as a shareholder also had other means of obtaining information about the economic activities of partly publicly owned companies, including information concerning the sums of money paid to members of the supervisory and management boards of such companies. There was no reason to disclose this information to the general public.

The information to be given in declarations of economic interests included information about an official's property, proprietary obligations and other circumstances which allowed the official's economic interests and financial situation to be determined. Information concerning income from abroad and property in joint ownership, as well as information about the official's spouse, parents and children also had to be declared. The Supreme Court found that such a serious interference with the right to inviolability of private life of the individuals concerned, and also of their family members, was not justified. There was no evidence that the submission of such declarations would promote the prevention of corruption or its exposure. The Supreme Court found the restriction to be disproportionate.

Therefore, the Supreme Court declared the relevant provisions of the Wages Act and Anti-Corruption Act unconstitutional and invalid.

#### Cross-references:

##### Supreme Court:

- no. III-4/A-2/94, 12.01.1994, *Bulletin* 1994/1 [EST-1994-1-001];
- no. 3-4-1-1-99, 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001];
- no. 3-4-1-1-01, 08.02.2001, *Bulletin* 2001/1 [EST-2001-1-001];
- no. 3-4-1-2-01, 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003].

#### European Court of Human Rights:

- *Niemietz v. Germany*, 16.12.1992, *Special Bulletin – Leading cases ECHR* [ECH-1992-S-007];
- *Rotaru v. Romania*, 04.05.2000.

#### Languages:

Estonian.



#### Identification: EST-2008-2-007

**a)** Estonia / **b)** Supreme Court / **c)** General Assembly (*En banc*) / **d)** 16.05.2008 / **e)** 3-1-1-88-07 / **f)** Misdemeanour matter concerning the punishment of S. Mulyar under Section 73.1 of the Customs Act and the confiscation of the assets of AIT under Section 94.4 of the Customs Act / **g)** *Riigi Teataja III* (Official Gazette), 2008, 24, 160, [www.riigikohus.ee](http://www.riigikohus.ee) / **h)** CODICES (Estonian, English).

#### Keywords of the systematic thesaurus:

- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**
- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

#### Keywords of the alphabetical index:

Confiscation, property / *Locus standi*.

#### Headnotes:

A provision of the Estonian Code of Misdemeanour was pronounced unconstitutional, to the extent that it prevented a third person, who was not party to the misdemeanour proceedings, from lodging an appeal

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against a decision by an extra-judicial body to confiscate its property.

**Summary:**

I. In a case before the extra-judicial body of the Tax and Customs Board, cigarettes and diesel fuel were found hidden under the passenger compartment of a motorbus driven by S. Mulyar. The motorbus belonged to Mulyar's employer, a public limited company (hereinafter, "AIT"). The driver was punished by a fine and the hidden items were confiscated. The motorbus was confiscated, because the extra-judicial body could not rule out the possibility that this specially reconstructed vehicle might still be used to commit breaches of the customs rules. There was no suggestion that Company AIT had committed an offence; it was not embroiled in any misdemeanour proceedings. The company was viewed as a third party not participating in the proceedings.

AIT appealed against the decision by the Tax and Customs Board ordering the confiscation of the motorbus. The County Court overturned the decision, and the vehicle was returned to AIT. The Tax and Customs Board submitted an appeal in cassation against the County Court's judgment, pointing out that AIT was not a party to the proceedings enumerated in Section 16 of the Code of Misdemeanour Procedure (hereinafter, the "CMP"). Thus, under Section 114.1 of the CMP, it had no right to appeal against the decision of the extra-judicial body. By the ruling of the Criminal Chamber of the Supreme Court, the matter was referred to the General Assembly of the Supreme Court for hearing.

II. The General Assembly began its examination of the case by considering whether, under the law currently in force, AIT could challenge the decision of the extra-judicial body on the confiscation of the motorbus, either by way of misdemeanour proceedings or by way of any other court proceedings. The General Assembly then reviewed the constitutionality of the relevant regulation.

The County Court suggested that if the extra-judicial body had decided on confiscation by a ruling under Section 67.4 of the CMP, rather than making a final decision, AIT's right to appeal would have been guaranteed. This exception can only be used if the item in question was the direct object used for commission of the misdemeanour, and the lawful owner of the object cannot be identified. The Supreme Court dismissed this argument. This exception would not have been possible here. The motorbus was not a direct object of a misdemeanour, but was used as a means to commit an offence. Moreover, the extra-judicial body knew the true owner and lawful possessor of the property.

Neither could AIT file an appeal with the head of an extra-judicial body. This organ would only be competent to adjudicate appeals filed against the activities of the extra-judicial body until the decision is made in the matter, not against the decisions themselves.

The CMP contains a precise definition of those who are parties to proceedings. Only those parties are entitled under this legislation to file an appeal with a county court against decisions by an extra-judicial body. Because this definition does not embrace third parties, there are no grounds for recognising a third party in misdemeanour proceedings as parties to proceedings and for granting them the same rights. Therefore, the Supreme Court concluded that in the present case, there were no effective possibilities for AIT to contest the decision of the extra-judicial body on the confiscation of the motorbus.

As for other court procedures, Section 2 of the CMP mentions norms of criminal procedure applicable in misdemeanour proceedings if the same issue is not regulated by a provision of the CMP. Sections 16 and 17 of the Code of Criminal Procedure (CCP) include third parties as participants to proceedings. However, it was not possible to invoke the above CCP provisions here, because the CMP contains a precise definition of participants to proceedings and their right to appeal, which excludes third parties.

Neither could AIT enlist the assistance of the administrative court here. Under Section 3.2 of the Code of Administrative Court Procedure, a different procedure applies to disputes in public law; they do not fall within the competence of administrative courts. The decisions of extra-judicial bodies are contested in the county court pursuant to the CMP. Thus, a special procedure excludes administrative court procedure. If third parties were allowed access to the administrative court, this would result in a situation where, depending on the procedural status of an appellant, one and the same act of a public authority could be contested in two different courts.

AIT could not protect its right of ownership by way of civil court proceedings. The decision to confiscate the motorbus was a dispute arising from a public law relationship. Under Section 1 of the Code of Civil Procedure, it could not be adjudicated by way of civil court procedure.

The Supreme Court pointed out that none of the possibilities mentioned above would be sufficiently clear to the addressee of the right. In other words, the recognition of the right of appeal through one of the considered interpretations would not meet the principle of legal clarity (Sections 10 and 13.2 of the Constitution). Nonetheless, lack of legal clarity must not

be the price of an interpretation that was constitutionally compliant. For the above reasons the General Assembly concluded that the law in force did not afford AIT any possibility of recourse to the court to contest the confiscation of its motorbus.

The confiscation of the motorbus infringed AIT's ownership rights under Section 32 of the Constitution. Under Section 15.1 of the Constitution, all those whose rights and freedoms are violated have the right of recourse to the courts. The Supreme Court stressed the importance of gapless protection of the right of recourse to the courts. It pointed out that Sections 13, 14 and 15 of the Constitution give rise to the right to an effective remedy. This means that somebody whose rights and freedoms have been violated may file an action with a court. Equally, the State is under a duty to provide for a fair and effective judicial procedure for the protection of fundamental rights.

The Supreme Court was concerned to note that a third party to misdemeanour proceedings was deprived of a right to contest a decision by an extra-judicial body that affected its rights (the very rights or constitutional values that the legislator aimed to protect). A restriction of fundamental rights that has no clear aim or which was established to serve an aim not arising from the Constitution is in conflict with the Constitution. The proportionality of such a restriction cannot be controlled. The General Assembly held that because the infringement of Section 15.1 of the Constitution had no apparent aim, Section 114.1.2 of the CMP was unconstitutional to the extent that it prevented someone not a party to the proceedings from filing an appeal with the court against a decision by an extra-judicial body, confiscating its property.

As regards AIT's appeal against the decision of the Tax and Customs Board, the Supreme Court upheld the conclusions of the judgment of the County Court, and substituted the reasoning thereof concerning the grounds for AIT's right to file an appeal with the reasoning set out in its own judgment. The appeal in cassation of the Tax and Customs Board was dismissed. 7 justices out of 19 put forward a dissenting opinion, arguing that there was no ground to declare Section 114.1.2 of the CMP partly unconstitutional and invalid. They contended that the law presently in force afforded sufficient possibilities for somebody not party to misdemeanour proceedings to file an appeal against a decision by an extra-judicial body to confiscate a motorbus, as the relevant provisions of the Code of Criminal Procedure could have been applied.

#### Cross-references:

##### Supreme Court:

- no. 3-4-1-15-07, 08.10.2007, Constitutional Review Chamber;
- no. 3-3-1-38-00, 22.12.2000, General Assembly;
- no. 3-1-3-10-02, 17.03.2003, General Assembly, *Bulletin* 2003/2 [EST-2003-2-003];
- no. 3-4-1-4-06, 09.05.2006, Constitutional Review Chamber;
- no. 3-4-1-17-06, 17.01.2007, Constitutional Review Chamber;
- no. 3-4-1-8-07, 04.04.2007, Constitutional Review Chamber;
- no. 3-4-1-11-07, 17.05.2007 Constitutional Review Chamber;
- no. 3-4-1-3-02, 10.05.2002, Constitutional Review Chamber, *Bulletin* 2002/2 [EST-2002-2-004].

##### European Court of Human Rights:

- *Klass and others v. Germany*, 06.09.1978, *Special Bulletin – Leading cases ECHR* [ECH-1978-S-004];
- *Kudla v. Poland*, 26.10.2000;
- *Hasan and Chaush v. Bulgaria*, 26.10.2000.

##### Languages:

Estonian, English.



# Finland

## Supreme Administrative Court

### Important decisions

*Identification:* FIN-2011-2-002

a) Finland / b) Supreme Administrative Court / c) Third Chamber / d) 13.04.2011 / e) 1025 / f) / g) Yearbook of the Court, 2011:39 / h) *Lakimies*, 2011, 788.

*Keywords of the systematic thesaurus:*

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

*Keywords of the alphabetical index:*

Candidate, office, appointment, civil servant / Conflict of an Act with the Constitution, appeal, prohibition.

*Headnotes:*

A decision of the Government concerning appointment to office did not, in the manners referred to in Article 6 ECHR, concern the rights and obligations of the unsuccessful candidate. An opportunity to bring the matter before a court through an ordinary appeal was not safeguarded under national law.

The State Officials Act included a provision prohibiting appeal against decisions concerning appointments to office. This provision was not in evident conflict with the Constitution in the manner referred to in Section 106 of the Constitution.

*Summary:*

I. The Government appointed person A to the office of the Environment Counsellor in the Environmental Permits Office. According to the relevant instructions for appeal, the decision was non-appealable pursuant to Section 59 of the State Officials Act. Person B, who had also applied for the position, lodged an appeal against the Government decision with the Supreme Administrative Court and asked that his appeal be heard because based on Section 106 of the

Constitution, the prohibition of appeal referred to in Section 59 of the State Officials Act could not be applied as it was in evident conflict with Section 21 of the Constitution (protection under the law).

II. The Supreme Administrative Court ruled the appeal inadmissible. In the reasoning of its decision, the Court firstly quoted the national legislation applicable to the matter and thereafter considered the relevance of the European Convention on Human Rights *vis-à-vis* the prohibition of appeal.

Regard shall be had to the case-law of the European Court of Human Rights upon application of the European Convention on Human Rights. According to this Convention, the right to a fair trial safeguarded for everyone within the scope of application of Article 6 ECHR (in matters concerning "civil rights and obligations") entails a fundamental right to bring a matter to a court for consideration either through an appeal or by other means.

Regard to the case-law involving Article 6 ECHR shall also be had upon interpretation of Section 21 of the Constitution. This behoves an examination of whether a decision on appointment to office involves a right within the scope of application of Article 6 ECHR. If this is the case, then that right also comes within the scope of application of Section 21 of the Constitution, as the said provision applies to all matters within the scope of the protection afforded under Article 6 ECHR, whereas exclusion of the disputed matter from the scope of application of Article 6 ECHR does not necessarily exclude the matter from the scope of application of Section 21 of the Constitution, its scope of application being wider in some respects.

In this case, regard as concerns the scope of application of the European Convention on Human Rights shall in particular be had to the Judgment issued in the case of *Vilho Eskelinen et al. v. Finland* (19 April 2007). The said judgment is a ruling of the Grand Chamber expressly concerning the conditions for application of Article 6 ECHR to matters involving public officials. It has particular precedent value also in light of the fact that the ruling was intended to determine generally valid criteria for resolving when a dispute involving public service law comes within the scope of application of Article 6 ECHR, earlier case-law (*inter alia*, the case of *Pellegrin v. France*, 8 December 1999, *Bulletin* 1999/3 [ECH-1999-3-009]) having been deemed to be unsatisfactory.

In its ruling, the Court of Human Rights accepted that Article 6 ECHR may not necessarily be applicable to all disputes involving public service law, as the State may have an interest in controlling access to a court when it comes to certain categories of staff. It is primarily for the

Contracting States to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. The Court exerts its supervisory role subject to the principle of subsidiarity verifying that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6 ECHR, which as a rule also apply to public service relationships. Unlike held in the *Pellegrin* case, the crucial criterion in assessing the applicability of Article 6 ECHR was not solely whether the civil servant participates in the exercise of public power.

Based on the aforementioned case, it may be concluded that a dispute involving public service law falls outside the scope of application of Article 6 ECHR when two conditions are met. Firstly, the national law must exclude access to a court for the civil servant in question. Secondly, the exclusion must be justified in light of the nature of the dispute or the matter.

The Supreme Administrative Court found that the prohibition of appeal under Section 59 of the State Officials Act is unequivocal and cannot be excluded through a rights-oriented interpretation of the law. The case thus involved an examination of whether safeguarding the right of appeal was required under Section 21 of the Constitution, when interpreted in light of Article 6 ECHR, and whether application of the prohibition of appeal was in evident conflict with the Constitution in the manner referred to in Section 106 of the Constitution.

The first condition imposed in the *Eskelinen* case for exclusion of the matter from the scope of application of Article 6 ECHR is met in that under national law, the right of an applicant for office to bring his case to a court of law is withheld owing to the aforementioned prohibition of appeal. What remains to be resolved is thus whether there is acceptable justification for the prohibition of appeal.

The traditional justification for the prohibition of appeal has been held to be that no one has a subjective right to be appointed to office, this not being in conflict with the fact that in Section 125 of the Constitution, the general grounds for appointment are defined in a manner which encroaches upon the discretion of the party making the appointment. Above all, the said grounds mean that no one failing to satisfy these conditions or the supplementary qualifications shall be appointed to office. However, if this nonetheless occurs, a person injured by such unlawful appointment has access to an extraordinary appeal, pursuant to which the decision to appoint may be annulled by the Supreme Administrative Court. The appointment of a person, who does not meet the qualifications provided, is unlawful and can be annulled. However, no applicant

who satisfies the general grounds for appointment and other qualifications has an actual right to be appointed, as the party making the decision has considerable discretion in the matter.

Access to protection under the law, however, has been deemed to an increasing degree to demand the right of appeal also in matters of a more discretionary nature. Consequently, the Constitutional Law Committee of Parliament in its statement (PeVL 51/2010 vp) on the Government Bill on amending the State Officials Act (HE 181/2010 vp), issued in autumn 2010, held that the discretion associated with appointment decisions does not make them by nature different from other administrative decisions to such a degree that the right of appeal could not be extended to these. The said Bill proposes, in the manners described below, to retain the prohibition of appeal only in respect of appointments to office. The Constitutional Law Committee proposed that the Administration Committee consider the extension of the right of appeal to apply to appointments to office and public service relationships, but accepted that such a Bill could be considered in enactment procedure for ordinary Acts. This being the case, the Committee did not find the lack of appeal in matters of appointment to office to be unconstitutional.

According to the said Government Bill, decisions on appointments to office would in future represent the most important exception from the new main rule, under which appeal could be lodged with a court of law also against decisions involving legislation governing State officials. Even before the proposed legislative amendment, case-law has evolved in a direction generally to exclude prohibition of appeal in connection with decisions concerning the rights and obligations of public officials already in office wholly regardless of whether the said official participates in the exercise of public power and to what extent. Accordingly, the Supreme Administrative Court, in reliance on Section 106 of the Constitution, found the existing-law provision on prohibition of appeal to be contrary to Section 21 of the Constitution and did not apply the provision in a case involving the transfer of a public official already in office to other duties without the said official's consent, which consent was required under law (Supreme Administrative Court decision KHO 2008:25).

As justification for keeping decisions on appointments to office subject to the prohibition of appeal, the Government Bill (HE 181/2010 vp) makes reference not only to the fact that no one can be deemed to have a subjective right to be appointed to office, but also to the problems arising to the efficiency of administration, were appointments to office made subject to ordinary appeal. A further justification is given of the uncertainty arising to applicants from possible legal proceedings,

such uncertainty among other things being capable of hampering the State's opportunities of hiring the best possible staff. It was moreover held in the Government Bill that considering the existing legal remedies, access to ordinary appeal would not markedly enhance protection under the law. In this respect, reference was made *inter alia* to the aforementioned extraordinary appeal as well as the fact that decisions on appointment to office taken by the Government, which the case at hand involves, are subject to the advance supervision of legality carried out by the Chancellor of Justice who reviews all Government proposals for appointments to office. Proceedings under the Act on Equality between Women and Men and the Non-Discrimination Act are furthermore available to an applicant wishing to invoke procedure contrary to these Acts in appointments to office.

Although the aforementioned Government Bill 181/2010 vp lapsed because time did not permit its consideration before the parliamentary elections scheduled for April 2011, the Bill for its part indicates that objective justification of the kind required by the European Court of Human Rights may be presented for the prohibition of appeal in matters involving appointments to State office. Considering also that the aforementioned other legal remedies besides regular appeal provide legal protection inasmuch as the appointment decision involves not only the relevant discretion, but also obvious questions of legality, the exclusion of matters involving appointment to State office from ordinary appeal is not in violation of Article 6 ECHR, nor do any further-ranging demands in this respect arise from EU law. The rules are furthermore not in evident conflict with the Constitution.

#### *Languages:*

Finnish, Swedish and two sámi languages.



## France Constitutional Council

### Important decisions

*Identification:* FRA-2000-2-009

**a)** France / **b)** Constitutional Council / **c)** / **d)** 20.07.2000 / **e)** 2000-434 DC / **f)** Hunting act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.07.2000, 11550 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.18 General Principles – **General interest.**

4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

4.10.2 Institutions – Public finances – **Budget.**

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

*Keywords of the alphabetical index:*

Hunting, right / Hunting, non-hunting rights / Local law / Incompetence, negative.

#### *Headnotes:*

It must be understood that, given its inclusion in the Rural Code, the legislative provision under which the right to prohibit hunting on one's private property depends on hunting's being objected to on all of the land belonging to land-owners or co-owners opposed to hunting, applies to land belonging to the objector which is with in the territory of the municipal or intermunicipal association concerned but does not apply to all of the owner's or owners' property throughout France.

Where a landowner states that, from personal conviction, he objects to hunting on his land, he is not required to explain his objections.

Although a ban on hunting one day per week does not infringe the right of ownership to the extent of grossly affecting the meaningfulness and scope of the right, it must be shown that there is justification for such a prohibition on the ground of public interest.

One such justification would be the need to ensure the safety of school children and the adults accompanying them on Wednesdays; on the other hand, allowing the authorities to choose another weekly period of twenty-four hours "on account of local circumstances" when neither the provision at issue nor the parliamentary debate refer to any ground of public interest justifying such a prohibition is liable to interfere with ownership rights in a manner contrary to the Constitution.

Although hunting federations are private law bodies, they are governed by special statutory provisions and have various public-service functions. The need for central government to ensure that hunting federations perform the public services required of them and that they make proper use of the resources they receive for the purpose are sufficient reason to introduce a special system of supervision. The obligations placed on local hunting federations, in particular scrutiny by the Auditor General's Department, therefore do not infringe freedom of association.

### **Summary:**

The act at issue was passed in a context of widespread legal and political controversy over hunting in France (eg the administrative proceedings on account of delay in incorporating the "migratory birds" directive into French law and the European Court of Human Rights finding against France in the case of *France v. Chassagnou*, *Bulletin* 1999/1 [ECH-1999-1-006]). As soon as the legislation was enacted, its constitutionality was challenged in an application lodged by a group of parliamentarians.

In its reply to this application, the Constitutional Council:

- confirmed its case-law regarding the right of amendment (cf. 2000-430 DC of 29 June 2000);
- applied once again the method of "nullifying interpretations" and "constructive interpretations" to safeguard the exercise of fundamental freedoms;
- clarified the scope of the principle of freedom of association established by the Council in its historic Decision of 16 July 1971.

### **Languages:**

French.



## **Georgia Constitutional Court**

### **Important decisions**

*Identification:* GEO-2006-1-001

**a)** Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.11.2005 / **e)** N1/5/323 / **f)** Citizens of Georgia – Giorgi Vacharadze, Arthur Kazarovi, Levan Chkheidze, Giorgi Berishvili, Shorena Oskopeli and Nino Archvadze v. Parliament of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.7.15.1.4 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Status of members of the Bar.**

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

*Keywords of the alphabetical index:*

Association, membership, obligatory / Bar, membership, obligatory / Lawyer, bar, membership, obligatory.

*Headnotes:*

Article 26.1 of the Constitution does not include the Bar Association of Georgia, as it is a public legal association and is based therefore on the principle of obligatory membership. Article 26.1 implicitly applies only to legal entities of private law, the main characteristic feature of which is the principle of voluntary decision to unite. Such an approach is reflected in the case-law of the European Court of Human Rights. In a number of decisions, a person may be obliged to join certain organisations, as these are not considered to be associations (based on the voluntary membership principle) implied in Article 11 ECHR.

**Summary:**

I. The subject of the dispute is whether or not the following provisions of the "Law of Georgia on the Bar" of 20 June 2001 (hereinafter, the "Law on the Bar") are contrary to Article 26.1 of the Constitution:

- a. the words "and is a member of the Bar Association of Georgia" in Article 1.2 and
- b. the words "of public law" in Article 20.1.

The claimants state that they have graduated from law schools of various Georgian colleges and universities and are currently working as attorneys. They are representatives of a free profession, however, they are forced to become members of the Bar Association of Georgia (which has the status of a legal entity of public law) due to the threat of restriction on their right to employment based on the disputed provisions of the Law on the Bar. In this respect, the claimants point out that, according to Article 26.1 of the Constitution, "Everyone shall have the right to create and to join public associations...". Therefore, in the claimants' opinion, the disputed provisions restrict the freedom of association because unless they join the Bar Association, they are deprived of the right to exercise advocacy, i.e. a possibility to earn their living.

The claimants allege that they are deprived of the right to independently create an alternative association of attorneys, the authority of which would be recognised by the state. In respect of the freedom of association, the claimants referred to Article 11 ECHR, Article 22 of the International Covenant on Civil and Political Rights, Article 20 of the Universal Declaration of Human Rights and paragraphs 23-24 of the Basic Principles on the Role of Lawyers.

The representatives of the respondent – the Parliament of Georgia – did not admit the claim. In their opinion, the disputed provisions do not contradict Article 26.1 of the Constitution. An attorney is a person exercising a free profession who is subject only to the law and norms of professional ethics, of observing the rights of clients and, at the same time, serving the public interest. In the respondent's opinion, Article 26.1 of the Constitution should not be interpreted to mean that the state is not entitled to confer, by a legislative act, the status of legal entity of both private and public law to relevant organisations. The requirement of obligatory membership in an association having the status of a legal entity of public law envisaged by the Law on the Bar does not violate, in any way, the right guaranteed by Article 26.1 of the Constitution. As regards the cases considered by the European Court of Human Rights, the representatives of the respondent point out that a clause obliging a person to become a member of an

association created on the basis of a special law adopted by the state power is "a concept of public law, and its priority is protection of public interests rather than the interests of its members". The above does not violate the right to create public associations guaranteed by the European Convention on Human Rights.

The representatives of the respondent allege that the Bar Association of Georgia is not a public association but a legal entity of public law created by law, which carries out public functions. Therefore, the principle of the free will of private associations cannot be applied to it. The right of the state to create the Bar Association of Georgia as a legal entity of public law is based on Article 7 of the Constitution. In the respondent's opinion, in some cases, this right becomes an obligation. By creating the Bar Association, the state intended to protect universal human rights and freedoms. Taking into account the essence and importance of advocacy, it has a public role in the Georgian legal system, which is confirmed by the fact that the rights and interests of the person defended by an attorney are regulated on the level of the Constitution and international norms.

Considering all of the above, the representatives of the respondent requested the Court to reject the constitutional claim on the basis that it is unfounded.

II. The Court cannot support the opinions of the claimants regarding the unconstitutionality of the disputed norms of the Law on the Bar.

The Court does not support the opinion that although the Bar Association of Georgia is a legal entity of public law, it is still a public association of citizens despite its legal and organisational form.

The legal nature of the Bar Association and its legal status are defined by the Law on the Bar, which is currently in force. According to Article 20.1 of this Law, "The Bar Association of Georgia is a legal entity of public law based on the membership principle". Despite the opinion of the claimants, the above status of the Bar Association cannot be changed by the Law on Public Associations of Citizens of 1995, which was adopted before the Constitution and which is invalid now, and even less so by the "Regulations of the Georgian Soviet Socialist Republic on the Bar".

As regards "public association", the Civil Code of Georgia defines organisational legal forms. In such an association, unlike legal entities of public law, private common interests prevail, which may include social, creative, cultural and other fields. A legal entity of private law has the right to carry out any activities that are not prohibited by law (notwithstanding whether a

specific activity is specified in its regulations). However, a legal entity of public law is only authorised to carry out activities specified in a law or its founding document.

The name "Bar Association of Georgia" contains the word "association", according to the explanation given by the European Court of Human Rights, this word implies a voluntary unification in order to pursue a common goal (*Young, James and Webster v. United Kingdom*, *Special Bulletin – Leading cases ECHR* [ECH-1981-S-002]). The Court supports the expert witness's opinion that "Name and title does always define the essence". Therefore, the Bar Association of Georgia should neither be identified as an association (union), as provided by Article 30 of the Civil Code of Georgia, nor as associations as provided by the International Pacts referred to by the claimant. The Bar Association could just as well have been called Chamber of Attorneys, Collegium of Attorneys, etc.

Therefore, the Bar Association of Georgia is not a public association, but a legal entity of public law created by law.

Since the Bar Association of Georgia is a legal entity of public law, the voluntary membership principle of private associations is not applied to it. Membership of the Association is required in order to obtain the status of attorney. The public legal status of the Bar Association of Georgia and the relevant principle of obligatory membership are unacceptable for the claimants, however, they could not provide reasonable legal arguments that the relevant association should be private. In the opinion of the Court, there are data confirming that a bar association based on the principle of obligatory membership in the form of a legal entity of public law is admissible and acceptable.

All of the above gives a strong basis to state that, as a result of the consideration of the case on the merits, the assertion made by the claimants of the violation by the disputed provisions of the constitutional right to create and join public associations is not confirmed. The state is entitled to create, in accordance with the Constitution, an association of attorneys in the form of a legal entity of public law with an obligatory membership requirement and the condition of absence of strict state control over its activities, which is most important.

Furthermore, in the opinion of the Court, the above-mentioned fact does not exclude a legitimate possibility that in the future, if it becomes necessary, the state may form a bar association based on other organisational legal grounds, taking into account both the Georgian and international practice with relevant legislative regulations, within the limits set out by Article 26.1 of the Constitution.

Considering all of the above, in a Judgment of 30 November 2005, the Constitutional Claim no. 323 brought by the citizens of Georgia – Giorgi Vacharadze, Arthur Kazarovi, Levan Chkheidze, Giorgi Berishvili, Shorena Oskopeli and Nino Archvadze v. Parliament of Georgia on the constitutionality of the following provisions of the Law on Bar in relation to Article 26.1 of the Constitution:

- a. the words "and is a member of the Bar Association of Georgia" in Article 1.2 and
- b. the words "of public law" in Article 20.1

was rejected.

#### *Languages:*

English.




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# Germany

## Federal Constitutional Court

### Important decisions

*Identification:* GER-1995-1-008

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 24.01.1995 / **e)** 1 BvL 18/93, 1 BvL 5/94, 1 BvL 6/94, 1 BvL 7/94, 1 BvR 403/94, 1 BvR 569/94 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 92, 91 / **h)** *Europäische Grundrechte Zeitschrift*, 1995, 410; *Neue Juristische Wochenschrift*, 1995, 1737; CODICES (German).

*Keywords of the systematic thesaurus:*

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

*Headnotes:*

The imposition of mandatory service in fire-brigades and the imposition of substitute levies exclusively on men violates the prohibition of discrimination on the grounds of sex.

The principles concerning the admissibility of special taxes are applicable also to taxes levied by the *Länder*.

*Summary:*

In some German *Länder*, the statutes on fire-brigades provide for an obligation on men to do service in such units. As a matter of fact, nobody has been obliged to do so because there have always been sufficient volunteers. Some of the statutes on fire-brigades required men to pay a substitute levy if they fail to do service in the fire-brigade.

The Constitutional Court decided that these provisions violate the prohibition of discrimination on the grounds of sex. Referring to its settled case-law, the Constitutional Court declared that a differentiation of treatment between men and women is only admissible if it is unavoidable for the regulation of matters which by nature affect one of the sexes. The only exception concerns preferential

treatment of one sex in order to compensate factual disadvantages. There are no sufficient reasons to except women from service in the fire- brigade because of their physical constitution. The Constitutional Court bases its motives on sociological and medical data. The discrimination against men with respect to service in fire-brigades is not justified by a compensation for factual disadvantages of women, as it is not aimed at overcoming a social differentiation between the sexes, but at establishing it in a special field.

Special taxes which are not levied for specific tasks of the State and which are imposed only on a certain part of the population are admissible only under very limited conditions, i.e. they must aim to establish an equality of the burden in cases where an obligation is imposed by law on a group of persons and not all members of this group fulfil this obligation. The substitute levy in question does not meet this requirement because nobody has in fact to do service in the fire-brigade. Therefore, money for the fire-brigade has to be paid out of the general budget.

*Cross-references:*

See, on the same problem, the Judgment of the European Court of Human Rights:

– *Karlheinz Schmidt v. Germany*, 18.07.1994, *Bulletin* 1994/2, 179 [ECH-1994-2-011].

*Languages:*

German.



*Identification:* GER-2013-1-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.06.2000 / **e)** 2 BvL 1/97 / **f)** Banana market organisation / **g)** *BVerfGE Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 102, 147-166 / **h)** *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2000, 1456-1461; *Wertpapiermitteilungen* 2000, 1661-1663; *Europäische Grundrechte-Zeitschrift* 2000, 328-333; *Neue Juristische Wochenschrift* 2000, 3124-3126; *Verwaltungsblätter für Baden-Württemberg* 2000, 427-430; *Die Öffentliche Verwaltung* 2000, 957-959; *Höchstrichterliche Finanzrechtsprechung* 2000, 839-842; *Europäische Zeitschrift für Wirtschaftsrecht* 2000,

702-704; *Europarecht* 2000, 799-810; *Bayerische Verwaltungsblätter* 2000, 754-755; *Zeitschrift für Öffentliches Recht in Norddeutschland* 2000, 501-502; *Entscheidungssammlung zum Arbeitsrecht*, Art 100 GG no. 2; *Verwaltungsrundschau* 2001, 104-105; *Steuerrechtsprechung in Karteiform GG*, Art 101 R. 23; *Lebensmittelrechtliche Entscheidungen* 39, 23-36; CODICES (German).

*Keywords of the systematic thesaurus:*

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between the EU and member states.**

1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law.**

2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and constitutions.**

*Keywords of the alphabetical index:*

Banana market organisation / European Union, fundamental rights standard.

*Headnotes:*

1. Constitutional complaints and submissions by courts which assert that fundamental rights guaranteed in the Basic Law have been infringed by secondary European Community Law are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has declined below the standard of fundamental rights required after the *Solange II* Decision (*BVerfGE* 73, 339 <378-381>).

2. Therefore, the grounds for a submission or a constitutional complaint must state in detail that the protection of the fundamental rights unconditionally required by the Basic Law is not generally ensured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the *Solange II* Decision (*BVerfGE* 73, 339 <378-381>).

*Summary:*

I. The Frankfurt/Main Administrative Court submitted to the Federal Constitutional Court the question whether the application of the European Community banana market organisation in the Federal Republic of Germany was compatible with the Basic Law.

The banana market organisation, in particular Council Regulation (EEC) no. 404/93 and Commission Regulation (EEC) no. 1442/93, differentiates between Community bananas (from states within the European Community), bananas from certain African, Caribbean and Pacific countries (hereinafter, "ACP") and third country bananas (another origin).

As regards price and quality, neither Community bananas nor ACP bananas can compete with third country bananas on open markets. In Germany, before the enactment of the Regulations submitted for review, the bananas best known and most sold used to be third country bananas.

The aim of the banana market organisation is to support the production of bananas within the Community and to ensure the duty-free sale of traditional ACP bananas (up to a specific import quantity, which corresponds to the customary sales of ACP bananas, ACP bananas are referred to as traditional ACP bananas).

To achieve this aim, compensatory aid arrangements for Community bananas were created. Traditional ACP bananas as all bananas produced outside the European Community require an import licence, but are duty-free. Non-traditional ACP bananas and third country bananas may be imported, in the framework of a specified tariff quota, at low customs duty rates or duty-free. Beyond this quota they are subject to high levies.

The respective tariff quotas are distributed among the importers through import licences.

Due to the Community Regulations, the prices of third country bananas are above those of Community bananas and "traditional" ACP bananas.

In the original proceedings, banana importers brought actions against import limitations for third country bananas. The Frankfurt Administrative Court submitted the question whether the banana market organisation was compatible with European Community Law to the Court of Justice of the European Communities (hereinafter, the "ECJ"). The ECJ held that there were no reservations concerning the validity of the underlying Regulation. The Frankfurt Administrative Court thereupon submitted to the Federal Constitutional Court the question whether the application of the import arrangements for bananas was compatible with the Basic Law. In the Administrative Court's view, the Regulations violated the plaintiffs' fundamental rights to property, to the freedom to pursue economic activities and to equal treatment. Due to the banana market organisation, the plaintiffs had only been allowed to import less than 50 % of the quantities of third country bananas they had imported before. This devalued their ownership of their facilities and restricted their

freedom to pursue economic activities in an unconstitutional manner, in particular because there was no transitional arrangement.

The Administrative Court regarded a submission to the Federal Constitutional Court as admissible, arguing as follows: basically, the ECJ was the lawful judge with regard to the provisions of secondary Community law. The ECJ had held that there had been no infringements of Community law. If, however, the submitting court held the view that the ECJs case-law did not guarantee the protection of fundamental rights required by the Basic Law, did not respect the Federal Republic of Germany's obligations under international law arising from GATT, or did not counter the Community legislator acting outside, or violating, the EC Treaty, this raised the question of the limits of the primacy of application of Community law.

Since its Decision of 12 October 1993 (*Maastricht* judgment), the Federal Constitutional Court extended its competence to review and to invalidate to sovereign acts of the Community that were effective in Germany. Unlike after its "Solange II" Decision, it explicitly exercised its review authority again, albeit in co-operation with the ECJ.

The Federal Constitutional Court informed the Administrative Court of the fact that after its decision for submission had been issued, the ECJ, on 26 November 1996, had taken a decision according to which Article 30 of Regulation no. 404/93 required the Commission to take any transitional measures it judged necessary. Such transitional measures had to serve to overcome the difficulties which had occurred after the common organisation of the market came into being but originated in the state of the national markets before the enactment of the Regulation.

The presiding judge of the Administrative Court's chamber that had made the submission replied to this letter from the Federal Constitutional Court. Making reference to the statements made in the submission order, he stated that Article 30 of Regulation no. 404/93 did not provide a possibility of remedying the fundamental rights violations. There was no individual hardship which had not been seen at all, or not in this manner, by the legislator enacting the Regulation, but an intentional hardship.

II. The Federal Constitutional Court decided that the submission was inadmissible.

As the Panel had held in 1986 in its *Solange II* Decision, the European Communities, in particular the ECJ's case-law, ensure effective protection of fundamental rights as against the sovereign powers of the Communities.

Such protection is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law. As long as this is the case, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation. Submissions of rules of secondary Community law to the Federal Constitutional Court are therefore inadmissible. In its *Maastricht* Judgment, the Panel maintained this view. There, the Panel stressed: the Federal Constitutional Court, through its jurisdiction, guarantees, in cooperation with the ECJ, that effective protection of fundamental rights for the residents of Germany will generally be secured also against the sovereign powers of the Communities. Under the preconditions that the Panel has formulated in its *Solange II* Decision, the ECJ is also competent for the protection of the fundamental rights of the citizens of the Federal Republic of Germany against acts done by the German public authority on account of secondary Community law. The Federal Constitutional Court will only become active again in the framework of its jurisdiction should the ECJ depart from the standard of fundamental rights stated by the Panel in its *Solange II* Decision.

This ruling has been confirmed by sentence 1 of Article 23.1 of the Basic Law, which was inserted pursuant to the Law of 21 December 1992.

Thus, constitutional complaints and submissions by courts are, as before, inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the ECJ, has resulted in a decline below the required standard of fundamental rights after the *Solange II* Decision. Therefore, the grounds for a submission must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case. This requires a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in its *Solange II* Decision.

Such a statement is lacking here. The grounds of the submission fail to satisfy the requirement for admissibility, as they are based on a misunderstanding of the *Maastricht* Decision. The submitting court is of the opinion that the Federal Constitutional Court, pursuant to the *Maastricht* Decision, contrary to the *Solange II* Decision, explicitly exercises its review authority again, albeit in co-operation with the ECJ. This conclusion cannot be drawn from the *Maastricht* Decision. There is no contradiction between the *Solange II* and the *Maastricht* Decisions. In particular, the Panel has nowhere in its *Maastricht* Decision given up its opinion on the delimitation of the ECJ's authority for jurisdiction *vis-à-vis* the Federal Constitutional Court and *vice versa*.

In the present case there was, beyond these requirements, a special cause for detailed statements concerning a negative evolution of the standard of fundamental rights in the ECJ's case-law. This follows from the aforementioned Judgment of the ECJ of 26 November 1996 requiring the Commission to take any transitional measures it judges necessary. The fact that the presiding judge of the chamber alone replied to information to that effect provided by the Federal Constitutional Court makes this statement inadmissible already for formal reasons. Moreover, against the background of this decision of the ECJ, it would not have been possible for the Administrative Court to infer a general decline of the standard of fundamental rights.

#### Cross-references:

- no. 2 BvR 197/83, 22.10.1986, *Solange II*, Special Bulletin – Inter-Court-Relations [GER-C-001];
- nos. 2 BvR 2134/92 and 2159/92, 12.10.1993, *Maastricht*, Bulletin 1993/3 [GER-1993-3-004].

#### Languages:

German, English (translation of excerpts of the decision by the Court) on the Court's website.



#### Identification: GER-2004-3-009

- a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.10.2004 / **e)** 2 BvR 1481/04 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 111, 307-332 / **h)** *Neue Juristische Wochenschrift* 2004, 3407-3412; *Europäische Grundrechte-Zeitschrift* 2004, 741-748; CODICES (German).

#### Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions.**

3.9 General Principles – **Rule of law.**

3.17 General Principles – **Weighing of interests.**

#### 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

#### Keywords of the alphabetical index:

European Court of Human Rights, decision, national law, effects / Judge, duty to respect international law / Child, best interest / Child, parent, right to contact with child / Child, custody.

#### Headnotes:

1. The principle that the judge is bound by the law (Article 20.3 of the Basic Law includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the European Court of Human Rights and the “enforcement” of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

2. In taking into account decisions of the European Court of Human Rights, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.

3. The Federal Constitutional Court must if possible prevent and remove violations of international law that consist in the incorrect application of or non-compliance with duties under international law by German courts. This applies to a particularly high degree to the duties under international law arising from the Convention, which contributes to promoting a joint European development of fundamental rights. As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to the interpretation in accordance with the Convention. In any event, the Convention provision as interpreted by the European Court of Human Rights must be taken into account in making a decision; the court must at least duly consider it.

#### Summary:

I. The complainant is the father of a child born illegitimate in 1999. The mother of the child gave the child up for adoption one day after its birth and declared her prior consent to the adoption by the foster parents, with whom the child has been living since its birth.

Since October 1999, the complainant has unsuccessfully endeavoured in a number of judicial proceedings, including a constitutional complaint, to be given custody and granted a right of access. In response to his individual application, a chamber of the Third Section of the European Court of Human Rights, in a Judgment of 26 February 2004, declared unanimously that the Decision on custody and the exclusion of the right of access violated Article 8 ECHR. It held that in cases where family bonds to a child demonstrably existed the state had the duty to endeavour to reunite a natural parent with his or her child. It stated that the complainant must at least be enabled to have access to his child. Thereupon, the Local Court, in accordance with the complainant's application, transferred custody to him and granted him a right of access by way of a temporary injunction of the court's own motion. The Higher Regional Court overturned the temporary injunction on the complainant's right of access. It held that the judgment of the European Court of Human Rights bound only the Federal Republic of Germany as a subject of public international law. The independent courts, however, were not bound by it because the European Convention on Human Rights was ordinary statutory law below the level of the Constitution and the European Court of Human Rights was not functionally a higher-ranking court.

In his constitutional complaint against this ruling, the complainant challenged the violation of his fundamental rights under Article 1 of the Basic Law (human dignity), Article 3 of the Basic Law (equality before the law) and Article 6 of the Basic Law (fundamental rights related to marriage, the family and children) and of the right to fair trial. He submitted that the Higher Regional Court had disregarded international law and had failed to recognise the binding effect of the decision of the European Court of Human Rights.

II. The Second Panel of the Federal Constitutional Court has overturned the challenged order of the Higher Regional Court because it violates the complainant's fundamental right under Article 6 of the Basic Law in conjunction with the principle of the rule of law.

The grounds of the decision are, in part, as follows: The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) and its protocols are international treaties, each of which has been incorporated into German law by the federal legislature in a formal statute (Article 59.2 of the Basic Law). The Convention and its protocols thus have the status of federal German statutes. For this reason, German courts must observe and apply the Convention in interpreting national law. The guarantees of the Convention and its protocols, however, are not a direct

constitutional basis for a court's review, if only because of the status given them by the Basic Law. But on the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights serve as interpreting aids in determining the contents and scope of fundamental rights and fundamental constitutional principles of the Basic Law, to the extent that this does not restrict or reduce the protection of the individual's fundamental rights under the Basic Law – and this the Convention itself does not desire (see Article 53 ECHR). This constitutional importance of an international treaty demonstrates the commitment of the Basic Law to international law. If possible, the Constitution is also to be interpreted in such a way that no conflict arises with obligations of the Federal Republic of Germany under international law. However, the commitment to international law takes effect only within the democratic and constitutional system of the Basic Law. The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German Constitution. If a violation of fundamental principles of the Constitution cannot otherwise be averted, there is no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law established by international treaties.

The decisions of the European Court of Human Rights have a particular importance for the law of the Convention as the law of international agreements. Under Convention law, the States parties have agreed that in all legal matters to which they are party they will follow the final judgment of the European Court of Human Rights. For this reason, the judgments of the European Court of Human Rights are binding on all parties to the proceedings, but only on those parties. On the question of fact, the European Court of Human Rights makes a declaratory judgment, without revoking the challenged measure. The binding effect of a decision of the European Court of Human Rights extends to all legal bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention.

The nature of the binding effect of decisions of the European Court of Human Rights depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. The administrative authorities and courts are bound by statute and law, and this includes a duty to take into account the guarantees of the Convention and the decisions of the European Court of Human Rights as part of a methodologically justifiable interpretation of the law.

Both a failure to consider a decision of the European Court of Human Rights and the “enforcement” of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law. In taking into account decisions of the European Court of Human Rights, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights. Above all in family law and the law concerning aliens, and also in the law on the protection of personality, it may be necessary to balance conflicting fundamental rights by creating groups of cases and graduated legal consequences. It is the task of the national courts to integrate a decision of the European Court of Human Rights carefully into the partial area of law affected.

By these standards, the decision of the Higher Regional Court challenged violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany. Here it is of central importance that the Federal Republic of Germany's violation of Article 8 ECHR established by the European Court of Human Rights is a continuing violation, for the complainant still has no access to his child. The Higher Regional Court should have considered the grounds of the European Court of Human Rights judgment in particular because the decision, which found that the Federal Republic of Germany had violated the Convention, was made on the matter which the Higher Regional Court had to consider again in a retrial. The duty to take the decision into account neither adversely affects the Higher Regional Court's constitutionally guaranteed independence, nor does it force the court to enforce the European Court of Human Rights decision without reflection. In the legal assessment in particular of new facts, in the weighing up of conflicting fundamental rights such as those of the foster family and in particular the best interest of the child, and in the integration of the individual case in the overall context of family-law cases with reference to the law of access, the Higher Regional Court is not bound in its concrete result.

### *Languages:*

German.



### *Identification:* GER-2007-3-015

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 13.03.2007 / **e)** 1 BvF 1/05 / **f)** / **g)** / **h)** Deutsches Verwaltungsblatt 2007, 821-831; Wertpapiermitteilungen 2007, 1478-1483; Gewerbeearchiv 2007, 328-333; Neue Zeitschrift für Verwaltungsrecht 2007, 937-941; Europäische Grundrechte-Zeitschrift 2007, 340-349; Zeitschrift für neues Energierecht 2007, no. 2, 163-167; CODICES (German).

### *Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Secondary legislation**.

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.

2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and constitutions**.

4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction**.

5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

### *Keywords of the alphabetical index:*

Environment, emissions trading / Environment, climate protection / Environment, greenhouse gas, reduction / Environment, protection.

### *Headnotes:*

1.a The Federal Constitutional Court and the competent courts will not evaluate the national implementation of European Community directives which contain mandatory provisions and allow Member States no

discretion as to how to effect implementation based on the standard of the fundamental rights contained in the Basic Law as long as the case-law of the Court of Justice of the European Communities generally ensures protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law.

b. To ensure that such effective protection exists, the competent courts are obliged to evaluate Community rules according to the standards of Community fundamental rights and, where appropriate, they may request a preliminary ruling pursuant to Article 234 of the Treaty establishing the European Community.

2. The decision concerns the question of the constitutionality of Section 12 of the Act on the National Allocation Plan for Greenhouse Gas Emission Allowances in the 2005 to 2007 Allocation Period.

#### *Summary:*

I. Trade in greenhouse gas emission allowances has been possible in Europe since 2005. This is based on the Emissions Trading Directive adopted by the European Community, according to which participating states must issue emission allowances to resident companies that allow the emission of a certain quantity of greenhouse gases. If emissions fall below the thresholds in the allowances, the companies concerned may sell these unused allowances to other companies who exceed their allocated quota of greenhouse gas emissions. The purpose of the trade is to bring about a reduction in greenhouse gas emissions in a cost-effective and economic way.

In order to implement Community law, the German legislature adopted, *inter alia*, the Allocation Act 2007 (hereinafter the "Act"), which entered into force on 31 August 2004. This Act lays down the total quantity of allowances for carbon dioxide emissions in Germany for the period of 2005 to 2007 and the rules for the allocation of emission allowances. It distinguishes between existing and new installations. The latter are in principle accorded preferential treatment in the allocation of allowances over the former on the basis of different allocation rules. Section 12 of the Act contains a special allocation rule, which provides for the recognition of early reductions in emissions. Under this section, installations whose emissions have been reduced due to modernisation measures taken between 1 January 1994 and 31 December 2002 are accorded preferential treatment in the allocation of allowances over existing installations that have not been modernised; the preferential treatment is given for a period of twelve calendar years following the

conclusion of the modernisation measures. This provision is intended to ensure that significant early action in relation to the cleaning up of industry and the energy sector, in particular in the new *Länder* (states), is at least partially taken into account in the allocation.

The present proceedings concern the judicial review of Section 12 of the Act. The government of the *Land* Saxony-Anhalt is of the opinion that the section is not compatible with the principle of equality before the law since it does not sufficiently acknowledge early modernisation measures. It claims that this results in competitive disadvantages for many East German companies in particular. In its view, companies which made their contributions to the reduction of greenhouse emissions early on through the adoption of modernisation measures in the 1990s are at a disadvantage. The government of Saxony-Anhalt alleges that their early action was either not recognised at all (in the case of modernisation occurring up until 1994) or – in comparison with new installations – not adequately recognised (in the case of modernisation occurring up to and including 2002). In comparison with companies which had not brought about a reduction in emissions in the past, the companies which had contributed most and for the longest amount of time to a reduction in carbon dioxide emissions are seriously disadvantaged.

II. The application for judicial review of a statute was unsuccessful. The First Panel of the Federal Constitutional Court held that Section 12 of the Act was compatible with the Basic Law. In particular, this section does not violate the requirement of equal treatment. Preferential treatment of new installations, i.e. installations that were modernised after 2005, over installations that were modernised early, is objectively justified. The legislature may provide special investment incentives for additional new installations and future modernisations in the interests of active climate protection. This is precisely the purpose of the trade in emissions.

In essence, the decision is based on the following considerations:

The Federal Constitutional Court is entitled to undertake a complete review of Section 12 of the Act. It is true that the Federal Constitutional Court and the competent courts will not evaluate the national implementation of European Community directives containing mandatory provisions by the standard of the fundamental rights contained in the Basic Law as long as the [case-law of the Court of Justice of the] European Communities generally ensure protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental

rights required unconditionally by the Basic Law ("Solange II" case-law). The recognition of early reductions in emissions, as provided for in Section 12 of the Act, is, however, made expressly a matter for the discretion of the Member States and thus is not of an obligatory nature.

Section 12 of the Act does not violate the equal treatment requirement contained in Article 3.1 of the Basic Law.

There is no objectively unjustified unequal treatment of installations which underwent early emissions reductions (Section 12 of the Act) vis-à-vis installations which were replaced by new installations in 2005 or later (Section 10 of the Act). The preferential treatment of new installations in comparison with installations with early reductions in emissions in the issuance of allowances is objectively justified. Section 10 of the Act aims, in particular, to achieve by 2012, a 21 % reduction in the level of greenhouse gas emissions as compared to the emission level in 1990. The provision creates innovation incentives for new installations and thus serves to promote active climate protection. In contrast, measures that were taken prior to the emissions trading scheme entering into effect, do not have any further effects on climate protection. Section 12 of the Act is concerned only with appropriate compensation for past action.

Nor is it possible to find unequal treatment which is not justified under constitutional law if one compares the allocation of allowances for modernisations of old installations after 1 January 2005 with the allocation of allowances for early emissions reductions pursuant to Section 12. The legislature may provide special incentives for future modernisations, particularly where the reduction in carbon dioxide is of a considerable degree. This is precisely the purpose of the trade in emissions.

Similarly, there is no constitutionally unjustified unequal treatment of the installations falling within the scope of Section 12 of the Act in comparison with the installations which were modernised before 1994. It is true that an operator who modernised its installation by the end of 1993, and thus contributed to the reduction in greenhouse gases, will not receive any preferential treatment. Such operators will be treated in the same way as operators of installations that have not been modernised. This unequal treatment is, however, justified. The Federal Government's choice of 31 December 1993 as the cut-off date was objectively justified by the fact that reliable data required for ascertaining any relevant early reduction in emissions would not otherwise have been available. Furthermore, the legislature's consideration that, based on current technical knowledge, it no longer considers measures

undertaken at least eleven years before the time the emissions trading scheme took effect and which today no longer serve to further reduce greenhouse gas emissions to be particularly worth rewarding from a climate change perspective is not constitutionally objectionable.

#### *Supplementary information:*

Two constitutional complaints lodged against the Act (nos. 1 BvR 1847/05 and 1 BvR 2036/05, which are published on the website of the Federal Constitutional Court) were not admitted by the First Panel of the Federal Constitutional Court for decision.

#### *Cross-references:*

- The "Solange II" case-law mentioned in the decision is reported in the Decision no. 2 BvR 197/83, 22.10.1986, *Special Bulletin – Inter-Court Relations* [GER-1986-C-001].

#### *Languages:*

German.



#### *Identification:* GER-2008-1-004

- a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 26.02.2008 / **e)** 1 BvR 1602/07, 1 BvR 1606/07, 1 BvR 1626/07 / **f)** / **g)** / **h)** *Wettbewerb in Recht und Praxis* 2008, 645-659; *Europäische Grundrechte-Zeitschrift* 2008, 202-215; CODICES (German).

#### *Keywords of the systematic thesaurus:*

- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
- 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**
- 2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities.**
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**

5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

*Keywords of the alphabetical index:*

Photojournalism, celebrity / Photojournalism, contemporary public figure / Image, right.

*Headnotes:*

Decision regarding the scope of the fundamental right to the protection of personality rights pursuant to Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law in respect of photographs of celebrities within the context of entertaining media reports concerning their private and everyday life.

[Official Headnotes]

Even “mere entertainment” is protected by the right of freedom of the press. Freedom of the press includes the right of the mass media to decide themselves what they consider worthy of reporting. While assessing the weight to be attached to the public’s interest in information, the courts are to refrain from evaluating whether or not the portrayal is of value in terms of its content, and are to limit themselves to an examination and analysis of the extent to which the report may be expected to contribute to the process of forming public opinion. Unrestricted photographing of contemporary public figures for the purposes of media reporting, whenever they are not in situations of spatial seclusion is not safeguarded constitutionally.

The role of the Federal Constitutional Court is limited to examining retrospectively whether the other national courts, in interpreting and applying the provisions of ordinary statutory law, particularly when weighing conflicting legal rights, have sufficiently regarded the influence of fundamental rights, as well as the constitutionally relevant provisions of the European Convention on Human Rights. The fact that their assessment might have resulted in a different conclusion is not sufficient grounds for the Federal Constitutional Court to rectify a decision of such courts. Published images are justified only insofar as the public would otherwise be deprived of opportunities to form an opinion.

[Non official Headnotes]

*Summary:*

I. The complainants are Princess Caroline von Hannover and two publishers. The publisher of *Frau im Spiegel* magazine had reported on an illness affecting

Prince Rainier of Monaco, on whether the complainant would be attending a society ball, and on a popular resort for winter sport, and had in each case added photographs showing the complainant on holiday with her husband. The publisher of *7 Tage* magazine had reported on the letting of a holiday villa belonging to the couple and had added a photographic image showing the complainant on holiday with her husband.

The applications for an injunction relief lodged by the complainant, Princess Caroline von Hannover in front of the civil courts were directed against the photographs. The Federal Court of Justice only allowed publication of the photo illustrating the article concerning the illness of the Prince of Monaco. Otherwise, it confirmed the prohibition issued by the lower courts, approving in particular the prohibition on publishing the photograph illustrating the report on the letting of the holiday villa.

II. The constitutional complaints lodged by the complainant, Princess Caroline von Hannover, and the publisher of *Frau im Spiegel* magazine failed, whereas the constitutional complaint lodged by the publishers of *7 Tage* magazine was successful.

In essence, the decision is based on the following considerations:

The fundamental rights of freedom of the press (sentence 2 of Article 5.1 of the Basic Law) and protection of personality rights (Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law) are not guaranteed without reservation. The general laws curtailing the right of freedom of the press include *inter alia* the provisions of §§ 22 et seq. of the Art Copyright Act and the legal concept of personality rights under civil law, but also the right to respect for private and family life as enshrined in Article 8 ECHR. On the other hand, the provisions contained in the Art Copyright Act, as well as the right to freedom of expression guaranteed by Article 10 ECHR, restrict the protection of personality rights as part of the constitutional order.

Even “mere entertainment” is protected by the right of freedom of the press. Entertainment can fulfil an important social function, such as when it conveys images of reality and proposes subjects for debate that spark off a process of discussion relating to philosophies of life, values and everyday behaviour. Protection of freedom of the press also includes entertaining reports concerning the private and everyday life of celebrities and the social circles in which they move, in particular, concerning persons who are close to them.

To limit reporting on the lifestyle of this circle of persons only to reports concerning their exercise of official functions would mean restricting freedom of the press to an extent that is no longer compatible with Article 5.1 of the Basic Law. Press reports may bring to the attention of the public not only behaviour that is scandalous or morally or legally questionable, but also the normality of everyday life, as well as conduct of celebrities that is in no way objectionable if this serves to form public opinion on questions of general interest.

Freedom of the press includes the right of the mass media to decide themselves what they consider worthy of reporting. In so doing, they are to have regard to the personality rights of the persons concerned. However, in the event of a dispute it shall be for the courts to decide what weight should be attached to the public's interest in being informed when weighed against the conflicting interests of the persons concerned. While assessing the weight to be attached to the public's interest in information, the courts are to refrain, however, from evaluating whether or not the portrayal is of value in terms of its content, and are to limit themselves to an examination and analysis of the extent to which the report may be expected to contribute to the process of forming public opinion. In assessing the weight to be attached to the protection of personality rights, the situation in which the person concerned was photographed and how he or she is portrayed will also be taken into account in addition to the circumstances in which the image was obtained, such as by means of secrecy or continual harassment. The need to protect personality rights can thus acquire greater significance even outside situations of spatial seclusion, such as when media reports capture the person concerned during moments where he or she is in a relaxed setting outside professional obligations or those of everyday life. At such times, the person may be entitled to assume that he or she is not exposed to the view of photographers. The need for protection has increased as a result of developments in camera technology and the availability of small cameras.

Commentary in or via the press generally aims to contribute to the formation of public opinion. The fundamental right in Article 5.1 of the Basic Law does not, however, justify a general assumption that any and every visual portrayal of the private or everyday life of famous personalities is associated with contributing to the formation of public opinion. At no time has the Federal Constitutional Court recognised unrestricted access by the press to contemporary public figures but has, rather, viewed published images as justified only insofar as the public would otherwise be deprived of opportunities to form an opinion. What is not

safeguarded constitutionally, on the other hand, is unrestricted photographing of contemporary public figures for the purposes of media reporting, whenever they are not in situations of spatial seclusion.

It is the task of courts other than the Federal Constitutional Court to examine the informational value of reports and their illustrations on the basis of their relevance to the formation of public opinion and to weigh freedom of the press against the detriment to the protection of personality rights associated with obtaining and disseminating the photographs. The role of the Federal Constitutional Court is limited to examining retrospectively whether the other national courts, in interpreting and applying the provisions of ordinary statutory law, particularly when weighing conflicting legal rights, have sufficiently regarded the influence of fundamental rights, as well as the constitutionally relevant provisions of the European Convention on Human Rights. The fact that their assessment might have resulted in a different conclusion is not sufficient grounds for the Federal Constitutional Court to rectify a decision of such courts.

By reference to the above standards, the following applies in the instant case:

There were no constitutional objections, in principle, preventing the Federal Court of Justice from deviating from its previous case-law in judicially assessing the criteria for the admissibility of a piece of photojournalism and modifying its concept of protection by dispensing with the use of the legal concept of the contemporary public figure previously developed by reference to legal writing. As the concept of the contemporary public figure is not prescribed by constitutional law, the national courts are free under constitutional law not to use the term at all in future or to use it only in limited circumstances, and to decide instead by considering in each individual case whether the image concerned is part of the "sphere of contemporary history".

In accordance with the standards indicated, the constitutional complaints of the complainant Caroline von Hannover and of the publisher of *Frau im Spiegel* magazine are unfounded. The Federal Court of Justice properly assessed the relevant concerns of both parties in a manner that is constitutionally unobjectionable thereby taking into account the relevant standards laid down by the case-law of the European Court of Human Rights. In particular, the Federal Court of Justice – even in accordance with the standards laid down by the case-law of the European Court of Justice – was permitted to view the report on the illness of the reigning Prince of Monaco as an event of general public interest manifesting a sufficient connection to the published image.

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The right of freedom of the press was violated, however, when the publisher of *7 Tage* magazine was prohibited from adding a visual portrayal of the complainant to a report on the letting of a holiday villa in Kenya. The courts failed to recognise the informational content of the report which, in the magazine, opened with the words: "Even the rich and beautiful live economically. Many let their villas out to paying guests." The report was not about a holiday scene as part of private life. Rather, it was a report on the letting of a holiday villa belonging to the couple and on similar undertakings by other celebrities and contained value judgments in the commentary which encourage readers to reflect socio-critically. There is no indication in the situation portrayed by the image used that Princess Caroline von Hannover had been portrayed in a pose which was particularly representative of the need to relax and therefore worthy of a higher level of protection from media attention and portrayal. The prohibition confirmed by the Federal Court of Justice was therefore to be revoked and must be examined anew on the basis of the standards laid down by the Panel.

#### *Languages:*

German.



*Identification: GER-2009-2-019*

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 30.06.2009 / e) 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 / f) Lisbon Decision / g) / h) Neue Juristische Wochenschrift 2009, 2267-2295; Europäische Grundrechte-Zeitschrift 2009, 339-388; Deutsches Verwaltungsbllatt 2009, 1032-1040; ZFSH/SGB Sozialrecht in Deutschland und Europa 2009, 469-501; Recht der Internationalen Wirtschaft, supplement 2009, 537-565; Europäisches Wirtschafts- und Steuerrecht 2009, 319-322; CODICES (German, English, French).

#### *Keywords of the systematic thesaurus:*

3.1 General Principles – **Sovereignty**.  
 4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.  
 4.17 Institutions – **European Union**.  
 4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

#### *Keywords of the alphabetical index:*

European Union, Treaty of Lisbon / Treaty of Lisbon, act approving / European lawmaking procedures and treaty amendment procedures, participation of the Parliament / European Union, legal instrument transgressing the boundaries of its sovereign powers / European Union, Member States, room for the political formation of living conditions.

#### *Headnotes:*

1. Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (*Staatenverbund*). The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimization.

2.a. Insofar as the Member States elaborate treaty law in such a way as to allow treaty amendment without a ratification procedure, whilst preserving the application of the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany has to comply internally with the requirements under Article 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court.

2.b. A law within the meaning of Article 23.1 second sentence of the Basic Law is not required, in so far as special bridging clauses are limited to subject areas which are already sufficiently defined by the Treaty of Lisbon. However, in such cases it is incumbent on the *Bundestag* and, in so far as legislative competences of the *Länder* are affected, the *Bundesrat*, to assert its responsibility for integration in another appropriate manner.

3. European unification on the basis of a treaty union of sovereign states may not be achieved in such a way that not sufficient space is left to the Member States for the political formation of economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely

especially on cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics.

4. The Federal Constitutional Court examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (see *BVerfGE* 58, 1 <30-31>; 75, 223 <235, 242>; 89, 155 <188>; see the latter two concerning legal instruments transgressing the limits), whilst adhering to the principle of subsidiarity under Community and Union law (Article 5.2 ECT; Article 5.1 second sentence and 5.3 of the Treaty on European Union in the version of the Treaty of Lisbon (hereinafter, "Lisbon TEU"). Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see *BVerfGE* 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.

### **Summary:**

I. The Federal Constitutional Court had to decide on constitutional complaints and applications in *Organstreit* proceedings (proceedings on a dispute between supreme constitutional bodies) challenging the German Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) of 13 December 2007, the Act Amending the Basic Law (Articles 23, 45 and 93) and the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters (*Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*).

The Treaty of Lisbon, among other things, extends the European Union's competences, expands the possibilities of qualified majority voting in the Council, strengthens the European Parliament's participation in the lawmaking procedures and dissolves the European Union's pillar structure. At the same time, it confers legal personality on the European Union. Furthermore the Treaty incorporates provisions of the failed Treaty establishing a Constitution for Europe. Moreover, it

provides for a number of reforms of the European Union's institutions and procedures.

In October 2008, the Act Approving the Treaty of Lisbon and the accompanying laws successfully passed through the German legislative process.

II. The Second Panel of the Federal Constitutional Court has decided that the Act Approving the Treaty of Lisbon is compatible with the Basic Law. In contrast, the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters infringes Article 38.1 in conjunction with Article 23.1 of the Basic Law insofar as the *Bundestag* and the *Bundesrat* have not been accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures. The Federal Republic of Germany's instrument of ratification of the Treaty of Lisbon may not be deposited before the rights of participation set out in law as constitutionally required have entered into force. The decision was reached unanimously as regards the result and by seven votes to one as regards the reasoning.

The judgment focuses on the connection between the democratic system prescribed by the Basic Law at Federation level and the level of independent rule which has been reached at European level. The structural problem of the European Union is at the centre of the review of constitutionality: The extent of the Union's freedom of action has steadily and considerably increased, not least by the Treaty of Lisbon, so that in some policy areas, the European Union has a shape that corresponds to that of a federal state, i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation i.e. are analogous to international law.

As before, the structure of the European Union essentially follows the principle of the equality of states.

As long as no uniform European people, as the subject of legitimization, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority. In Germany, accession to a European federal state would require the creation of a new Constitution, which would go along with the declared waiver of the sovereign statehood safeguarded by the Basic Law. There is no such act here. The European Union continues to constitute a union of rule (*Herrschartsverband*) founded on international law, a union which is permanently supported by the intention of the sovereign Member States. The primary

responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples. With increasing competences and further independence of the institutions of the Union, safeguards are required to keep pace with this development, in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States. With progressing integration, fields of action which are essential for the development of the Member States' democratic opinion-formation must be retained. In particular, a guarantee is vital that the responsibility for integration can be exercised by the state bodies of representation of the peoples.

The further development of the competences of the European Parliament can reduce, but not completely fill, the gap between the extent of the decision-making power of the Union's institutions and the citizens' democratic power of action in the Member States. Neither as regards its composition nor its position in the European competence structure is the European Parliament sufficiently prepared to take representative and assignable majority decisions as uniform decisions on political direction. Measured against requirements placed on democracy in states, its election does not take due account of equality, and it is not competent to take authoritative decisions on political direction in the context of the supranational balancing of interests between the states. It therefore cannot support a parliamentary government and organise itself with regard to party politics in the system of government and opposition in such a way that a decision on political direction taken by the European electorate could have a politically decisive effect. Due to this structural democratic deficit, which cannot be resolved in an association of sovereign states (*Staatenverbund*), further steps of integration that go beyond the *status quo* may not undermine the States' political power of action or the principle of conferral.

The peoples of the Member States are the holders of the constituent power. The Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the Constitution, i.e. of the constitutional identity (sentence 3 of Article 23.1 and Article 79.3 of the Basic Law). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to ensure, within the boundaries of its competences, that the Community or Union authority does not violate the constitutional identity by its acts or evidently transgress the competences conferred on it. The transfer of competences, which has been increased again by the Treaty of Lisbon, and the independence of decision-

making procedures therefore require an effective *ultra vires* review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany.

#### *Languages:*

German, English, French.



*Identification:* GER-2010-2-010

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 06.07.2010 / **e)** 2 BvR 2661/09 / **f)** Honeywell Decision / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 126, 286 / **h)** CODICES (German, English).

#### *Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law**.
- 5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract**.

#### *Keywords of the alphabetical index:*

Damage incurred relying on legitimate expectations / European Union act, *ultra vires* / Court of Justice of the European Union, submission procedure, preliminary ruling / Obligation to submit, preliminary ruling, Court of Justice of the European Union / Employment contract, fixed term / Act, *ultra vires*, European Union, Federal Constitutional Court review / Law, inapplicability, retroactive, compensation.

#### *Headnotes:*

1.a. *Ultra vires* review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.

1.b. Prior to the acceptance of an *ultra vires* act, the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.

2. To ensure the constitutional protection of legitimate expectations, it should be considered, in constellations of retroactive inapplicability of a law as a result of a ruling by the Court of Justice of the European Union, to grant compensation domestically for a party concerned having trusted in the statutory provision and having made plans based on this trust.

3. Not all violations of the obligation under Union law to make a submission constitute a breach of sentence 2 of Article 101.1 of the Basic Law. The Federal Constitutional Court only complains of the interpretation and application of rules on competences if, on a sensible evaluation of the concepts underlying the Basic Law, they no longer appear to be comprehensible and are manifestly untenable. This standard for what is considered arbitrary is also applied if a violation of Article 267.3 TFEU is considered to have taken place (confirmation of Decisions of the Federal Constitutional Court <*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*> 82, 159 <194>).

### **Summary:**

I. The applicant is an enterprise involved in automotive supplies. In February 2003, it concluded several fixed-term employment contracts with previously unemployed individuals. There were no objective reasons for the fixed term of employment. Objective reasons were in principle required. However, according to the version of sentence 4 of § 14.3 of the Law on Part-Time Working and Fixed-Term Contracts (*Teilzeit- und Befristungsgesetz*, hereinafter, the "Law") which was applicable at that time, it was possible to depart from this principle if the employee had already reached the age of 52 on commencement of the employment relationship.

The plaintiff of the original proceedings had been employed by the complainant on this basis. He later asserted a claim *vis-à-vis* the applicant with regard to the invalidity of the fixed-term nature of the employment contract. His request for a finding that the employment relationship was to continue and for continued employment was successful before the Federal Labour Court (*Bundesarbeitsgericht*).

The Federal Labour Court found that the employment relationship between the parties had not ended as a result of its fixed-term nature. It further stated that

national courts could not apply sentence 4 of § 14.3 of the Law for they were bound in this respect by the Judgment of the European Court of Justice of 22 November 2005 in Case C-144/04. A provision of national law such as sentence 4 of § 14.3 of the Law was said to be incompatible with Anti-Discrimination Directive 2000/78/EC and the general principle of non-discrimination in respect of age according to this judgment. Since the judgment of the European Court of Justice was absolutely clear, there was no need for a renewed submission. Although the agreement on a fixed term of employment which was the subject of the dispute was reached prior to the *Mangold* Judgment, the Federal Labour Court refused to apply sentence 4 of § 14.3 of the Law for reasons of the protection of legitimate expectations under Community or national law.

The applicant considers its contractual freedom and its right to its lawful judge to have been violated by the judgment of the Federal Labour Court.

II. The Second Panel of the Federal Constitutional Court rejected the constitutional complaint as unfounded. In essence, the decision is based on the following considerations.

1. A violation of the applicant's contractual freedom does not result from the fact that the impugned judgment of the Federal Labour Court is based on a non-permissible further development of the law on the part of the European Court of Justice, and that the *Mangold* Judgment should therefore not have been applied in Germany as a so-called *ultra vires* act.

As the Panel found in its Lisbon Judgment, *ultra vires* review of acts of the European bodies and institutions by the Federal Constitutional Court may only be exercised in a manner which is considerate (well-disposed) towards European law. It can hence only be considered if a breach of competence on the part of the European bodies and institutions is sufficiently qualified. This is contingent on the acts of the authority of the European Union being manifestly in breach of competences. Furthermore, the impugned act must lead to a structurally significant shift to the detriment of the Member States in the structure of competences between Member States and the European Union.

When reviewing acts of the European bodies and institutions, the Federal Constitutional Court must in principle adhere to the rulings of the European Court of Justice as providing a binding interpretation of Union law. Insofar as the European Court of Justice has not yet clarified the questions which have arisen, it should therefore be afforded the opportunity to interpret the Treaties prior to the acceptance of an *ultra vires* act, as well as to rule on the validity and interpretation of the acts in question.

Measured against this, the Federal Labour Court has not ignored the scope of the applicant's contractual freedom. At any rate, the European Court of Justice has not violated its competences by virtue of the outcome in the *Mangold* Judgment in a sufficiently qualified manner.

This particularly applies to the derivation of a general principle of non-discrimination in respect of age. It is irrelevant whether such a principle could be derived from the constitutional traditions common to the Member States and their international agreements. Even a putative further development of the law on the part of the European Court of Justice that would no longer be justifiable in terms of legal method would only constitute a sufficiently qualified infringement of its competences if it also had the effect of establishing competences in practice. The derivation of a general principle of non-discrimination in respect of age would however not introduce a new competence for the European Union, nor would an existing competence be expanded. Anti-Discrimination Directive 2000/78/EC had already made non-discrimination in respect of age binding for legal relationships based on employment contracts, and hence opened up discretion for interpretation for the European Court of Justice.

2. The applicant's contractual freedom has also not been violated because the impugned judgment of the Federal Labour Court did not grant any protection of legitimate expectations.

Confidence in the continuation of a law can be affected not only by the retroactive finding of its invalidity by the Federal Constitutional Court, but also by the retroactive finding of its inapplicability by the European Court of Justice. The possibilities for Member States' courts to grant protection of legitimate expectations are however pre-defined and limited by Union law. Accordingly, the Member States' courts cannot grant protection of legitimate expectations by virtue of applying a national provision – whose incompatibility with Union law has been established – for the time prior to the issuing of the preliminary ruling.

The case-law of the European Court of Justice, by contrast, does not provide any indication that Member States' courts are precluded from granting secondary protection of legitimate expectations by compensation. To ensure constitutional protection of legitimate expectations, one must hence consider – in constellations of retroactive inapplicability of a law as a result of a ruling of the European Court of Justice – granting compensation domestically for a party concerned having trusted in the statutory regulation and having made plans based on this trust.

Measured by this, the Federal Labour Court has not ignored the scope of protection of legitimate expectations that is to be constitutionally granted. Because of the primacy of application of Community and Union law, it was allowed to not consider itself able to grant protection of legitimate expectations by confirming the rulings of the previous instances that had been handed down in favour of the applicant. A claim for compensation against the Federal Republic of Germany for the loss of assets which the applicant suffered by virtue of the employment relationship being extended for an indefinite period of time was not the subject-matter of the proceedings before the Federal Labour Court.

3. The applicant was, finally, not denied its lawful judge by virtue of the Federal Labour Court not submitting the case to the European Court of Justice. The Federal Labour Court justifiably presumed in this respect that it was not obliged to effect such a submission.

The Federal Constitutional Court confirms its case-law in this context, in accordance with which the standard of arbitrariness which it generally applies when interpreting and applying competence norms also applies to the obligation to make a reference in accordance with Article 267.3 TFEU (see its Decision of 31 May 1990). The Federal Constitutional Court is not obliged by Union law to fully review the violation of the obligation to submit under Union law and to orientate it in line with the case-law that has been handed down by the European Court of Justice on this matter.

The ruling was handed down with 6:2 votes with regard to the grounds and with 7:1 votes with regard to the outcome.

III. Justice Landau has added a dissenting opinion to the ruling. He takes the view that the Panel majority is taking the requirements too far as to the finding of an *ultra vires* act by the Community and Union bodies by the Federal Constitutional Court. The European Court of Justice is said to have manifestly transgressed the competences granted to it to interpret Community law with the *Mangold* Judgment. Under these circumstances, it is said that the Federal Labour Court was prevented from invoking the *Mangold* Judgment, setting aside sentence 4 of § 14.3 of the Law and granting the action against the employment relationship being extended for an indefinite period of time.

#### Cross-references:

- nos. 2 BvL 12, 13/88 and 2 BvR 1436/87, 31.05.1990, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 82, 159 (in particular p. 194);

- nos. 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08 and 2 BvR 182/09, 30.06.2009, *Bulletin* 2009/2 [GER-2009-2-009];

Court of First Instance:

- C-144/04, 22.11.2005, *Mangold*, *Bulletin* 2007/3 [ECJ-2007-3-006].

#### *Languages:*

German, English (on the website of the Federal Constitutional Court).



*Identification:* GER-2010-2-011

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 21.07.2010 / **e)** 1 BvR 420/09 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 127, 132 / **h)** *Zeitschrift für das gesamte Familienrecht* 2010, 1403; CODICES (German, English).

#### *Keywords of the systematic thesaurus:*

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

#### *Keywords of the alphabetical index:*

Child born out of wedlock / Father, child born out of wedlock, parental custody / Child, best interests / Parental custody, child born out of wedlock.

#### *Headnotes:*

The parental right under Article 6.2 of the Basic Law of the father of a child born out of wedlock is violated because he is in principle excluded from the parental custody of his child where the child's mother does not consent and because he cannot obtain a judicial review as to whether, for reasons of the child's best interests, it is appropriate to grant him the parental custody of his child together with the mother or to transfer the sole parental custody of the child to him in place of the mother.

#### *Summary:*

I. In 1998, the Act Reforming the Law of Parent and Child (*Gesetz zur Reform des Kindschaftsrechts*) entered into effect. For the first time, it gave parents who are not married to each other the opportunity, through § 1626a of the Civil Code (hereinafter, the "Code"), to have joint parental custody of their children, regardless of whether or not they live together. The requirement for this is that this is their intention and both parents make declarations of parental custody to this effect (§ 1626a.1.1 of the Code). Failing this, the mother retains sole parental custody of a child born out of wedlock. A transfer of sole parental custody from the mother to the father where the parents permanently live apart may also, under § 1672.1 of the Code, only be effected with the consent of the mother. The father of a child born out of wedlock may be given parental custody against her will only if parental custody is removed from the mother on grounds of endangering the child's best interests, if her parental custody is permanently suspended or if she dies.

As early as 2003, the Federal Constitutional Court dealt with the compatibility of § 1626a.1.1 of the Code with a father's parental right under Article 6.2 of the Basic Law (*Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 107, 150 et seq., see cross-reference below). In doing so, it stated that an incompatibility would be shown to exist if it transpired – contrary to the assumption of the legislator – that there were a large number of cases where, for reasons not based on the child's best interests, the parents of children born out of wedlock did not have joint custody. The legislator was instructed to review the legislation in this respect. In its Decision of 3 December 2009, the European Court of Human Rights held that the general exclusion of judicial review of the initial attribution of sole custody to the mother was disproportionate with regard to the aim pursued, that is, the protection of the best interests of a child born out of wedlock (see cross-reference below).

The applicant is the father of a son who was born out of wedlock in 1998. The parents separated when the mother was pregnant. Their son has lived in the mother's household since he was born. He has, however, regular contact with his father, who has acknowledged his paternity. The mother refused to make a declaration of joint parental custody. When the mother planned to move with the child, the applicant applied to the Family Court for the mother to be partially deprived of parental custody and for the right to determine the child's place of abode to be transferred to himself. In the alternative, he applied for sole parental custody to be transferred to himself or for the court to give consent to joint custody in place of the mother. The

Family Court dismissed the applications, applying the current law. The appeal against this to the Higher Regional Court (*Oberlandesgericht*) was unsuccessful.

II. In response to the constitutional complaint, the First Panel of the Federal Constitutional Court has decided that §§ 1626a.1.1 and 1672.1 of the Code are incompatible with Article 6.2 of the Basic Law. The order of the Family Court is set aside and the case is referred back for a new decision. Until revised legislation enters into force, the Federal Constitutional Court, supplementing the above-mentioned provisions, has provisionally ordered as follows: the Family Court, on the application of a parent, is to transfer parental custody or part thereof to the parents jointly, provided it is to be expected that this complies with the child's best interests. On the application of a parent, parental custody or part thereof is to be transferred to the father alone where joint parental custody is out of the question and it is to be expected that this best complies with the child's best interests.

It is constitutionally unobjectionable that the legislator initially transfers parental custody of a child born out of wedlock to its mother alone. It is also compatible with the Constitution that the father of a child born out of wedlock is not granted joint parental custody together with the mother at the same time as his paternity is effectively recognised. Such an arrangement would certainly be compatible with the Constitution if it were combined with the possibility of obtaining judicial review as to whether joint parental custody in accordance with statute actually satisfies the child's best interests in the individual case. It is, however, not constitutionally required.

With the arrangement currently in effect, however, the legislator disproportionately encroaches upon the parental rights of the father of a child born out of wedlock. The provision of § 1626.1.1 of the Code, which provides that sharing joint parental custody is subject to the mother's consent, constitutes a far-reaching encroachment upon the father's parental rights under Article 6.2 of the Basic Law if there is no possibility of judicial review. The legislator disproportionately generally subordinates the father's parental rights to those of the mother although this is not necessary in order to protect the child's best interests.

The assumption of the legislator on which the current law is based has proved to be incorrect. The legislator had assumed that parents generally make use of the possibility of joint parental custody. It had further assumed that mothers' refusal of consent is as a rule based on a conflict between the parents which has detrimental effects for the child and is based on reasons which do not serve the mother's own interests

but preserve the interests of the child. On the contrary, only slightly more than half of the parents of children born out of wedlock agree to make declarations of joint parental custody. In addition, on the basis of empirical studies, it may be assumed that a considerable number of mothers refuse consent to joint parental custody merely because they do not want to share their traditional parental custody with the child's father.

The provision of § 1672.1 of the Code which makes the transfer of sole parental custody of a child born out of wedlock subject to the mother's consent is also a serious and unjustified encroachment upon the father's parental rights under Article 6.2 of the Basic Law. Conversely, however, enabling a court transfer of sole parental custody to the father is a serious encroachment on the parental rights of the mother if in the individual case the father's application is granted, for the parental custody previously exercised by the mother is completely removed from her. Moreover, this is done not because she has failed in her duty of upbringing and therefore the child's best interests are endangered, but because the father, in competition with her, claims his parental right. In addition, as a rule a change of parental custody entails the child moving from the mother's household to the father's household. This particularly affects the child's need for stability and continuity. Taking this into account and weighing the constitutionally protected interests of both parents against each other, it is admittedly not compatible with Article 6.2 of the Basic Law to refuse the father sole parental custody. However, transferring sole parental custody from the mother to the father of the child born out of wedlock is justified only if there is no other possibility of safeguarding the father's parental rights which encroaches less seriously upon the mother's parental rights. Moreover, important reasons of the child's best interests must suggest removing parental custody from the mother. It must therefore first be examined whether joint parental custody of both parents may be considered as a less drastic arrangement. Where this is the case, there must be no transfer of sole custody.

#### Cross-references:

- nos. 1 BvL 20/99 and 1 BvR 933/01, 29.01.2003, *Bulletin* 2009/3 [GER-2009-3-023];

#### European Court of Human Rights:

- *Zaunegger v. Germany*, no. 22028/04, 03.12.2009.

#### Languages:

German, English (on the website of the Federal Constitutional Court).



*Identification: GER-2011-2-013*

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 04.05.2011 / **e)** 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 128, 326 / **h)** *Neue Juristische Wochenschrift* 2011, 1931; *Europäische Grundrechte-Zeitschrift* 2011, 297; *Neue Zeitschrift für Strafrecht* 2011, 450; *Der Strafverteidiger* 2011, 470; *Recht und Psychiatrie* 2011, 177; CODICES (German).

*Keywords of the systematic thesaurus:*

1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

*Keywords of the alphabetical index:*

Detention, preventive / Detention, preventive, retrospective / Detention, preventive, extension / Basic Law, interpretation, international law.

*Headnotes:*

1. Decisions of the European Court of Human Rights containing new aspects on the interpretation of the Basic Law are equivalent to legally relevant changes which may lead to the final and non-appealable effect of a Federal Constitutional Court decision being transcended.

2.a. It is true that in national law the European Convention on Human Rights is subordinate to the Basic Law. However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law. At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights serve as interpretation aids to determine the contents and scope of fundamental rights and of rule-of-law principles of the Basic Law.

2.b. An interpretation that is open to international law does not require the statements of the Basic Law to be schematically parallel to those of the European Convention on Human Rights.

2.c. Limits to an interpretation that is open to international law follow from the Basic Law. Taking account of the European Convention on Human Rights may not result in the restriction of the protection of fundamental rights under the Basic Law; this is also excluded by the European Convention on Human Rights itself under Article 53 ECHR. This obstacle to the reception of law may become of particular relevance in multi-polar fundamental rights relationships, in which an increase of liberty for one subject of a fundamental right means a decrease of liberty for the other. The possibilities of interpretation in a manner open to international law end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution.

3.a. Preventive detention (*Sicherheitsverwahrung*) constitutes a serious encroachment upon the right to liberty (sentence 2 of Article 2.2 of the Basic Law), which can only be justified in compliance with a strict review of proportionality and if the decisions on which it is based and the implementation of its execution satisfy strict requirements. In this connection, the principles of Article 7.1 ECHR must also be taken into account.

3.b. Preventive detention is only justifiable if, when enacting legislation introducing it, the legislature takes due note of the specific nature of the encroachment that it constitutes and takes care to avoid further burdens extending beyond the unavoidable deprivation of "external" liberty. This must be achieved by implementation of the sentence orientated towards liberty and aimed at therapy; making the purely preventive character of the measure clear both to the detainee undergoing preventive detention and to the general public. The deprivation of liberty must be designed in such a way at a marked distance from the execution of a custodial sentence ("distance requirement") that the prospect of regaining freedom visibly determines the practice of confinement.

3.c. The constitutional distance requirement is binding on all powers of the state and is directed initially at the legislature, which has a duty to develop an overall concept of preventive detention in line with this requirement and to enshrine it within the law. The central importance of this concept for the realisation of the detainee's fundamental right to liberty means that the legislation must have "regulatory density", leaving no significant questions to be decided by the executive or the judiciary, and governing their actions in all material areas.

3.d. The distance requirement must be designed in compliance with particular minimum constitutional requirements.

4. Retrospective extension of preventive detention beyond the former ten-year maximum period and the retrospective imposition of preventive detention constitute serious encroachments on the reliance of the persons affected; in view of the serious encroachment on the fundamental right to liberty involved (sentence 2 of Article 2.2 of the Basic Law), this is constitutionally permissible only in compliance with a strict review of proportionality and to protect the highest constitutional interests. The weight of the affected concerns regarding the protection of legitimate expectations is reinforced by the principles of the European Convention on Human Rights in Articles 5.1 and 7.1 ECHR.

#### **Summary:**

Two of the four constitutional complaints relate to the continuation of preventive detention after the expiry of the former ten-year maximum period.

Article 1 of the Act to Combat Sexual Offences and Other Dangerous Criminal Offences, which entered into force in 1998, repealed the ten-year maximum period provided before that in the German Criminal Code (hereinafter, the "Code") for committal to preventive detention. At the same time, the provision introduced a duty to review preventive detention once it had been served for ten years. Under § 67d.3 of the Code, the court competent for the execution of sentences would declare the measure terminated after ten years. This would only apply in the absence of any risk that the detainee, as a result of a propensity, will commit serious criminal offences resulting in serious mental or physical injury for his or her victims. According to § 2.6 of the Code, the revised statute would apply to all cases where preventive detention had already been ordered but had not been terminated at the point in time of its entry into force. The removal of the maximum period also affected those detainees who committed their original offences and were sentenced at a time when the ten-year maximum period of preventive detention still applied.

In a Judgment of 2009, the European Court of Human Rights granted the individual application of a detainee who had been committed to preventive detention for more than ten years due to offences he had committed before the revised statute had entered into force. The Court held that the continuation of preventive detention violated the right to liberty under Article 5.1 ECHR as well as the ban on retrospective law under Article 7 ECHR because retrospective extension constituted an additional penalty which was imposed retrospectively on the detainee under a statute that only entered into force after he had committed his offence.

In May and October 2009 respectively, the two applicants had each been in preventive detention for ten years. They would have had to be released under the old law. The respective chambers for the execution of sentences ordered preventive detention to be continued, on the basis of the revised statute. Legal remedies lodged against the orders were unsuccessful.

The other two constitutional complaints relate to retrospective orders of preventive detention.

The Act to Introduce Retrospective Preventive Detention entered into force in 2004. It allowed, through its new § 66.b, the retrospective committal of offenders to preventive detention (following final and non-appealable conviction). In 2008, the Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders entered into force, making it possible, by amending § 7.2 of the Juvenile Court Act, for preventive detention to be retrospectively ordered for offenders who had received final and non-appealable sentences under the criminal law relating to juvenile offenders.

The Regional Court issued a committal order against one of the applicants shortly before he had completely served his sentence and retrospectively ordered his committal to preventive detention due to his high level of dangerousness, under § 7.2 of the Juvenile Court Act.

The Regional Court retrospectively ordered the second applicant's committal to preventive detention after the execution of a prison sentence pursuant to § 66.b.2 of the Act.

Legal remedies lodged against these orders were unsuccessful.

All provisions of the Criminal Code and of the Juvenile Court Act on the imposition and duration of preventive detention are incompatible with the right to liberty of the detainees under sentence 2 of Article 2.2 in conjunction with Article 104.1 of the Basic Law because they do not satisfy the prerequisites of the constitutional "distance requirement".

Furthermore, the challenged provisions on the retrospective extension of preventive detention beyond the former ten-year maximum period and on the retrospective imposition of preventive detention in criminal law relating to adult and to juvenile offenders infringe the rule-of-law precept of the protection of legitimate expectations under sentence 2 of Article 2.2 in conjunction with Article 20.3 of the Basic Law.

The Federal Constitutional Court ordered the continued applicability of the provisions that were declared unconstitutional until the entry into force of a new legislation, until 31 May 2013 at the latest. It made the following transitional arrangements:

1. In cases where preventive detention continues beyond the former ten-year maximum period, and in cases of retrospective preventive detention, committal to preventive detention or its continuation may only be imposed if a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or conduct of the detainee and where the detainee suffers from a mental disorder within the meaning of § 1.1 no. 1 of the Therapeutic Committal Act. The courts with responsibility for the execution of sentences must immediately review whether these prerequisites for continued preventive detention exist. If this is not the case, they are to order the release of the detainees affected until 31 December 2011 at the latest.
2. During the transitional period, the other provisions on the imposition and duration of preventive detention may only be applied in compliance with a strict review of proportionality; the proportionality requirement will usually only be satisfied if there is a risk that the person concerned may go on to commit serious offences of violence or sexual offences.

The rulings challenged by the constitutional complaints were reversed and referred back to the non-constitutional courts for a new decision.

The finality and non-appealability of the Federal Constitutional Court's Decision of 5 February 2004, which declared the removal of the ten-year maximum period for preventive detention that had applied previously and the application of the new legislation to the so-called old cases constitutional, does not constitute a procedural bar to the admissibility of the constitutional complaints. This is because the decisions of the European Court of Human Rights which, like the above-mentioned Judgment of 17 December 2007, contain new aspects on the interpretation of the Basic Law are equivalent to legally relevant changes which may lead to the final and non-appealable effect of a Federal Constitutional Court decision being transcended.

In national level, the European Convention on Human Rights is subordinate to the Basic Law. However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law (*völkerrechtsfreundlich*). At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights function as interpretation aids to determine the contents and scope

of fundamental rights and rule-of-law principles of the Basic Law. An interpretation that is open to international law requires a reception of the provisions of the European Convention on Human Rights where this is methodically justifiable and compatible with the terms of reference of the Basic Law.

Preventive detention constitutes a serious encroachment upon the right to liberty, and can only be justified in compliance with a strict review of proportionality and if the decisions on which it is based and the organisation of its execution satisfy strict requirements. The existing provisions do not satisfy the (minimum) constitutional requirements pertaining to the implementation of preventive detention.

Due to the fundamentally different constitutional objectives and legal bases of prison sentences and preventive detention, the deprivation of liberty brought about by preventive detention must remain at a marked distance from the execution of a prison sentence (the "distance requirement" (*Abstandsgebot*)). While a prison sentence serves the retribution of culpably committed offences, the deprivation of liberty of a detainee under preventive detention solely pursues the objective of preventing future offences. It is exclusively based on a prognosis of dangerousness and in the interest of the general public's safety as it were imposes a special sacrifice on the person affected.

The constitutional distance requirement is directed initially at the legislature, which is under a duty to develop an overall concept of preventive detention in line with this requirement and to enshrine it in law. Preventive detention may only be ordered and executed as the *ultima ratio*. Where therapeutic treatment is needed, it must begin at a sufficiently early stage of the prison sentence and be sufficiently intensive that, where possible, it will be terminated before the end of the sentence. A comprehensive review of possible treatments must take place, at the start of the preventive detention at the latest. The detainee must receive intensive therapeutic treatment conducted by qualified personnel, so as to open up a realistic prospect of release. Detainees must be accommodated separately from the prison regime in special buildings or wards with sufficient staffing levels which satisfy the therapeutic requirements and where family and social contacts are possible. Provision must be made for relaxation of the execution of the sentence and for preparations for release. The detainee must be granted an effectively enforceable legal claim to the implementation of the necessary measures to reduce his or her dangerousness. Continuation of preventive detention is to be judicially reviewed at least once a year.

The present provisions on preventive detention and its actual execution were found not to meet these requirements.

The provisions relating to the retrospective extension of preventive detention beyond the former ten-year maximum period and the retrospective imposition of preventive detention were found to infringe the rule-of-law requirement of the protection of legitimate expectations under sentence 2 of Article 2.2 in conjunction with Article 20.3 of the Basic Law.

They were found to entail a serious encroachment on the reliance of the group of persons affected that preventive detention would end after ten years or not be imposed at all.

Because of the serious encroachment on the right to liberty which preventive detention entails, concerns regarding the protection of legitimate expectations carry particular weight under constitutional law, further increased by the principles of the European Convention on Human Rights. According to the principle of Article 7.1 ECHR, the result of insufficient distance of the execution of preventive detention from that of prison sentences is that the weight of the reliance of the persons affected approaches an absolute protection of legitimate expectations. Furthermore, the provisions of Article 5 ECHR are to be taken into account with regard to detainees committed to preventive detention. From this perspective, justification of the deprivation of liberty in cases where preventive detention has been extended or imposed retrospectively virtually only ever becomes relevant subject to the requirements of an unsound mind within the meaning of sentence 2 of Article 5.1.e ECHR. The statutory provisions must provide for the diagnosis of a true and persistent mental disorder as an express element of the offence. Furthermore, for deprivation of liberty to be deemed justified, the detention of the person concerned must take account of the fact that the detainee is detained by reason of a mental disorder.

In view of the principles outlined above, and the substantial encroachment upon the reliance of the detainees in preventive detention whose fundamental right to liberty is affected, the legitimate legislative purpose of the challenged provisions (to protect the general public against dangerous offenders) is largely outweighed by the constitutionally protected reliance of the group of persons affected. A deprivation of liberty through preventive detention which is ordered or extended retrospectively can only be regarded as proportionate if the required distance from punishment is observed, if a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or conduct of the detainee and if the requirements of sentence 2 of

Article 5.1 ECHR are satisfied. The provisions under dispute were found not to meet these requirements.

To avoid a “legal vacuum”, the Federal Constitutional Court did not declare the unconstitutional provisions void. It held that they should continue in force for a particular period of time. Otherwise further preventive detention would lack legal basis, and all those committed to it would have to be released immediately, which would cause almost insoluble problems for the courts, the administration and the police.

#### Cross-references:

- no. 2 BvR 2029/01, 05.02.2004, *Bulletin* 2004/1 [GER-2004-1-001].

#### European Court of Human Rights:

- *M. v. Germany*, no. 19359/04, 17.12.2009.

#### Languages:

German, English version and English press release on the Court's website.



#### Identification: GER-2011-3-015

- a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.07.2011 / **e)** 1 BvR 1916/09 / **f)** Designer furniture copyright Decision / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2011, 180; *Wertpapier-Mitteilungen* 2011, 1874; *Neue Juristische Wochenschrift* 2011, 3428; *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 2011, 95; *Juristenzeitung* 2011, 1112; *Neue Zeitschrift für Gesellschaftsrecht* 2011, 1262; *Recht der Internationalen Wirtschaft* 2011, 857; *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht* 2011, 495; *Verwaltungsrundschau* 2011, 428; *Europäische Grundrechte-Zeitschrift* 2011, 63; *Zeitschrift für Urheber- und Medienrecht* 2011, 82; *Gewerblicher Rechtsschutz und Urheberrecht* 2012, 53; [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de); CODICES (German).

**Keywords of the systematic thesaurus:**

- 1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Secondary legislation.**
- 3.26 General Principles – **Principles of EU law.**
- 5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**
- 5.1.1.5.1 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Private law.**
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

**Keywords of the alphabetical index:**

Copyright / Fundamental rights, entitlement / Fundamental rights, holder / Judge, lawful, right to / Preliminary ruling, Court of Justice of the European Communities.

**Headnotes:**

1. The extension of the entitlement to fundamental rights to cover legal entities from Member States of the European Union constitutes an expansion of the application of the protection of fundamental rights under German law as a result of the European Treaties because of the priority of application of the fundamental freedoms in the Single Market (Article 26.2 TFEU) and because of the general ban on discrimination on grounds of nationality (Article 18 TFEU).
2. An ordinary (non-constitutional) court may misjudge the significance and gravity of the fundamental rights of the Basic Law by virtue of the presumption that the law of the European Union does not permit any flexibility in the implementation of European Union law.

**Summary:**

I. According to the German Copyright Act (*Urheberrechtsgesetz*), the author of a work has the exclusive right to distribution of that work. § 17.1 of the Copyright Act defines the distribution right as the right to offer to the public or to put into circulation the original work or copies thereof. The provision serves, *inter alia*, to implement Article 4 of European Copyright Directive 2001/29/EC in German domestic law. In the general view to date, the term “distribution” encompassed any act offering the work to the general public, for which any assignment of ownership was sufficient. Additionally, § 96 of the Copyright Act contains a prohibition of exploitation for unlawfully made copies.

The applicant, a limited liability company under Italian law, headquartered in Italy, manufactures furniture

according to plans of the architect and designer Le Corbusier, who died in 1965, and exercises his copyright under license. The plaintiff of the original proceedings, a cigar manufacturer, furnished a cigar lounge in an art and exhibition hall in which it placed imitations of Le Corbusier furniture. Upon the applicant's request, the Regional Court (*Landgericht*) issued a judgement to cease and desist, which was subsequently upheld by the Higher Regional Court (*Oberlandesgericht*).

The Federal Court of Justice (*Bundesgerichtshof*), by contrast, rejected the action on the ground that the placing of the furniture violated neither the right to distribution nor the prohibition of exploitation. It based its ruling on a judgment of the Court of Justice of the European Union (hereinafter, “CJEU”), which had ruled in a parallel case referred by the Federal Court of Justice that “distribution”, within the meaning of Article 4.1 of the Copyright Directive, applied only in cases of transfer of ownership. The Federal Court of Justice held that according to this judgment of the CJEU, the distribution right was not violated if imitations of copyrighted furniture were merely made available for use by the public. The Copyright Directive was found to constitute a binding provision, also within the meaning of the maximum level of protection that a Member State could not surpass.

II. The Federal Constitutional Court rejected the constitutional complaint as unfounded. As a foreign legal entity incorporated in the European Union, the applicant is a holder of fundamental rights under the Basic Law. However, in the case at issue its constitutional rights have not been violated.

The Federal Constitutional Court decided that foreign legal entities incorporated in the European Union may be holders of substantive fundamental rights under the Basic Law.

According to Article 19.3 of the Basic Law, fundamental rights under the Basic Law also apply to domestic legal entities to the extent that the nature of such rights permits. Even if legal entities from Member States of the EU are not “domestic” within the meaning of the Basic Law, an expansion of the application of the protection of fundamental rights to such legal entities corresponds to the obligations assumed by Member States under the European Treaties, which in particular are expressed in the fundamental freedoms and the general ban on discrimination on grounds of nationality enshrined in EU law. These oblige the Member States and all their bodies and agencies to also place legal entities from another EU Member State on the same footing as domestic entities with regard to the legal protection that can be obtained. The provisions of European Union law do not suppress Article 19.3 of the

Basic Law, but only prompt an extension of the protection of fundamental rights to cover further legal subjects of the European Single Market. The extension is contingent on the legal entity having an adequate domestic connection. This will generally be the case if the foreign legal entity operates in Germany and is able to file lawsuits and be sued before the ordinary (non-constitutional) courts in this country.

Furthermore, the Federal Constitutional Court had to clarify whether and to what degree the ordinary courts have to test the German law which they are to apply, be it fully or partly harmonised by Union law, by the standard of the German Basic Law and of the law of the European Union, and to what degree the Federal Constitutional Court in turn has the power to review the ordinary courts' interpretation of the European Directive in terms of the Basic Law. When interpreting domestic copyright law, the civil courts have to take the protection of property rights under the Basic Law into account, insofar as European law accords discretion with regard to national implementation. If the courts consider full harmonisation by Union law to be evident without referring the case to the CJEU for a preliminary ruling, this is subject to review by the Federal Constitutional Court. If such a case arises, the latter is not restricted to a mere review of arbitrariness. If the Member States have no discretion in the implementation of European Union law, the courts must review the applicable EU law where appropriate as to whether and how it may be reconciled with the fundamental rights of Union law and, where necessary, refer the matter to the CJEU.

According to these standards, the applicant's copyright protected by Article 14.1 of the Basic Law to control the distribution of copies of the furniture was not violated by the impugned judgment. The presumption by the Federal Court of Justice that the Copyright Directive, as interpreted by the CJEU, did not leave any latitude to domestic law with regard to protecting the mere offering of imitated furniture for use as copyright, is constitutionally unobjectionable. In the parallel case, the CJEU did not mention any leeway in implementation, and explicitly reserved any expansion of the term "distribution" to the Union legislator. The Federal Court of Justice was able to presume that regarding the interpretation of § 17 of the Copyright Act, the CJEU judgment did not leave it any latitude.

The impugned judgment does not deprive the applicant of its guarantee of a lawful judge (sentence 2 of Article 101.1 of the Basic Law). According to the case-law of the CJEU, a national court of final instance must comply with its obligation of reference if a question of Union law arises in proceedings pending before it, unless the court has found that the question is not material to the ruling, that it has already been the subject of interpretation by the CJEU, or that the correct

application of Community law is so obvious as to leave no room for any reasonable doubt. The Federal Constitutional Court only reviews whether the application of these rules is manifestly untenable.

Having submitted the questions it considered relevant for the ruling to the CJEU in the parallel case, the Federal Court of Justice has not fundamentally misjudged its obligation to refer to the CJEU in the case at hand. From the impugned judgment, one can deduce the reasonable conviction of the Federal Court of Justice that Article 4.1 of the Copyright Directive constitutes a fully harmonised provision of the distribution right and that the CJEU has finally and comprehensively clarified the interpretation of the definition of distribution contained in the directive.

#### *Languages:*

German.



#### *Identification:* GER-2011-3-017

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.09.2011 / **e)** 2 BvR 987/10, 1485/10, 1099/10 / **f)** Euro rescue package Decision / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** Neue Juristische Wochenschrift 2011, 2946; Europäische Grundrechte -Zeitschrift 2011, 525; Neue Zeitschrift für Gesellschaftsrecht 2011, 1107; Europäisches Wirtschafts- & Steuerrecht 2011, 420; Juristenzeitung 2011, 1004; Deutsches Verwaltungsblatt 2011, 1288; Recht der Internationalen Wirtschaft 2011, 719; Verwaltungsrundschau 2011, 394; Europäische Zeitschrift für Wirtschaftsrecht 2011, 920; Entscheidungssammlung zum Wirtschafts – und Bankrecht I L 3 Article 38 GG 1.11; www.bundesverfassungsgericht.de; CODICES (German).

#### *Keywords of the systematic thesaurus:*

- 4.5.2 Institutions – Legislative bodies – **Powers**.
- 4.10 Institutions – **Public finances**.
- 4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

**Keywords of the alphabetical index:**

*Bundestag*, budget, autonomy / Parliament, control by the people / Parliament, powers, nature / Power, delegation / Greece, aid / Euro rescue package / EU, financial and sovereign debt crisis.

**Headnotes:**

1. Article 38 of the Basic Law protects the citizens with a right to elect the *Bundestag* (national parliament) from a loss of substance of their power to rule, which is fundamental to the structure of a constitutional state, by far-reaching or even comprehensive transfers of duties and powers of the *Bundestag*, above all to supranational institutions. The defensive dimension of Article 38.1 of the Basic Law takes effect in configurations in which the danger clearly exists that the competences of the present or future *Bundestag* will be eroded in a manner that legally or *de facto* makes parliamentary representation of the popular will, which is intended to realise the political will of the citizens, impossible.

2.a. The Decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself. The *Bundestag* must make decisions on revenue and expenditure with responsibility to the people. In this connection, the right to decide on the budget is a central element of the democratic development of informed opinion.

b. As representatives of the people, the elected Members of the *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental administration.

3.a. The *Bundestag* may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budgetary implications without [the] prior mandatory consent [of the *Bundestag*].

b. No permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by the free will of other states, above all if they entail consequences which are hard to calculate. Every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level must be specifically approved by the *Bundestag*.

c. In addition it must be ensured that there is sufficient parliamentary influence over the manner in which the funds made available are dealt with.

4. The provisions of the European treaties do not conflict with the understanding of national budget autonomy as an essential competence, which cannot be relinquished, of the parliaments of the Member States, which enjoy direct democratic legitimisation; rather, they presuppose it. Strict compliance with [national budget autonomy] guarantees that the acts of the bodies of the European Union in and for Germany have sufficient democratic legitimisation. The treaty conception of the monetary union as a stability community is the basis and subject of the German Consent Act.

5. With regard to the probability of having to pay out on guarantees, the legislator has a latitude of assessment which the Federal Constitutional Court must respect. The same applies to the assessment of the future soundness of the federal budget and the economic performance capacity of the Federal Republic of Germany.

**Summary:**

I. The constitutional complaints challenge German and European legal instruments related to attempts to solve the financial and sovereign debt crisis in the area of the European monetary union. They deal with the following subjects:

Aid to Greece: In May 2010, the states of the Eurogroup made available considerable financial aids for Greece and promised support through bilateral loans. In order to take the necessary measures on a national level, on 7 May 2010 the *Bundestag* passed the challenged Act (Act on the assumption of guarantees to preserve the solvency of the Hellenic Republic necessary for financial stability within the Monetary Union). The Act authorises the Federal Ministry of Finance to give guarantees up to the total amount of 22.4 billion euros for loans to Greece. By its order of 7 May 2010, the Federal Constitutional Court denied an application for the issuing of a temporary injunction directed against such action.

Euro rescue package: On 7 May 2010, the heads of state and government of the Eurogroup agreed that the EU Commission should propose a European stabilisation mechanism to preserve stability in the European financial markets. The Economic and Financial Affairs Council thereupon decided to establish a European stabilisation mechanism. It consists of the European Financial Stabilisation Mechanism (hereinafter, the "EFSM") on the basis of an EU Regulation and of the European Financial Stability Facility (hereinafter, the "EFSF"). The European

Central Bank (ECB) decided to establish a Securities Markets Programme. *Inter alia*, the ECB Governing Council in this connection authorised the national central banks of the Eurosystem to purchase on the secondary market debt instruments issued by central governments or public entities of the Member States. In order to create the conditions on a national level to give financial support through the EFSF, on 21 May 2010 the *Bundestag* passed the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism. The Act authorises the Federal Ministry of Finance to give guarantees up to a total amount of 147.6 billion euros to secure loans raised by the EFSF. By its order of 9 June 2010, the Federal Constitutional Court denied an application for the issuing of a temporary injunction directed against such action.

II. The Federal Constitutional Court rejected the constitutional complaints as unfounded. It held that the challenged Acts do not violate the right to elect the *Bundestag* under Article 38.1 of the Basic Law. By adopting these Acts, the *Bundestag* did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments.

Article 38.1 of the Basic Law protects competences of the present or future *Bundestag* from being eroded in a manner which would legally or *de facto* make the realisation of the political will of the citizens impossible. In principle, there is a threat of the act of voting being devalued in such a way if authorisations to give guarantees are granted in order to implement obligations which the Federal Republic of Germany incurs under international agreements concluded in order to maintain the liquidity of currency union member states.

Article 38 of the Basic Law demands, in connection with the tenets of the principle of democracy (Articles 20.1, 20.2 and 79.3 of the Basic Law), that the Decision on revenue and expenditure of the public sector remain within the remit of the *Bundestag* as a fundamental part of the ability of a constitutional state to democratically shape itself. As elected representatives of the people, the Members of Parliament must also remain in control of fundamental budget policy decisions in a system of intergovernmental governance. The *Bundestag* is prohibited from establishing mechanisms with financial effect which may result in incalculable burdens with a budgetary implication without the prior mandatory consent of the *Bundestag*. The *Bundestag* is also prohibited from creating permanent mechanisms under international treaties which are tantamount to accepting liability for decisions by the free will of other states, above all if they entail consequences which are hard to calculate. Every large-scale measure of aid of the

Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level must be specifically approved by the *Bundestag*. Sufficient parliamentary influence over the manner in which the funds made available are dealt with must also be ensured.

In establishing that there is a prohibited relinquishment of budget autonomy, the Federal Constitutional Court asserted that it may not with its own expertise usurp the decisions of the legislator. With regard to the extent of the guarantee given, the Federal Constitutional Court must restrict its review to the evident overstepping of extreme limits. With regard to the probability of having to pay out on guarantees, the legislator has a latitude of assessment which the Federal Constitutional Court must respect. The same applies to the assessment of the future soundness of the federal budget and of economic performance. Taking this legislative priority of appreciation into account, and measured against the constitutional standards, the Federal Constitutional Court held both the Act on Financial Stability within the Monetary Union and the Euro Stabilisation Mechanism Act to be compatible with the Basic Law. The Court held that the *Bundestag* had not eroded its right to decide on the budget in a constitutionally impermissible manner and had not disregarded the material content of the principle of democracy.

The Court held that it cannot be established that the amount of the guarantees given exceeds the limit to budgetary burdens to such an extent that budget autonomy effectively failed. The legislator's assessment that the guarantee authorisations are within the capacity of the federal budget does not overstep its margin of appreciation and is therefore constitutionally unobjectionable. The same applies to the legislator's expectation that even in the case that the guarantee risk were realised in full, the losses could be refinanced by way of increases of revenue, reductions of expenses and long-term government bonds.

At present there is also no occasion to assume that there is an irreversible process with adverse consequences for the *Bundestag*'s budget autonomy. The German Consent Act to the Treaty of Maastricht, now as amended by the Treaty of Lisbon, continues to guarantee with sufficient constitutional detail that the Federal Republic of Germany does not submit to the automatic creation of a liability community which is complex and whose course can no longer be controlled.

None of the challenged statutes creates or consolidates an automatic effect as a result of which the *Bundestag* would relinquish its right to decide on the budget.

However, § 1.4 of the Act merely obliges the Federal Government to endeavour, before giving guarantees, to reach agreement with the *Bundestag's* budget committee. This is not sufficient. Instead, guaranteeing parliamentary budget autonomy requires an interpretation of this provision in conformity with the Basic Law to the effect that the Federal Government is, in principle, obliged to obtain the prior consent of the budget committee before giving guarantees.

#### Cross-references:

- Order of 07.05.2010, 2 BvR 987/10, *BVerfGE* 125, 385 (Official Digest);
- Order of 09.06.2010, 2 BvR 1099/10, *BVerfGE* 126, 158 (Official Digest).

#### Languages:

German.



#### Identification: GER-2011-3-019

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 09.11.2011 / **e)** 2 BvC 4/10, 6/10, 8/10 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2011, 621; *Deutsches Verwaltungsblatt* 2011, 1540; www.bundesverfassungsgericht.de; CODICES (German).

#### Keywords of the systematic thesaurus:

4.5.10 Institutions – Legislative bodies – **Political parties.**

4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

#### Keywords of the alphabetical index:

Election, European Parliament / Election, electoral threshold / Election, list of candidates / Election, voters, equality / Political party, equal treatment.

#### Headnotes:

The serious encroachment on the principles of equal suffrage and of equal opportunities of the political parties that results from the five per cent barrier clause in § 2.7 of the Act on the Election of the Members of the European Parliament from the Federal Republic of Germany cannot be justified under the present legal and factual circumstances.

#### Summary:

I. According to the Act on the Election of the Members of the European Parliament from the Federal Republic of Germany (hereinafter, the "Act"), election to the European Parliament shall not only be general and direct, but also free, equal and secret. Furthermore, the legislator has opted in favour of the election being held according to the principles of proportional representation with election proposals in the form of lists of candidates. Furthermore, the legislator has decided that the seats obtained by an election proposal shall be allocated according to the sequence of candidates as they appear on the list ("rigid" list) and that this applies *mutatis mutandis* to combinations of lists. Thus, the voter can only vote in favour of the list as such but has no influence on the sequence of the candidates when it comes to allocating the seats.

Finally, § 2.7 of the Act provides a five per cent barrier clause related to the valid votes cast in the electoral area. Thus, in the allocation of the seats in Parliament only parties and political associations which reach the quorum of 5 % of the votes cast in the territory of the Federal Republic of Germany are taken into account.

II. The Federal Constitutional Court had to render judgment on three complaints, requesting the scrutiny of an election, which were directed against the five per cent barrier clause. The election on the basis of "rigid" lists was also challenged.

The Second Panel of the Federal Constitutional Court ruled by five to three votes that under the present circumstances, the five per cent barrier clause in force at the 2009 election to the European Parliament violates the principles of equal suffrage and of equal opportunities of the political parties.

As German federal law, the Act must be measured against the standards of equal suffrage and of equal opportunities of the political parties, which are anchored in the Basic Law. In proportional representation, which also applies to the election of the Members of the European Parliament, the principle of equal suffrage requires that every voter's vote must have the same influence on the composition of the representative body

to be elected. The principle of equal opportunities of the parties requires every party to be accorded, in principle, the same opportunities in the entire electoral procedure, and thus equal opportunities with regard to the allocation of seats.

The five per cent barrier clause results in an unequal weighting of votes with regard to their chance to contribute to success. This is because the votes which were cast for parties that failed to overcome the barrier are unsuccessful. At the same time, the five per cent barrier clause impairs the political parties' claim to equal opportunities.

Provisions which differentiate with regard to equal suffrage and to equal opportunities of the parties always require a special, factually legitimised, "compelling" reason. They must be suitable and necessary for pursuing their objectives.

The legislator must review a provision of electoral law that affects equal suffrage and equal opportunities and, if necessary, amend it if the constitutional justification of the provision is called into question by new developments.

The legislator only has narrow latitude for differentiation. The elaboration of the law governing the European elections is subject to strict constitutional review. This is because there is a risk that the German legislator drafting the electoral law might secure, by a majority of its Members of Parliament, the election of its own parties at European level by means of a barrier clause and by the exclusion of small parties affected by this clause. The general and abstract assertion that the abolition of the five per cent barrier clause would make it easier for small parties and voters' groups to win seats in the representative bodies, which would make opinion-forming in these bodies more difficult, cannot justify the encroachment on the principles of equal suffrage and of equal opportunities. What is required instead to justify the five per cent barrier clause is that an impairment of the representative bodies' ability to function can be expected with some degree of probability.

According to these standards, it was not permissible to retain the five per cent barrier clause. The factual and legal circumstances existing at the 2009 European elections, which continue in existence, do not provide sufficient reasons for justifying the serious encroachment on the principles of equal suffrage and of equal opportunities of the political parties that results from the barrier clause.

The legislator's assessment that the European Parliament's ability to function would be impaired by the abolition of the five per cent barrier clause cannot rely

on a sufficient factual basis. It does not adequately take account of the European Parliament's specific working conditions and duties. Admittedly, it can be expected that without a barrier clause in Germany, the number of parties which are represented in the European Parliament merely by one or two Members will increase; moreover, it can be expected that this will not be a negligible quantity. However, it is not apparent that this would with the required probability impair the European Parliament's ability to function. The groups, which have a considerable power of integration, are the central working units of the European Parliament. Over the years, they have been able to integrate the parties which acceded particularly in the course of the enlargements of the European Union, despite the broad spectrum of different political views. According to this experience, it can be expected, fundamentally at any rate, that other small parties can join the existing groups.

The same applies to the groups' ability to reach majority decisions by agreements within a reasonable time. In parliamentary practice, the "established" groups in the European Parliament have shown their willingness to cooperate, and they are able to organise the necessary voting majorities. It is not apparent that with the abolition of the five per cent barrier clause, Members of Parliament from small parties would have to be expected in a quantity which would make it impossible for the existing political groups in the European Parliament to reach decisions in a properly conducted parliamentary process. Finally, the European Parliament's development shows that adaptations of parliamentary business to changed circumstances, such as for instance to an increase in the number of independent Members of Parliament, can be expected.

Furthermore, the European Parliament's duties have been formulated by the European treaties in such a way that there are no compelling reasons for encroaching on equal suffrage and on equal opportunities. The European Parliament does not elect a Union government which would depend on Parliament's continuous support. Nor is the Union's legislation dependent on a steady majority in the European Parliament which would be made up of a stable coalition of specific groups and which would face an opposition. Furthermore, according to primary law, Union legislation is organised in such a way that it does not depend on specific majority situations in the European Parliament.

However, the complaint lodged against the election according to "rigid" lists did not succeed. According to European Union law, the Member States are free to decide to organise the election with bound lists or with open lists. With regard to national elections, the Federal

Constitutional Court has repeatedly held that the election according to "rigid" lists is constitutionally unobjectionable. New arguments that might give rise to a different assessment with regard to the European elections had not been put forward.

Having found the five per cent barrier clause to be unconstitutional, the Federal Constitutional Court declared the nullity of § 2.7 of the Act. However, the electoral error did not lead to the 2009 election to the European Parliament being declared invalid in Germany and to a new election being called. For in the context of the required weighing, the Federal Constitutional Court held that the interest in maintenance of the *status quo* of the representation of the people composed in confidence in the constitutionality of the Act was to be accorded priority over the enforcement of the consequences of the electoral error found. New elections in Germany would have a disruptive impact with incalculable consequences on the current work of the European Parliament. In contrast, the electoral error could not be deemed "intolerable". It only concerned a small share of the German Members of Parliament and did not call into question the legitimacy of the German Members of the European Parliament in its entirety.

III. Two justices filed a dissenting opinion. They do not concur with the ruling with regard to its result and its reasoning. In their view, the five per cent barrier clause is factually justified to prevent, concerning the German Members of Parliament, excessive fragmentation of the political parties represented in the European Parliament.

#### *Languages:*

German.



*Identification:* GER-2012-1-009

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 28.02.2012 / e) 2 BvE 8/11 / f) Sondergremium, Euro rescue package / g) to be published in the Federal Constitutional Court's Official Digest / h) Wertpapiermitteilungen 2012, 494-502; CODICES (German).

#### *Keywords of the systematic thesaurus:*

- 3.3.1 General Principles – Democracy – Representative democracy.
- 4.5.1 Institutions – Legislative bodies – Structure.
- 4.5.4.4 Institutions – Legislative bodies – Organisation – Committees.
- 4.5.11 Institutions – Legislative bodies – Status of members of legislative bodies.
- 4.10.2 Institutions – Public finances – Budget.

#### *Keywords of the alphabetical index:*

Euro rescue package / Parliament, committee / Parliament, group, parliamentary / Parliament, membership / Parliament, powers.

#### *Headnotes:*

1. In principle, the *Bundestag* (national parliament) complies with its function as a body of representation in its entirety and through the participation of all its Members, not through individual Members, a group of Members or the parliamentary majority. The *Bundestag*'s right to decide on the budget and its overall budgetary responsibility are, in principle, exercised through deliberation and decision-making in the plenary sitting.
2. The principle of representative democracy, which is anchored in sentence 2 of Article 38.1 of the Basic Law, guarantees every Member of Parliament not only freedom in the exercise of his or her mandate, but also equal status as a representative of the entire people. To be justified, differentiations regarding the status of a Member of Parliament therefore require a special reason which is legitimised by the Constitution and which is of a weight that can outbalance the equality of Members of Parliament.

3. To the extent that the transfer of competences to decide to a decision-making committee intends to exclude Members of Parliament from participating in the overall budgetary responsibility, this is only admissible to protect other legal interests of constitutional rank, and if the principle of proportionality is strictly observed.

#### *Summary:*

- I. In *Organstreit* proceedings (relating to a dispute between supreme federal bodies), two Members of the *Bundestag* objected to the new legislation, adopted in connection with the extension of the "euro rescue package", concerning the *Bundestag*'s rights of participation.

As a reaction to the sovereign debt crisis, the Member States of the European Monetary Union (EMU) created the “euro rescue package”. In this connection, they established a special purpose vehicle, the European Financial Stability Facility (hereinafter, the “EFSF”). It is provided with guarantees by the Member States enabling it to borrow money on the capital markets which it makes available to over-indebted Member States. The Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, or Euro Stabilisation Mechanism Act (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*, or *Stabilisierungs-mechanismusgesetz*, hereinafter, the “Act”) of 2010 defined the preconditions for rendering financial assistance at national level.

In May/July 2011, the Member States agreed to make the EFSF’s maximum loan capacity of 44 billion Euro fully available and to provide the EFSF with further, more flexible instruments. In Germany, the European agreements were transposed by the Act Amending the Euro Stabilisation Mechanism Act (*Gesetz zur Änderung des Stabilisierungsmechanismusgesetzes*), which entered into force on 14 October 2011. The amending Act provides guarantee facilities on the part of the Federal Republic of Germany that have now been raised to approximately 211 billion Euro; it defines the extended instruments of the EFSF and determines the prerequisites of their use. Further-more, it redefines the *Bundestag’s* responsibilities. According to the amending Act, decisions of the German representative in the EFSF that concern the *Bundestag’s* overall budgetary responsibility in principle require the consent of the *Bundestag*. In cases of particular urgency and confidentiality, however, the *Bundestag’s* competence shall, according to § 3.3 of the Act, be exercised by a newly created committee (the so-called *Sondergremium*). Its members shall be elected from among the members of the Budget Committee (41 at present). According to the new legislation, emergency measures aimed at preventing risks of contagion shall as a general rule be deemed particularly urgent or confidential. In all other cases, the Federal Government can assert that a situation of urgency or confidentiality exists. The *Sondergremium* has the right to object to this assertion by a majority decision in order to achieve a decision of the entire *Bundestag* to decide. Apart from that, according to § 5.7 of the Act the rights of the *Bundestag* to be informed can be transferred to the committee in cases of particular confidentiality.

On 26 October 2011, the *Bundestag* elected the members of the *Sondergremium*. Upon the applicants’ application of 27 October 2011, the Federal Constitutional Court, by its order of the same day, issued a temporary injunction according to which the *Bundestag’s* competences were not allowed to be

exercised by the *Sondergremium* until a ruling in the main proceedings would be issued.

II. Reviewed against the standards set out in the Headnotes, the Federal Constitutional Court held that the application made by the Members of Parliament was, for the most part, well-founded.

First, the Court held that § 3.3 of the Act violates the applicants’ rights under sentence 2 of Article 38.1 of the Basic Law. The provision completely excludes the Members of Parliament who are not represented in the *Sondergremium* from substantial decisions affecting the *Bundestag’s* overall budgetary responsibility. It thus effects unequal treatment with regard to the parliamentary rights of participation that arise from the status of a Member of Parliament.

The establishment of a subsidiary body to exercise duties of the *Bundestag* autonomously and as a substitute of the plenary sitting is covered by Parliament’s right to organise its own affairs. In principle, the exclusion of the Members of Parliament who are not represented in such a subsidiary body can be justified by reasons orientated towards Parliament’s ability to function, which enjoys constitutional rank. This principle fundamentally justifies that in cases of particular urgency or confidentiality, the *Bundestag* may make provision for speedy action and against planned measures becoming known, if otherwise, internal decision-making in Parliament in a way that is appropriate to the matter would not be ensured.

However, where the rights of the Members of Parliament arising from their status are restricted, the principle of proportionality must be observed. An appropriate balance must be guaranteed between the rights of the Members of Parliament arising from their status and the *Bundestag’s* ability to function that collides with such rights. The establishment of the *Sondergremium* provided in § 3.3 of the Act does not satisfy these requirements under the perspective of particular urgency or under that of confidentiality.

Reasons of particular urgency cannot justify the extensive delegation of competences of the *Bundestag* to the *Sondergremium* with regard to any of the emergency measures indicated in the EFSF’s list of measures. No reasons are apparent which would require having a subsidiary body with the “smallest possible number of members” that would be able to meet as quickly as possible. The lower administrative effort involved with having to convene only nine members of the panel is not sufficient. The fact that no deputies are provided for the members of the *Sondergremium*, so that a few members being unable to attend might result in the committee lacking a quorum, also speaks against particular urgency.

Moreover, all measures taken by the EFSF require extensive preparative actions and implementing measures by the applying state and the EFSF.

Reasons of particular confidentiality justify the transfer of decision-making competences to the *Sondergremium* only with regard to some of the emergency measures indicated in the EFSF's list of measures.

The transfer is constitutionally unobjectionable to the extent that the purchase of government bonds by the EFSF on the secondary market must be deliberated upon and decided. Even the planning of such an emergency measure becoming known would be likely to prevent the measure's success. It must therefore be assumed that the preparation of such an emergency measure, i.e. also its deliberation and a decision adopting the measure, must be subject to absolute confidentiality.

In contrast, the provision contained in § 3.3 of the Act, according to which emergency measures aimed at preventing risks of contagion shall "as a general rule" be deemed particularly urgent or confidential, is not compatible with the rights resulting from status as a Member of Parliament. The assumption of a general rule fails to consider that the possibility of delegation is restricted to strictly limited exceptions. It does not do justice to the requirements placed on a balance between the interest in the security of classified information, which serves the *Bundestag*'s ability to function, and the rights arising from the status of a Member of Parliament that conflict with such interest. The restriction of the rights of the Members of Parliament arising from their status is additionally exacerbated by the fact that the plenary assembly has no effective possibility of examining in advance whether the assumption of a general rule is valid, and of resuming control of the matter.

Second, the Court held that the provision in § 5.7 of the Act, which provides for the possibility of transferring the *Bundestag*'s rights to be informed to the *Sondergremium* in cases of particular confidentiality, does not violate the rights of the Members of Parliament arising from their status under sentence 2 of Article 38.1 of the Basic Law. However, the rights of the Members of Parliament to be informed may take a back seat only to the extent that is absolutely necessary in the interest of Parliament's ability to function. The provision is to be interpreted in such a way that Parliament's rights to be informed are suspended only as long as the reasons for particular confidentiality exist. Once these reasons have ceased to exist, the Federal Government must of its own accord inform the *Bundestag* without delay about the involvement of the *Sondergremium* and the reasons justifying such involvement.

### *Languages:*

German, press release in English on the Court's website.



### *Identification:* GER-2012-3-022

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 12.09.2012 / **e)** 2 BvR 1390/12, 1421/12, 1438/12, 1439/12, 1440/12, 2 BvE 6/12 / **f)** ESM Treaty, Fiscal Compact / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** Wertpapiermitteilungen 2012, 1812-1826; Europäische Grundrechte-Zeitschrift 2012, 569-596; Europäisches Wirtschafts- und Steuerrecht 2012, 423-444; Neue Juristische Wochenschrift 2012, 3145-3161; Deutsches Verwaltungsblatt 2012, 1370-1375; Verwaltungsrundschau 2012, 421-431; CODICES (German, English).

### *Keywords of the systematic thesaurus:*

3.3 General Principles – **Democracy**.

4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements**.

4.10.2 Institutions – Public finances – **Budget**.

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

### *Keywords of the alphabetical index:*

Treaty establishing the European Stability Mechanism, interpretation / European Fiscal Compact / *Bundestag*, overall budgetary responsibility.

### *Headnotes:*

The safeguarding of the *Bundestags* overall budgetary responsibility requires commensurate interpretations of the Treaty establishing the European Stability Mechanism to be ensured under international law.

### *Summary:*

I. The Federal Constitutional Court ruled on several applications for the issue of temporary injunctions. The applications aim was to prohibit the Federal President from signing the statutes passed by the *Bundestag* and the *Bundesrat* in June 2012 (as measures to deal with

the sovereign debt crisis in the euro currency area) until the decision in the respective main proceedings was rendered. These statutes are mainly the Act of assent to the Treaty establishing the European Stability Mechanism (hereinafter, "ESM Treaty"), the Act of assent to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (hereinafter, "Fiscal Compact") and the Act of assent to the European Council Decision to amend Article 136 of the Treaty on the Functioning of the European Union (hereinafter, "TFEU") with regard to a stability mechanism for Member States whose currency is the euro.

## II. The applications were unsuccessful for the most part.

Diverging from the usual scope of examination in preliminary injunction proceedings, the review in the present temporary injunction proceedings was not restricted to a mere weighing of the consequences of the decision. Instead, the Panel summarily examined the contested approval laws to the international treaties and their accompanying legislation, so as to determine whether the violations exist which the applicants claimed in accordance with procedure. This was required because with the ratification of the Treaties, the Federal Republic of Germany would enter into commitments under international law. Their cancellation would not be easily possible in the event that violations of the Constitution should be established in the main proceedings. If a summary review in temporary injunction proceedings were to establish a high probability that there is indeed the alleged violation of the precept of democracy, which Article 79.3 of the Basic Law lays down as the identity of the Constitution, a serious detriment to the common good would result in the temporary injunction not being issued. Avoiding possible economic and political disadvantages which a delayed entry into force of the contested laws entails, cannot be a consideration in this determination.

The main proceedings were regarded as admissible to the extent that the applicants, relying on Article 38 of the Basic Law (right to elect the *Bundestag*), asserted a violation of the *Bundestags* overall budgetary responsibility, which is entrenched in constitutional law through the principle of democracy (Articles 20.1, 20.2 and 79.3 of the Basic Law).

According to Article 38 of the Basic Law in conjunction with the principle of democracy, the decision on public revenue and public expenditure must remain in the hands of the *Bundestag* as a fundamental part of the ability of a constitutional state to democratically shape itself. The *Bundestag* may not establish mechanisms of considerable financial importance which may result in incalculable budgetary burdens incurred without its mandatory approval being given. The *Bundestag* may

also not establish permanent mechanisms based on international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are difficult to predict. The *Bundestag* must approve individually every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Sufficient parliamentary influence must also be ensured on the manner of dealing with the funds provided.

The *Bundestags* overall budgetary responsibility is also safeguarded by the design as a stability union the monetary union has to date been given under the Treaties, in particular by the provisions of the Treaty establishing the European Union and of the Treaty on the Functioning of the European Union. However, a democratically legitimised change of the stability requirements under European Union law is not unconstitutional from the outset. The Basic Law does not guarantee that the law in force will not be changed.

Measured against these standards, the applications are unfounded for the most part.

The Act of assent to the insertion of Article 136.3 TFEU does not impair the principle of democracy. The provision contains the authorisation to establish a permanent mechanism for mutual aid between the Member States of the euro currency area. Admittedly, this changes the present design of the economic and monetary union in such a way that it moves away from the principle of the independence of the national budgets. This, however, does not relinquish the stability-oriented character of the monetary union because the essential elements of the stability architecture remain intact. The possibility of establishing a permanent stability mechanism, which is opened up by Article 136.3 TFEU, does not result in a loss of national budget autonomy. Through the challenged Act of assent, the *Bundestag* does not transfer budget competences to bodies of the European Union. For the provision itself does not establish a stabilisation mechanism, but merely gives the Member States the possibility of installing such a mechanism on the basis of an international agreement. The ratification requirement for the establishment of a stability mechanism makes participation of the legislative bodies a precondition for the stability mechanism to enter into force.

The Act of assent to the ESM Treaty essentially takes account of the requirements under constitutional law with regard to the safeguarding of the *Bundestags* overall budgetary responsibility.

However, the following needs to be ensured in the ratification procedure under international law: the provisions of the Treaty may only be interpreted in such a way as to not increase the liability of the Federal Republic of Germany beyond its share in the authorised capital stock of the ESM without the approval of the *Bundestag* and that the information of the *Bundestag* and the *Bundesrat* according to the constitutional requirements is ensured.

Admittedly, it can be assumed that the express and binding limitation of the liability of the ESM Members to their respective portions of the authorised capital stock (sentence 1 of Article 8.5 TESM), limits the Federal Republic of Germanys budget commitments to EUR 190 024 800 000. This ceiling can also be assumed to apply to all capital calls made according to Article 9 TESM. However, an interpretation in the sense that in the case of a revised increased capital call, the ESM Members cannot rely on the liability ceiling cannot be ruled out. The Federal Republic of Germany must ensure that it is only bound by the Treaty in its entirety if no payment obligations that go beyond the liability ceiling can be established for it without the *Bundestags* consent.

A reservation in the ratification procedure is also required with regard to the provisions of the ESM Treaty on the inviolability of the documents (Articles 32.5 and 35.1 TESM) and on the professional secrecy of the legal representatives of the ESM and of all persons working for the ESM (Article 34 TESM). Admittedly, a good argument can be made that these provisions are above all intended to prevent a flow of information to unauthorised third parties, for instance to actors on the capital market, but not to the parliaments of the Member States. However, an interpretation is conceivable which would stand in the way of sufficient parliamentary monitoring of the ESM by the *Bundestag*. A ratification of the ESM Treaty is therefore only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, *Bundestag* and *Bundesrat* will receive the comprehensive information they need to be able to develop an informed opinion.

In other respects, the provisions of the ESM Treaty are unobjectionable according to the summary review.

Admittedly, the provision under Article 4.8 TESM, according to which all voting rights of an ESM Member are suspended if it fails to fully meet its obligations to make payment *vis-à-vis* the ESM, is not unproblematic in view of its potentially far-reaching consequences under the overall budgetary responsibility. However, the provision does not violate the *Bundestags* overall budgetary responsibility because the latter can, and must, see to it that the German voting rights are not suspended.

Furthermore, it cannot be established that the amount of the payment obligations entered into through the participation in the ESM exceeds the limit of the burden on the budget to such an extent that the budget autonomy effectively fails. The legislators assessment that the risks involved in making available the German shares in the European Stability Mechanism are manageable, while without the granting of financial assistance by the ESM the entire economic and social system would be under the threat of unforeseeable, serious consequences, does not transgress its latitude of assessment and must therefore be accepted by the Federal Constitutional Court.

The objection that the ESM could become the vehicle of unconstitutional state financing by the European Central Bank cannot be raised against the ESM. As borrowing by the ESM from the European Central Bank, alone or in connection with the depositing of government bonds, would be incompatible with the prohibition of monetary financing entrenched in Article 123 TFEU, the Treaty can only be taken to mean that it does not permit such borrowing operations.

The provisions on the *Bundestag*'s involvement in the decision-making processes of the ESM which result from the Act of assent to the ESM Treaty and from the ESM Financing Act also essentially comply with the requirements placed on the safeguarding of the principle of democracy at the national level. This applies to the *Bundestags* rights of participation as well as with regard to its rights to be informed and to the personal legitimization of the German representatives in the bodies of the ESM.

The Act of assent to the Fiscal Compact (hereinafter, "TSCG") does not violate the *Bundestags* overall budgetary responsibility. The regulatory content of the Treaty is for the most part identical to the existing requirements of the Basic Law's "debt brake" and to the budgetary obligations arising from the Treaty on the Functioning of the European Union. The Fiscal Compact does not grant the bodies of the European Union powers which affect the *Bundestags* overall budgetary responsibility. Article 3.2 TCSG, according to which a correction mechanism is to be put in place by the Contracting Parties at the national level in the event of significant deviations from the medium-term objective of submitting a balanced budget, on the basis of the principles to be proposed by the European Commission, only concerns institutional but not specific substantive requirements for the preparation of the budgets.

By ratifying the Fiscal Compact, the Federal Republic of Germany does not undertake an irreversible commitment to pursue a specific budget policy. Admittedly, the Treaty does not provide for a right of termination or resignation for the Contracting States. It is, however, recognised under customary international law that the resignation from a treaty by mutual agreement is always possible, and that unilateral resignation is at any rate possible in the event of a fundamental change in the circumstances which were relevant on the conclusion of the treaty.

#### *Languages:*

German; English translation on the Courts website.



## Hungary Constitutional Court

### Important decisions

*Identification:* HUN-1994-1-008

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 16.04.1994 / **e)** 22/1994 / **f)** / **g)** Magyar Közlöny (Official Gazette), 40/1994 / **h)**.

*Keywords of the systematic thesaurus:*

4.7.15.1.1 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Organisation**.

5.2 Fundamental Rights – **Equality**.

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

*Keywords of the alphabetical index:*

Public body.

#### *Summary:*

Obligatory membership of a professional association (in this case the bar association) violates neither freedom of association, nor the principle of equality. The bar is a public body under Hungarian law which guarantees the professionalism and independence of private attorneys. The ruling of the Court is in accordance with the Judgment of the European Court of Human Rights (*Le Compte, Van Leuven and De Meyere* case, Judgment of 23 June 1981, *Special Bulletin – Leading cases ECHR* [ECH-1981-S-001].

#### *Languages:*

Hungarian.



***Identification: HUN-1998-1-002***

a) Hungary / b) Constitutional Court / c) / d) 24.02.1998 / e) 793/B/1997 / f) / g) *Alkotmánybíróság Határozatai* (Official Digest), 2/1998 / h).

***Keywords of the systematic thesaurus:***

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.16 General Principles – **Proportionality.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

***Keywords of the alphabetical index:***

Criminal proceedings / Testimony, pre-trial, use in trial / Testimony, refusal.

***Headnotes:***

To read aloud the testimony of an accused person at a court hearing despite the fact that the accused has refused to testify during the trial does not mean a disproportionate restriction of the rights of the defence if this limitation complies with the following constitutional requirements:

- reading aloud and using the testimony made during the investigation can be constitutional if it is done in the interest of making clear the facts of the case or in the interest of another accused or the victim;
- the judge should examine whether during the investigation the accused was familiarised with the possibility of refusing to testify and its consequences, and whether the testimony was given under duress;
- the judge should obtain evidence from other sources even if the accused made a full confession.

***Summary:***

Upon the petition of a judge, the Constitutional Court examined the constitutionality of Article 83 of Act I of 1973 on the Code of Criminal Procedure (hereinafter, the "Code") according to which the document containing the testimony could be used if the person who testified cannot be heard, the person refuses to testify or the document is contrary to the testimony. In the petitioner's opinion, that part of the challenged provision under which the testimony can be used in spite of the fact that the accused person later refuses to testify violates the rights of the defence ensured by Article 57.3 of the Constitution.

According to Article 57.3 of the Constitution, a person charged with a criminal offence is entitled to the rights of the defence in every phase of the criminal procedure. The Constitutional Court in this decision examined whether the contested provision of the Code infringes the fundamental rights of the defence.

Under Article 83 of the Code, the document containing the testimony is a piece of evidence, which, as a general rule, can be used only according to the provisions of this Code as direct evidence. According to Article 83.3, however, three cases are exceptions to the above-mentioned rule, one of which is the case where the accused refuses to testify.

The right not to incriminate oneself emerging from the fundamental right to human dignity guaranteed by Article 54 of the Constitution ensures for the accused the right to remain silent. In order for this right to be realised, under the Code the investigator is obliged to draw the accused's attention to the possibility of refusing to make a statement. But if the accused decides to make a statement despite the notice of the investigator, later on he/she does not have the right to decide whether this statement can be used at trial. Under the Code, however, both the defence counsel and the accused have the possibility of making a remark if the court decides on using the statement made during the investigation as evidence.

According to Article 50 of the Constitution, the courts punish the perpetrators of criminal offences. The restriction of the rights of the defence therefore can be justified by this obligation of the State if this restriction is necessary and proportionate to the purpose of the limitation. In answering the question whether in the instant case the restriction is necessary and proportionate, the Constitutional Court took into consideration the case-law of the European Court of Human Rights, especially the *John Murray v. the United Kingdom* Judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996, p. 30, *Bulletin* 1996/1 [ECH-1996-1-001]. In this case the European Court of

Human Rights stated that the right to remain silent is a generally recognised international standard which lies at the heart of a fair trial. However, the European Court of Human Rights also held that the right to silence is not an absolute right, but rather a safeguard which might, in certain circumstances, be removed provided other appropriate safeguards for accused persons are introduced to compensate for the potential risk of unjust convictions. The court has a discretionary power to draw inferences from the silence of an accused, but this does not, in itself, violate the right to silence. Accordingly, the Court held that there had been no violation of Article 6.1 and 6.2 ECHR.

On the basis of the aforesaid considerations, the Constitutional Court held the contested provision restricting the rights of the defence to be constitutional, since according to the reasoning of the Court, this limitation is justified by the interest of another accused or the victim and the rights of the defence can be also restricted in the interest of making clear the facts of the case.

#### *Languages:*

Hungarian.



*Identification:* HUN-2000-2-003

**a)** Hungary / **b)** Constitutional Court / **c) / d)** 08.05.2000 / **e)** 1270/B/1997 / **f)** / **g)** Alkotmánybíróság Határozatai (Official Digest), 5/2000 / **h)**.

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.16 General Principles – **Proportionality.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract.**

#### *Keywords of the alphabetical index:*

Advertising, ban / Speech, commercial, freedom.

#### *Headnotes:*

Although commercial speech, like non-commercial speech, is protected by the Constitution's freedom of expression clause, in the interest of individual's right to human dignity, privacy and the protection of personal data commercial speech could be subject of state regulation. In the case of advertisements, the state has a broader power to regulate misleading commercial speech in order to protect consumers from serious harm that may be caused by a false advertisement.

#### *Summary:*

The petitioners requested the constitutional review of some articles of Act LVIII of 1997 on commercial advertising. In their opinion, Article 4.a of the Commercial Advertising Act, which prohibits advertisements infringing personal rights and the right to protection of personal data restricted the right to freedom of expression in a disproportionate way.

The Court, on the basis of its previous free speech decisions and the related judgments of the European Court of Human Rights (see Cross-references) held that although commercial advertising is a constitutionally protected form of speech, taking into account the differences that exist between commercial and non-commercial messages, commercial speech can be subject to greater state regulation than non-commercial speech. Since Article 4.a restricted the right to freedom of expression in the interest of rights closely related to the right to human dignity, and, in addition, the restriction was necessary to avoid violation of personal rights and was proportionate to the aim to be achieved, the Court upheld the provision in question.

In the petitioners' view, Article 15.3 of the Commercial Advertising Act, which makes it possible to settle legal disputes arising in relation to commercial advertising outside of the judicial system, violates Article 70/K of the Constitution, under which claims arising from a violation of fundamental rights, as well as objections to the decisions of public authorities regarding the fulfilment of duties, shall be enforceable in a court of law.

The Court, however, held that the state has a duty emerging from Article 70/K of the Constitution to establish institutions whose task it is to impose

penalties for the violation of the consumers' rights. It is up to the legislator to establish a separate forum to protect consumers' rights effectively; however, if the decision of such a forum is enforceable, the legislator should ensure that an opportunity exists for review by the courts of the legality of these decisions.

#### *Supplementary information:*

Justice Kukorelli, who delivered the opinion of the Court, attached a concurring opinion to the decision. In this opinion he analysed the content of consumers' rights and the duty of the state to protect consumers from serious harm that could be caused by a false and misleading advertisement. The restriction of freedom of expression in this case is inevitable in order to ensure the constitutional rights of consumers, which are based not only on Article 9.2 of the Constitution, under which the Republic of Hungary recognises and supports the right to enterprise and the freedom of economic competition, but also on the constitutional right to contractual freedom.

#### *Cross-references:*

##### *European Court of Human Rights:*

- *Barthold v. Germany*, 31.01.1986, Series A, no. 98;
- *Markt Intern v. Germany*, 20.11.1989, Series A, no. 165;
- *Jacobowski v. Germany*, 23.06.1994, Series A, no. 291-A, *Bulletin* 1994/2 [ECH-1994-2-009];
- *Casado Coca v. Spain*, 24.02.1994, Series A, no. 285-A, *Bulletin* 1994/1 [ECH-1994-1-005];
- *X and Church of Scientology v. Sweden*, no. 7805/77, 05.05.1979 on admissibility.

#### *Languages:*

Hungarian.



*Identification:* HUN-2011-3-008

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 20.12.2011 / **e)** 166/2011 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2011/155 / **h)** CODICES (Hungarian).

#### *Keywords of the systematic thesaurus:*

- 4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.
- 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.
- 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

#### *Keywords of the alphabetical index:*

Witness, data, handling / Judge, choice, right / Criminal proceedings, initiation.

#### *Headnotes:*

Amendments made to the Criminal Procedure Code introduced a rule that certain cases are heard at the Court where the prosecutor presses charges and the manner in which witness data is handled limits the freedom of information and the introduction of a 120-hour detention rule, resulting in the defendant having no access to an attorney for the first 48 hours have raised concern on whether they respected the Constitution and international treaty obligations.

#### *Summary:*

I. A recent amendment to the Criminal Procedure Code allowed the Prosecutor General to bring a criminal case in a different court from the court which would normally have jurisdiction over it, provided the new court could try the matter within a reasonable time. The right only applies to specific crimes such as organised or economic crime.

It was suggested that the whole "package" amending the Criminal Procedure Code (or some of its elements) were unconstitutional and could infringe international treaties such as the European Convention on Human Rights. Several applicants, including the President of the Supreme Court, accordingly challenged the modification to the Criminal Procedure Code before the Constitutional Court.

Amongst the modifications to the Criminal Procedure Code was a rule which would have permitted the Prosecutor General to hand-pick a particular court to try certain crimes such as organised or economic crime, pressing charges before a court other than the legally designated one if this was deemed necessary in terms of the speed of the proceedings. The rationale behind the modification was to equip the prosecution service with stronger and more efficient tools, in order to provide more successful criminal investigations and trials in a timely manner, especially in economic and special criminal cases such as corruption or abuse of official power.

II. However, the Court found the above rule to be unconstitutional. Based on jurisprudence from the European Court of Human Rights, the Court held that it infringed the European Convention on Human Rights by impairing the right to an impartial court and violating the principle of fair trial. Pressing charges before a court other than the legally designated court would only be constitutional and in accordance with the Convention if the decision was made within the independent judiciary and if the rules concerning the initiation of criminal proceedings before a judge other than the natural judge were clear and predictable, containing normative conditions with no room for manoeuvre.

The Court had held in an earlier case (Decision no. 104/2010) that there was no constitutional reason or objective on the basis of which the investigating authority, the prosecutor or the court could be entitled to refuse a request for the closed handling of a witness's personal data. Granting a possibility of judicial discretion in the course of the criminal proceedings was an unnecessary restriction of the witness's right of informational self-determination. In the instant case the Court also held that handling of witness data in a way that limits the right of informational self-determination was against the Constitution.

The Court also held that the 120-hour pre-trial detention rule in certain special crimes (organised and economic, for example), were unconstitutional. Under Article 55.2 of the Constitution any individual suspected of having committed a criminal offence and held in detention must either be released or brought before a judge in the shortest possible time span. 120 hours cannot be perceived as the "shortest period of time". The Court took into account the Judgment delivered by the European Court of Human Rights in the case of *Brogan and Others v. the United Kingdom*, when the Court concluded that the periods of 102 hours did not satisfy the requirement of promptness required by Article 5.3 ECHR.

Finally, the Court held that the provision according to which the defendant would have no access to an attorney during the first 48 hours pre-trial detention infringed the Constitution by impairing the rights of the defence and violating the right to an effective remedy.

III. Justice Balogh, Justice Bragyova, Justice Dienes-Oehm, Justice Holló and Justice Lenkovics attached concurring opinions; Justice Dienes-Oehm, Justice Holló, Justice Kiss, Justice Lévay and Justice Szívós attached separate opinions to the judgment.

#### *Supplementary information:*

Shortly after the Court annulled the provision on changing the venue of the trial, Parliament inserted the rule into the Amendment to the Fundamental Law; as a result, the Court will no longer be able to decide on the constitutionality of it.

#### *Cross-references:*

European Court of Human Rights:

- *Brogan and Others v. the United Kingdom*, Series A, no. 145-B, Special Bulletin – Leading cases ECHR [ECH-1988-S-007].

#### *Languages:*

Hungarian.



# Ireland

## High Court

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### Important decisions

*Identification:* IRL-2007-1-003

a) Ireland / b) High Court / c) / d) 15.11.2006 / e) 2004/9792 P / f) R.(M.) v. R.(T.) and Others / g) / h) CODICES (English).

*Keywords of the systematic thesaurus:*

5.3.2 Fundamental Rights – Civil and political rights – Right to life.

*Keywords of the alphabetical index:*

Embryo, implantation / *In vitro* fertilisation, consent, withdrawal / Embryo, frozen, legal status / Gamete, implantation, consent, withdrawal / Foetus, legal status.

*Headnotes:*

Frozen embryos are not ‘unborn’ within the meaning of Article 40.3.3 of the Constitution (*Bunreacht na hÉireann*) and their legal status is a matter for the parliament (*Oireachtas*) to decide.

*Summary:*

I. The plaintiff and the first defendant had been married to each other. During the course of their marriage, the parties had sought and obtained the services of the second and third defendants who operated a clinic specialising in the provision of fertility treatments. As a result of that treatment, six embryos were created, three of which were implanted, resulting in the birth of one child. The first defendant consented to the fertilisation of the embryos and to the implantation. The remaining three embryos were frozen. The relationship between the parties subsequently broke down and they separated under the terms of a decree of Judicial Separation.

The plaintiff later sought to have the remaining embryos implanted and the first defendant refused to consent to this. The plaintiff unsuccessfully claimed that the consent given by the first defendant to the fertilisation and implantation of the embryos extended to the implantation of the three remaining embryos. In a

separate ruling on that issue, the High Court stated that the first defendant’s consent applied only to the implantation of the first three embryos.

The High Court was subsequently asked to determine two issues. Firstly, whether the remaining embryos were included in the definition of ‘unborn’ for the purposes of Article 40.3.3 of the Constitution (*Bunreacht na hÉireann*) which provides that ‘[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right’, and secondly, whether the plaintiff was entitled under that article or under Article 41 of the Constitution, which protects the institution of the family, to the return of the remaining embryos to her.

II. The High Court heard conflicting evidence on the issue of when human life can be said to begin and stated that it was not possible to decide definitively the point at which that occurred. This fact notwithstanding, the Court still had to decide whether the three frozen embryos were ‘unborn’ as that term is understood in Article 40.3.3. In so doing, the Court examined the Irish and English texts of the Constitution, the views of the Constitution Review Group contained in a report published in 1996, the legislative history of the amendment to Article 40.3 which inserted the term ‘unborn’ into the text of the Constitution and the jurisprudence of the Irish courts on this and analogous issues.

The Court took the view that the term ‘unborn’ as used in Article 40.3.3 has been taken to mean the foetus *in utero* and that the purpose of Article 40.3.3 was to copper-fasten the prohibition on abortion. The issue of whether the term could be taken to encompass embryos *in vitro* was, in the Court’s view, a matter for the legislature and not for the Courts to decide. Further, the onus of proving that the term ‘unborn’ could mean anything other than a foetus *in utero* lay on the plaintiff, who had not provided the Court with any evidence upon which it could decide this issue in her favour. That being so, the Court held that the term ‘unborn’ as used in Article 40.3.3 does not include embryos *in vitro* or outside the womb and by extension could not include the three frozen embryos the subject of the instant proceedings.

Having decided that the three frozen embryos are not considered ‘unborn’ in the context of Article 40.3.3, the Court then looked at the issue of what, if any, protection exists for them. The Court asserted that the embryos by their very nature are deserving of respect but that the absence of any express legislative provision governing the position of embryos outside the womb leaves them in a very precarious situation.

In the instant case, the Court considered it most unlikely that the parties could come to any agreement on the matter and that this being the case, the embryos would be very likely to remain frozen indefinitely. The Court recognised that there would come a point in time when the embryos could no longer be implanted in the plaintiff's uterus with any expectation that a baby would be born to her, given the plaintiff's age. This, however did not, in the Court's view, provide it with any real basis upon which to intervene. The first defendant argued that the implantation of the embryos in the plaintiff's uterus, would, if successful, render him a parent against his express wishes and in the absence of his consent. The plaintiff argued that the defendant, in consenting to the creation of the embryos and the implantation of the first three embryos, by extension consented to the implantation of these three embryos. The Court held that the issue of enforced paternity did not and could not arise, since it had held that the embryos were not 'unborn' for the purposes of Article 40.3.3. The plaintiff had earlier conceded that if the embryos were not 'unborn', the first defendant could not be forced into a situation of paternity.

The Court also dealt with the issue raised by the plaintiff that she had an entitlement to have the frozen embryos returned to her uterus under the terms of Article 41 of the Constitution. Article 41 protects the family and *inter alia* recognises that the family as being 'the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law'. The Article has the effect of prohibiting any interference by the courts or by legislation, except in very limited circumstances, into the realm of decision making by families as understood in the context of *Bunreacht na hÉireann*. In the instant case, the Court held that it didn't have to decide any issue arising under Article 41, given that it had already held that the frozen embryos were not 'unborn' within the meaning of Article 40.3.3 and that the issue of the precise time at which human life could be said to begin was not something that the Court could decide.

Arguments were also put forward on the issue of the attrition rate of embryos *in vitro*. Evidence was given that the attrition rate was significant in the case of such embryos. The Court stated that insofar as this issue was pertinent to the question of when human life begins, it did not have to form a view on it and that further, the attrition rate of embryos *in vitro* did not appear relevant to the question of whether such embryos were 'unborn' for the purposes of Article 40.3.3. The Court stated that all it had to decide was whether the three frozen embryos are protected by the Constitution or by the law and held that it was for the parliament to amend the law, not for the courts. This being so, the Court ruled that the three frozen embryos

are not 'unborn' within the meaning of Article 40.3.3 and that their legal status was a matter for the parliament.

This decision is under appeal to the Supreme Court.

#### Cross-references:

European Court of Human Rights:

- On this subject, see in the same *Bulletin* 2007/1 [ECH-2007-1-002].

#### Languages:

English.



# Italy

## Constitutional Court

### Important decisions

*Identification:* ITA-1998-2-003

a) Italy / b) Constitutional Court / c) / d) 20.05.1998 / e) 185/1998 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 22, 03.06.1998 / h) CODICES (Italian).

*Keywords of the systematic thesaurus:*

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

*Keywords of the alphabetical index:*

Multitherapy, tumour pathology / Medication, free / Medical experimentation / Illness, terminal phase / Treatment, evaluation by the Court / Right to health, minimum content / Recovery, expectation.

*Headnotes:*

The lack of provision for the distribution, at National Health Service expense, under criteria to be set down by the legislature itself, of the drugs prescribed in a treatment for certain types of cancer, to those living in poverty, is unconstitutional. Only those drugs forming part of the treatment for patients suffering from forms of cancer that are the subject of clinical trials are to be distributed free of charge until the effectiveness of this therapy has been confirmed following these trials.

*Summary:*

The Council of State, in a case referred to it, raised before the Court the question of the constitutional legitimacy of Act no. 94/1998, which only granted free treatment to patients in the terminal phase of cancer who had been selected for clinical trials of the “*Di Bella* multitherapy” in a hospital environment. For other patients in the terminal phase who were not selected for clinical trials, the law authorised doctors to prescribe drugs belonging to the “*Di Bella* therapy” but stipulated that these drugs were to be supplied entirely at the patient’s expense. The Council of State found that the

law in question was in violation both of the principle of equality (Article 3 of the Constitution) on account of the disparity in treatment between patients undergoing clinical trials, who received the drugs free of charge, and other cancer sufferers who had to pay for treatment, and of the right to protection of health enshrined in Article 32 of the Constitution.

The Constitutional Court points out above all that it is not within its jurisdiction to pass judgment on the therapeutic effectiveness of the “*Di Bella* multitherapy” in treating cancer; this is currently being investigated through clinical trials conducted by competent technical and scientific bodies, with the aim of assessing its effectiveness in the field of oncology.

The Court finds, however, that the start of clinical trials of the “*Di Bella* multi-drug treatment” on cancer sufferers in specialist medical establishments, and the authorisation of the use of the multi-drug treatment on other patients not undergoing clinical trials but also suffering from cancer, have aroused expectations of a cure among these patients, for whom existing forms of therapy have proved inappropriate; such expectations are to be understood as a minimum component of the right to health. It is unacceptable, under the principle of equality, that effective enjoyment of this fundamental right should depend, for patients who do not undergo clinical trials, on their respective financial circumstances.

The provision, in the law challenged before the Court, for a reduction in the sale price of the drugs belonging to the “*Di Bella* multi-drug treatment”, as agreed between the Ministry of Health and pharmaceutical companies, is insufficient to be regarded as a guarantee of the right to protection of health enshrined in Article 32 of the Constitution; the same is true of the provision allocating a fixed sum to local authorities for 1998, to fund contributions towards particularly heavy medical costs for poor people.

*Supplementary information:*

The government has adopted a decree increasing contributions to the funding of the National Health Service from those receiving health care, precisely in order to cover the increase in expenditure caused by the reimbursement of costs incurred by the less well-off in paying for the “*Di Bella* multitherapy”. The results of trials conducted up to September 1998 on this method of therapy have not demonstrated its effectiveness.

### Cross-references:

The matter at issue in this Judgment has considerable similarities with that at issue in the Federal Constitutional Court of German:

- nos. 1 BvR 1068/96 and 1 BvR 1071/95, 05.07.1997, *Bulletin* 1997/1 [GER-1997-1-004].

### Languages:

Italian.



## Latvia Constitutional Court

### Important decisions

*Identification:* LAT-1998-2-003

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 30.04.1998 / **e)** 09-02(98) / **f)** On Conformity of Paragraph 2 of the Resolution of the Supreme Council of 15 September 1992 on the Procedure by which the Law on Eminent Domain Takes Effect with Article 1 Protocol 1 of the Law of the Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** *Latvijas Vestnesis* (Official Gazette), 122, 05.05.1998 / **h)** CODICES (English, Latvian).

### Keywords of the systematic thesaurus:

- 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.  
 2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments**.  
 3.17 General Principles – **Weighing of interests**.  
 3.18 General Principles – **General interest**.  
 5.2 Fundamental Rights – **Equality**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.  
 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.  
 5.3.39.2 Fundamental Rights – Civil and political rights – Right to property – **Nationalisation**.  
 5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation**.

### Keywords of the alphabetical index:

Real estate / Compensation, determination / State Land Service.

### Headnotes:

The general principle of peaceful enjoyment of possessions is always to be considered in connection with the right of the State to limit the use of property in accordance with conditions envisaged by Article 1 Protocol 1 ECHR.

**Summary:**

On 19 December 1996, the Parliament (*Saeima*) passed the law “Amendment to the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect”, supplementing paragraph 2 with the second, third and fourth parts in the following wording:

“When expropriating real estate necessary for the State or public – needs for maintaining and operating specially protected natural objects, educational, cultural and scientific objects of State significance, State training farms, national sport centres, as well as objects of engineering and technical, energy and transportation infrastructure – according to which the ownership rights are renewed or shall be renewed in accordance with the law to former owners (or their heirs), the extent of compensation shall be determined in money by a procedure established by law, but shall be not more than the evaluation of the real estate in the Land Books or cadastral documents drawn up before 22 July 1940 in which the value of real estate is indicated. Coefficients for the recalculation of value of property according to prices in 1938-1940 (in pre-war lats) and present prices (in lats) shall be determined by the State Land Service.

The fourth part stresses that the procedure for expropriation of real estate established by this paragraph shall also be applied to owners who have acquired the real estate from the former land owner (or his or her heir) on the basis of an endowment contract.”

Taking into consideration that Article 64 ECHR (hereinafter, the “Convention”) envisages the possibility of making reservations to any particular provision of the Convention where any law then in force in its territory is not in conformity with the provision, the *Saeima* included the following reservation in Article 2 of the Law on the Convention:

“Claims under Article 1 Protocol 1 ECHR shall not relate to the property reform that regulates restitution of property or paying compensation to former owners (or their heirs) whose property has been nationalised, confiscated, collectivised or otherwise unlawfully expropriated during the period of the annexation by the USSR or to the process of privatisation of agricultural enterprises, fishermen’s collective bodies and State or municipal property.”

The case was initiated by twenty deputies of the *Saeima* who asked that parts 2 and 4 of paragraph 2 of the Resolution be declared null and void from the day the Convention took effect in Latvia, i.e. from 27 June 1997.

The applicants pointed out that the procedure established by the second and fourth parts of paragraph 2 of the Resolution, when applied to persons mentioned there, makes them less equal before court than those whose property is expropriated in the public or State interest under general procedure, since the persons mentioned in paragraph 2 of the Resolution have no right or reason to protect their interests at the court as regards the amount of compensation for the expropriated property. Courts – in cases like this and according to the law – can only quite formally approve of the price, determined by the State Land Service.

They also pointed out that the second and fourth parts of paragraph 2 of the Resolution express the notion that evaluation of the property depends only on what basis or how the property has been obtained and on whether the property status of its owner has improved or become worse. The applicants are of the opinion that compensation for expropriated property should be reasonable and should not be determined merely on the basis of the manner of obtaining it. If for one and the same property two people are paid different sums of money just because the properties have been obtained differently, then that constitutes discrimination on the ground of property status.

The Constitutional Court concluded that the procedure for the evaluation and determination of compensation for immovable property, which is envisaged by the second part of paragraph 2 of the Resolution, has been determined taking into consideration State or public interests. The terms of the second part of paragraph 2 of the Resolution refer only to immovable properties that are necessary for State or public needs for the maintenance and operation of specially protected natural objects, educational, cultural and scientific objects of state significance, State training farms, national sport centres as well as objects of engineering and technical, energy and transportation infrastructure. Such a procedure is in conformity with the fundamental principle of denationalisation of property in the Republic of Latvia – “to denationalise the property or to compensate its value to the extent that has been indicated during nationalisation” and it has the objective – in the context of consequences of the policy of annexation by the USSR to re-establish social justice and to fairly balance interests of the individual and the society after completion of the property reform (conversion).

Although the amount of compensation is to be reasonably related to the value of the property to be expropriated, Article 1 Protocol 1 ECHR – as has repeatedly been shown in the practice of the European Court of Human Rights – does not envisage full compensation for the expropriated property, especially in cases when expropriation of property takes place for

important public interests. The European Court of Human Rights has come to the conclusion that legitimate objectives of public interest, such as those pursued by measures of economic reform or measures designed to achieve greater social justice, may call for reimbursement of less than the full market value. Thus, the principle of fair balance not only establishes a certain boundary between an admissible and inadmissible expropriation of property but also invests the government with extensive rights when evaluating the property to be expropriated and determining the amount of compensation.

The second and fourth parts of paragraph 2 of the Resolution do not prevent the owner whose property is being expropriated in the public or State interest from appealing to a court to review the extent of compensation. The second part of paragraph 2 of the Resolution only establishes the maximum extent of compensation. Therefore the viewpoint of the applicants, that the above persons have been denied the right to protection by a court and equality before the court, is unfounded.

The Constitutional Court decided to declare the second and fourth part of Paragraph 2 of the Supreme Council Resolution of 15 September 1992 on the procedure by which the Law of the Republic of Latvia on eminent domain takes effect as being in compliance with Article 1 Protocol 1 ECHR.

#### Cross-references:

On the question of reimbursement for less than full market value, see European Court of Human Rights:

- *James and Others v. the United Kingdom*, 21.02.1986, paragraph 54;
- *Lithgow and Others v. the United Kingdom*, 08.07.1986, paragraph 121; *Special Bulletin – Leading cases ECHR* [ECH-1986-S-002];
- D.J.Harris, M.O'Boyle, C.Warbrick: *Law of the European Convention on Human Rights*; London, Dublin, Edinburgh, 1995, pages 532-534.

#### Languages:

Latvian, English (translation by the Court).



#### *Identification: LAT-2001-2-003*

- a) Latvia / b) Constitutional Court / c) / d) 26.06.2001 / e) 2001-02-0106 / f)** On Compliance of the Transitional provisions of the Law on State Pensions (on length of insurance period for foreign citizens and stateless persons whose permanent place of residence on 1 January 1991 has been the Republic of Latvia) with the Constitution and with Article 14 ECHR and Fundamental Freedoms and Article 1 Protocol 1 ECHR / **g) Latvijas Vestnesis** (Official Gazette), 99, 27.06.2001 / **h) CODICES** (Latvian, English).

#### *Keywords of the systematic thesaurus:*

- 1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law**.  
 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.  
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.  
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.  
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

#### *Keywords of the alphabetical index:*

Non-citizen, social insurance / Normative act / Pension, principle of solidarity / Pension, principle of insurance.

#### *Headnotes:*

A legal norm establish that foreign citizens and stateless persons, whose permanent place of residence until January 1991 was Latvia, were only allowed to include their periods of employment in Latvia but not those when they worked abroad, when assessing the length of the insurance period for calculating their state pension was held not violate these individuals' social rights, as protected by the Constitution.

The pension system, which existed in Latvia up until January 1991, and which was based on the principle of solidarity, did not create "possessions" within the meaning of Article 1 Protocol 1 ECHR.

#### *Summary:*

The case was initiated by 20 members of the parliament (*Saeima*) who questioned the conformity of Paragraph 1 of the Transitional Provisions of the Law on State Pensions with the Constitution (*Satversme*), and with Article 14 ECHR and Article 1 Protocol 1 ECHR.

The disputed legal norm established that the length of the insurance period for calculating the state pensions of foreign citizens and stateless persons, whose permanent place of residence until January 1991 had been Latvia, included only periods of employment in Latvia. Periods of employment abroad, up until January 1991, were not to be included in the as part of the period of insurance.

The applicants pointed out that the disputed legal norm limited the right of permanent residents of Latvia – non-citizens, foreign citizens and stateless persons – to the state pension, even though up to 1 January 1991 all the residents of Latvia – citizens, non-citizens, foreign citizens and stateless persons – made the same pension contributions, and the length of service required in order to receive the pension was calculated on the basis of the same unified social insurance system and on the same principles. The applicant noted that Article 109 of the Constitution established that “everyone has the right to social security in old age, to disability benefits, to unemployment benefit, and in other cases as provided by law”, and that Article 91 established that human rights should be implemented without any discrimination. Therefore, the applicant considered that the Constitution prohibited discrimination on the grounds of citizenship and that the expression “everyone” meant every inhabitant of Latvia, including non-citizens, foreign citizens and stateless persons. The applicant also pointed out that Article 14 ECHR, taken with Article 1 Protocol 1 ECHR, had been violated. The applicant considered that pensions constituted “possessions” within the meaning of Article 1 Protocol 1 ECHR and referred to the European Court of Human Rights case of *Gaygusuz v. Austria*.

The Constitutional Court held that in the Soviet times the pension system was based on the principle of re-division, which did not encourage employees to make provision for their old age. Therefore, after the renewal of independence, it became necessary to formulate a new pension system, and the Law on State Pensions was adopted in 1995. The law radically changed the classical principle of solidarity. It introduced a mandatory system based on insurance principles. According to the law, the amount of the state pension shall depend on the length of insurance, which is constituted from periods of employment and periods regarded as equal to employment. None of this depends on the citizenship of a person. The new pension scheme is the “property”-creating system. A person makes payments into defined funds, creating an individual share, the amount of which may be calculated at any moment. The pension system which existed in Latvia up to January 1991 was based on the principle of solidarity, which established the responsibility of the community as a whole and did not create a link between the payment of contributions and

the amount of the pension. According to the principle of solidarity, it was not possible to establish which part of the fund belonged to an individual participant. Therefore, the right to possessions protected by Article 1 Protocol 1 ECHR was not created. The disputed legal norm is not covered by Article 1 Protocol 1 ECHR and does not violate Article 14 ECHR.

According to Article 109 of the Constitution, everybody has the right to social guarantees and benefits in old age, but the article sets out neither a particular age nor the amount of the pension and the specific conditions of the pension scheme. The nature and the principles of the Latvian pension system objectively justify the differentiated approach, established by the disputed legal norm. Thus it may not be regarded as discrimination, and Articles 91 and 109 of the Constitution are not violated.

Latvia has concluded bilateral agreements on social security with several states. These agreements specify the rights and obligations of the contracting parties regarding social security.

As the disputed norm does not violate Articles 91 and 109 of the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, it does not contradict Article 89 of the Constitution, which establishes that “the state shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia”.

The applicants also questioned the norm in connection with the rights of non-citizens. Non-citizens are a group of people with a specific legal status, provided by the special “Law on Non-Citizens”. In Latvian law, groups such as non-citizens, foreign citizens and stateless persons are strictly determined. The term “non-citizens” was not mentioned in the disputed legal norm. Nothing suggests that the notion of “stateless person” includes also non-citizens. Therefore, the legislator did not regulate the issue on whether to include the periods of employment of non-citizens up to 1991 in calculating the length of insurance. The Constitutional Court may evaluate only legal norms, which are formulated in normative acts, and cannot evaluate the compliance of a non-existent norm with a legal norm of higher legal force. However it should be taken into consideration that non-citizens are a part of the inhabitants of Latvia and the legislator should regulate the issue on including periods of employment abroad by non-citizens up to January 1991 in calculating the length of insurance.

The Constitutional Court decided the disputed norm was in compliance with Articles 89, 91 and 109 of the Constitution and Article 14 ECHR and Article 1 Protocol 1 ECHR.

### Cross-references:

#### European Court of Human Rights:

- *Gaygusuz v. Austria*, *Bulletin* 1996/3 [ECH-1996-3-012];
- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31, p. 23, § 5; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002].
- *Sporrong and Lönnroth v. Sweden*, *Special Bulletin – Leading cases ECHR* [ECH-1982-S-002].

### Languages:

Latvian, English (translation by the Court).



### Identification: LAT-2001-3-006

- a) Latvia / b) Constitutional Court / c) / d)** 21.12.2001 / **e) 2001-04-0103 / f)** On Compliance of Article 19 of the State Language Law and the Cabinet of Ministers, 22 August 2000, Regulation no. 295 on Spelling and Identification of Names and Surnames with Articles 96 and 116 of the Constitution / **g) Latvijas Vestnesis** (Official Gazette), 187, 22.12.2001 / **h) CODICES** (English, Latvian).

### Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

4.3.1 Institutions – Languages – **Official language(s).**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

### Keywords of the alphabetical index:

Name, spelling, approximation / Language, official, use / Language, official, strengthening.

### Headnotes:

When evaluating whether the limitation on a person's private life pursue a legitimate aim, the role of the Latvian language has to be taken into consideration.

Spelling of a foreign surname in accordance with the Latvian language is a justified limitation on a person's private life insofar as it is exercised in a legitimate aim: to protect the right of other inhabitants of Latvia to use the Latvian language and to protect the democratic state system, and is proportionate to that aim.

On the contrary, so-called approximation (adjustment of the form of the first name and surname to the current rules of the Latvian language), is a limitation that is disproportional to the legitimate purposes of limitations of private life, and is thus unconstitutional.

### Summary:

Mrs Juta Mencena introduced the constitutional complaint questioning the conformity of Article 19 of the State Language Law, the Cabinet of Ministers Regulations On Spelling and Identification of Surnames, and the Regulations On the Citizen of Latvia Passports, with Articles 96 and 116 of the Constitution.

The Constitutional Court established that as the person's name and surname are a consistent part of the private life of the person, they shall be protected by Article 96 of the Constitution, which guarantees the right of everyone to the inviolability of private life.

The applicant acquired in Germany the surname Mentzen, after her marriage with a German citizen. Issuing a new passport to the applicant – a citizen of Latvia – the surname was reproduced as Mencena.

It was pointed out that the fact that the spelling of the surname differs from that of her husband's surname has caused a psychological discomfort and created social inconveniences to the applicant. Taking into account the applicant's psychological attitude to the reproduced surname and complications connected with difficulties of establishing her link with the family in foreign countries, the rule on reproduction of a foreign personal name and its spelling in passports in accordance with the norms of the Latvian language was considered as a limitation of one's private life.

Article 116 of the Constitution establishes that the right to a private life may be limited only in cases prescribed by law in order to protect the rights of others, a democratic state system, and the safety of society, welfare and morals. The limitation of the applicant's private life in the present case has been established by

the law, and specified with the Cabinet of Ministers Regulations.

Personal names are one of the elements of language influencing the whole language system. Thus, evaluating whether the limitation on people's private life has a legitimate purpose, the role of the Latvian language has to be taken into consideration. Article 4 of the Constitution fixes the constitutional status of Latvian language as the state language. Taking into account the fact that the number of Latvians in the state territory has decreased during the 20<sup>th</sup> century (in the biggest cities Latvians are a minority), and that the Latvian language only recently regained its status as the state language, the necessity of protecting the language and strengthening its usage is closely connected with the state democratic system.

Thus, the Constitutional Court considered that the limitation on the private life of the applicant has a legitimate purpose: to protect the right of other inhabitants of Latvia to use the Latvian language and to protect the democratic state system.

Furthermore, it was observed that it is also necessary to check whether the interference of the state in the applicant's private life is proportionate to its legitimate purposes. It is not possible to isolate the spelling of people's names in documents from the other sectors of language. The threat to the functioning of the Latvian language as a unified system, if the spelling of foreign personal names in the documents only in their original form was allowed, is much greater than the discomfort of individuals. Spelling only the original form of a surname at a time when the Latvian language as the state language is just starting to be instituted could negatively influence the process. Thus, the functioning of the Latvian language as a unified system is a social necessity in Latvia, and the limitations are justified.

To diminish the inconvenience caused by the reproduction of the person's name the law establishes that in the person's passport in addition to the name and surname, which are reproduced, the original form of the names of other languages must be indicated, if the person so requires, and is able to provide documents confirming it. The Regulations On Passports specifies that the original form of the name and surname must be entered in the "Special Notes" section of the passport pages.

As the reproduction of foreign personal names is a limitation on people's private lives, application of the limitation should be as careful as possible and respectful to a person and his or her family ties. On the contrary, the Instruction of the Director of the Citizenship and Immigration Department of the Ministry of the Interior On the Passports of the Republic of Latvia Citizens

establishes that the original form of the foreign personal name shall be entered only on page 14. Besides, it permits the possibility of entering the original form into the passport if "the form has noticeably changed in comparison with the former documents". Thus, it is possible even to ignore the request of a person to fix the original form of the personal name in the passport. The norm on entering the original form of a foreign personal name and surname under the title "Special Notes" limits the person's private life disproportionately and is contrary to Article 96 of the Constitution and the State Language Law.

The Cabinet of Ministers Regulations on Spelling and Identification of Names and Surnames also establish the so-called approximation of the name and surname and the adjustment of the form of the name and surname to the currently effective rules of the Latvian language. Approximation is applied if the former usage of the name or surname in personal documents contradicts the current norms of the Latvian language. Approximation may be applied if the documents are issued for the first time, e.g. issuing the birth certificate; and, if they are issued repeatedly, for example, in the case of losing one's passport or if its expiry date has passed.

Precision and consequence is needed in usage and spelling of personal names. Approximation creates a certain precariousness as the individual has to take into consideration that his or her identity and ties with the family might be doubted. From the moment the reproduced personal name is entered into the Republic of Latvia passport, the person has the right not only to use it but also to protect it. Errors or inaccuracy on the part of the officials as well as new conclusions of linguistics cannot be a reason to change the spelling of names reproduced and fixed in documents. Therefore approximation of personal names, if they have already been reproduced and if the individual himself or herself does not require it, is disproportionate to the legitimate purposes of limitations on private life.

#### Cross-references:

##### European Court of Human Rights:

- *Stjerna v. Finland*, 25.11.1994, Vol. 299-B, Series A, *Bulletin* 1994/3 [ECH-1994-3-019];
- *Burghartz v. Switzerland*, 22.02.1994, Vol. 280-B, Series A, *Bulletin* 1994/1 [ECH-1994-1-001];

##### Constitutional Court of Lithuania:

- no. 14/98, 21.10.1999, On writing of names and family names in passports of citizens of the Republic of Lithuania; *Bulletin* 1999/3 [LTU-1999-3-011].

*Languages:*

Latvian, English (translation by the Court).



*Identification:* LAT-2003-1-005

**a) Latvia / b) Constitutional Court / c) / d)** 23.04.2003 / **e)** 2002-20-0103 / **f)** On the Compliance of Article 11 (the Fifth part) of the Law "On State Secrets" and the Cabinet of Ministers 25 June 1997 Regulations "List of Objects of State Secrets" (Chapter XIV, Item 3) with Article 92 of the Constitution (*Satversme*) of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 62, 24.04.2003 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.9 General Principles – **Rule of law.**

3.17 General Principles – **Weighing of interests.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

*Keywords of the alphabetical index:*

Secret, state / Hearing, right / Justice, principle.

*Headnotes:*

It is especially important to consider alternative procedures by which a person may protect his or her rights to the highest degree possible, where the right to have a case reviewed in a fair court is denied. A state based on the rule of law may set up a well thought-out mechanism to take into consideration the interests of every person subject to clearance for access to state secrets and, at the same time, also take into consideration the interests of state security when reaching a decision on issuing a special permit. The principle of justice requires that a person subject to such clearance enjoys the right of expressing his or her viewpoint and being heard before a refusal to grant the special permit is issued.

The impugned provisions shall be interpreted in compliance with the Constitution and, in each particular case, to ensure as much as possible the realisation of the right to a hearing. If the impugned provisions are interpreted that way, they comply with Article 92 of the Constitution.

*Summary:*

The Law on "State Secrets" lists the cases where access to state secrets is prohibited. Where the issue of granting special permits to specific persons is decided, those persons shall be checked according to the procedure laid down in the Law on State Security Institutions; the institutions shall examine and reach a conclusion as to the effectiveness of the restrictions. The impugned provisions of that Law set out that a decision refusing the grant of a special permit or reducing a special permit category may be appealed to the Director of the Constitutional Defence Bureau (hereinafter, the "CDB"). The decision of the Director of the CDB may be appealed to the Procurator General, whose decision shall be final and not subject to appeal.

The impugned provisions of the Cabinet of Ministers Regulations no. 226 "List of Items subject to State Secrets" provide that the following items shall be considered subject to State secret: "specific record-keeping documents, materials of security clearance, deeds of conveyance and destruction of the objects of State secrets"; they also set out the levels of secrecy of state secrets: "extremely secret, secret and confidential".

The person filing the constitutional claim, Andris Ternovskis, was appointed Head of the Jelgava Border Guard Structural Unit on 27 February 1997. On 15 January 1999 the CDB adopted a decision to refuse the request of A. Ternovskis for a special permit for access to state secrets. On that basis, he was dismissed from his post and retired from the Border Guard service due to unsuitability for service.

The ordinary courts rejected the request of A. Ternovskis for reinstatement in the post of Head of Jelgava Border Guard Structural Unit. In a judgment, the Senate of the Supreme Court emphasised that A. Ternovskis could not be reinstated in that post, which required a special permit for access to state secrets, on the ground that the CDB Director had not granted that permit and the decision had not been annulled.

In his constitutional claim, A. Ternovskis pointed out that the impugned provisions denied him the possibility of having his case reviewed in an objective and independent court and were not in conformity with Article 92 of the Constitution.

The Constitutional Court emphasised that the first sentence of Article 92 of the Constitution provided: "everyone has the right to defend their rights and lawful interests in a fair court"; however, it did not mean that a person is guaranteed the right of adjudicating any issue that he or she finds important in a court. The person has the right of protecting only his or her "rights and lawful interests" in a fair court.

The Court considered that it could not be concluded that a person "has the right and lawful interest" to acquire information that (in compliance with the law) has been recognised to be a state secret.

On the other hand, the Court held that the right to freely choose employment enshrined in Article 106 of the Constitution meant also the right to keep the post. However, the rights set out in Article 106 of the Constitution might be subject to restrictions. State security requires that access to state secrets should be granted only to persons, whose personal characteristics show no risk that a state secret might be revealed. On the one hand, those restrictions are needed in a democratic society as they strike a reasonable balance between the public interests and interests of an individual. On the other hand, restrictions with regard to any particular person are permissible only where the refusal to grant the special permit is well-founded.

The impugned provisions restricted the fundamental rights that are incorporated into Article 92 of the Constitution. However, those fundamental rights may be restricted to protect other values that are guaranteed in the Constitution (*Satversme*).

When assessing whether those restrictions were needed in a democratic society, the Court took into consideration that by allowing a person subject to security clearance to acquaint himself or herself with all the materials, the identity of the operative employees might be revealed, and as a result, those employees would not be able to do their duty. In such a case, the harm to state interests would be much greater than the limitation to the rights of a person.

The impugned provisions had to be interpreted in compliance with the Constitution and, in each particular case, to ensure (as much as possible) the realisation of the right to be heard. If the legal provisions were interpreted that way, the restriction on the right of a person was proportionate to the legitimate aim – the protection of state security.

The Court declared that the impugned provisions complied with Article 92 of the Constitution.

#### Cross-references:

##### Constitutional Court:

- no. 04-02(99), *Bulletin* 1999/2 [LAT-1999-2-002];
- no. 2002-08-01; no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008].

##### German Federal Constitutional Court:

- no. 1 BvR 1934/93, 08.07.1997, *BVerfGE* 96, 189.

##### European Court of Human Rights:

- *Golder v. the United Kingdom*, 21.02.1975, Vol. 18, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1975-S-001];
- *Fogarty v. the United Kingdom*, 37112/97, 21.11.2001;
- *Leander v. Sweden*, 26.03.1987, Vol. 116, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1987-S-002].

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2003-2-007

- a) Latvia / b) Constitutional Court / c) / d) 05.06.2003 / e) 2003-02-0106 / f)** On the Compliance of Article 19.5 of the Radio and Television Law with Articles 89, 91, 100 and 114 of the Constitution (*Satversme*) as well as with Articles 10 and 14 ECHR (read together with Article 10 ECHR) and Articles 19 and 27 of the International Covenant on Civil and Political Rights / **g) Latvijas Vestnesis** (Official Gazette), 84, 05.06.2003 / **h) CODICES** (Latvian, English).

#### Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.18 General Principles – **General interest**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

*Keywords of the alphabetical index:*

Media, radio and television, broadcasting instructions / Language, use, restrictions.

*Headnotes:*

The impugned provision of the Radio and Television Law provides that the proportion of foreign language programs aired by a broadcasting organisation must not exceed 25 per cent of the total airtime per day. Those language use restrictions cannot be regarded as necessary and proportionate in a democratic society, because it is possible to attain the aim pursued by other means that would limit the right in question to a lesser degree.

*Summary:*

The claimants – twenty-four deputies of the parliament (*Saeima*) – sought a review of the conformity of the impugned legislative provision with Articles 89, 91, 100 and 114 of the Constitution; Articles 10 and 14 ECHR (read together with Article 10 ECHR); and Articles 19 and 27 of the International Covenant on Civil and Political Rights.

The Court pointed out that freedom of expression is considered one of the most essential fundamental human rights. It embraces a wide sector and includes two aspects: private and public. The public aspect of freedom of expression refers to the right of every person to freely receive information and voice his or her views in any way: orally, in a written form, visually, with the help of artistic means, etc. Mass media – radio and television – are also means of receiving and imparting information. The term “freedom of expression”, which is incorporated into Article 100 of the Constitution, also includes the notion “freedom of the press”.

Fundamental rights may be restricted in circumstances provided for by the Constitution in order to protect vital public interests and where the principle of proportionality is observed. The restriction of the right to freedom of expression must comply with the following requirements: it shall be determined by law; it shall be justified by a legitimate aim that the State wishes to attain when laying down the restriction; and it shall be proportionate to that aim.

The Court found that the impugned legislative provision had been laid down by a law adopted by the parliament; had been published in accordance with the procedure determined by law; and was valid. Therefore, there could be no doubt that the restrictions had been determined by law.

The Court held that under Article 116 of the Constitution, public welfare is one of the legitimate aims for which the right to freedom of expression may be restricted. Along with the material welfare aspects, the notion “public welfare” includes the non-material welfare aspects that are necessary for the functioning of a harmonious society. The actions of the State to secure public dominance of the Latvian language may be considered a non-material aspect.

The Court pointed out that in order to evaluate whether the limitations on freedom of press in the impugned provision were necessary in a democratic society and might be used as the means for attaining a legitimate aim, it had to be determined whether the bounds of the essence of human rights had been violated. It meant that it had to be considered whether the limitations were socially needed and proportionate.

The Court found that the implementation of the impugned provision neither promoted the more extensive use of the State language nor advanced the process of integration. The results of the research, attached to the materials of the case, show that where – because of language restrictions – residents cannot use the services of the local broadcasting organisations, they choose the services of broadcasting organisations of other States, in the particular case, the Russian television channels. Consequently, the limitation on the use of language in the impugned provision could not be regarded as socially required in a democratic society.

Article 10.1 ECHR does not prevent the State from requiring the licensing of radio and television broadcasting. Granting radio and television broadcasting licenses must not create disproportionate restrictions to fundamental human rights, including freedom of expression. To secure the enlargement of the sphere of the Latvian language in the electronic mass media, only the means that comply with that requirement are to be used. For example, one of the criteria for granting broadcasting licenses to private broadcasting organisations might be the number of companies broadcasting in foreign languages offering to broadcast programs promoting public integration as well as other criteria. The former Estonian Minister of National Affairs has pointed out that the companies broadcasting programs in foreign languages have stimulated the process of integration in Estonia. That indicates that it is possible to attain the aim pursued by other means that would limit the right in question to a lesser degree.

The Court concluded that the language use restrictions in the impugned provision could not be regarded as necessary and proportionate in a democratic society.

The Court declared that Article 19.5 of the Radio and Television Law was incompatible with Article 100 of the Constitution, and null and void as of the day of the publication of the Judgment.

#### Cross-references:

Constitutional Court:

- no. 2000-03-01, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2002-04-03;
- no. 2002-08-01;
- no. 2002-20-0103.

European Court of Human Rights:

- *Sunday Times v. the United Kingdom, Special Bulletin – Leading cases ECHR* [ECH-1979-S-001]; Vol. 30, Series A;
- *Groppera Radio AG and Others v. Switzerland*, Vol. 173, Series A;
- *Markt Intern Verlag GmbH and Claus Berman v. the Federal Republic of Germany*, Vol. 165, Series A;
- *Autronic AG v. Switzerland, Special Bulletin – Leading cases ECHR* [ECH-1990-S-003]; Vol. 178, Series A;
- *Radio ABC v. Austria, Reports* 1997-VI.

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2003-2-008

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 27.06.2003 / **e)** 2003-04-01 / **f)** On the Compliance of Articles 82.5 and 453.2 of the Code of Civil Procedure with Articles 91 and 92 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 97, 01.07.2003 / **h)** CODICES (Latvian, English).

#### Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.  
3.17 General Principles – **Weighing of interests**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

#### Keywords of the alphabetical index:

Court of Cassation, lawyer, representation, mandatory / Legal aid, absence / Lawyer, representation, mandatory / Fundamental right, implementation.

#### Headnotes:

The legislator, when laying down the principle of mandatory representation, had the possibility of using less restrictive means for reaching the legitimate aims. The restrictions laid down by the legislator are not proportionate, as state-financed legal aid is not ensured and the impugned statutory provisions deny persons the right of access to a court. The impugned provisions of the Code of Civil Procedure (hereinafter, "CCP") providing that natural and legal persons must have the help of an advocate in order to conduct court proceedings in the Court of Cassation do not comply with the principle of proportionality and are incompatible with Article 92 of the Constitution (*Satversme*).

#### Summary:

The applicant brought a constitutional claim in which she submitted that the impugned statutory provisions violated her rights, as she – like most people – could not afford to pay for the services of an advocate. In 2000, the applicant had made a request to the Council of Advocates for the appointment of an advocate to act in the proceedings free of charge. Her request had been refused, because advocates could not be appointed to represent an applicant in the review of a civil matter.

The Court held that when interpreting Article 92 of the Constitution (*Satversme*) in conjunction with Article 86 of the Constitution, one could conclude that the right to defend one's rights in a fair court might be restricted by law where the restriction (as the European Court of Human Rights has resolved with regard to the rights set out in Article 6.1 ECHR) has been established by law, has a legitimate aim and is proportionate to that aim.

The Court noted that the special function of the cassation instance was the reason for the specific nature of the proceedings in the Court of Cassation. Unlike the "Soviet" cassation model, the essential feature of the Latvian cassation institute is that the final determination is not important for the pursuit of the parties' interests, which are sufficiently protected by the first two instances

of the Court, but of legal public interests. Only *quaestiones iuris* – i.e. issues on the application of substantive and procedural rules – are reviewed by the cassation instance. The restrictions incorporated into the impugned provisions envisage the protection of the rights of persons, as Article 477 CCP lays down that no appeal lies from the decision of the cassation instance. Therefore, the proper preparation of a claim and qualified representation at the cassation instance, which can be achieved only if there is a capable, skilled and experienced representative, is in the interests of natural and legal persons. In the past, every person had the right to prepare an appeal for the Court of Cassation; consequently, that court was flooded with claims devoid of any legal grounds of appeal. Moreover, the legislator, in requiring a qualified person, wanted to limit the right of every person to speak during the court proceedings. Where a qualified lawyer represents a person, the bench can review the legal issues without hearing arguments that are unrelated to the legal issues. Therefore, the restrictions have two legitimate aims: the first is to ensure qualified legal representation in the Court of Cassation for the parties; the second is to ensure the efficient performance of the Court of Cassation.

The Court stressed that the principle of proportionality sets out that in cases where the public authority restricts the rights and legitimate interests of a person, a reasonable balance between the public and individual interests must be struck. In order to evaluate whether the statutory provision complies with the proportionality principle, one has to ascertain whether the means used by the legislator are suitable for achieving the legitimate objective; whether it is possible to attain the objective by other means that would limit the rights of an individual to a lesser degree; and to show whether the action of the legislator is proportionate.

The Court held that such means for reaching the legitimate aims existed, especially for ensuring qualified legal representation in the Court of Cassation; consequently, it was possible to use less restrictive means for securing qualified legal representation in the Court of Cassation.

The Constitutional Court held that the right of all persons to the assistance of an advocate should be understood as a subjective right to qualified legal aid. The right to an advocate within the meaning of Article 92 of the Constitution includes firstly the right to qualified legal aid, and secondly the obligation of the State to render such aid to persons who cannot afford it themselves. Every indigent person has the right to such aid in all cases where mandatory representation is required or the interests of the proceedings require it (the potential grievous effects of the case and complicated proceedings).

The Court concluded that the restrictions set out in the impugned statutory provisions had been determined by law and had legitimate aims. The means used by the legislator were appropriate for reaching the legitimate aims, namely – requiring mandatory representation by an advocate at the cassation instance did ensure qualified legal representation and the efficient performance of the cassation instance. However, the legislator, when determining the principle of mandatory representation, had the possibility of employing less restrictive means for reaching the legitimate aims. Moreover, the restrictions laid down by the legislator were not proportionate, as state-financed legal aid was not ensured and the impugned statutory provisions denied persons the right of access to the Court. Thus, the public benefit was not greater than the loss of the rights and damage to the legitimate interests of an individual. In a state governed by the rule of law, the protection of the rights and interests must be secured, not only declared. However, the valid statutory regulation was evidently insufficient and did not ensure the implementation of the rights guaranteed in Article 92 of the Constitution. Thus, the impugned statutory provisions do not comply with the principle of proportionality and were unlawful.

The Court declared that Articles 82.5 and 453.2 of the Civil Procedure Law were incompatible with Article 92 of the Constitution and null and void as from 1 January 2003.

#### Cross-references:

##### Constitutional Court:

- no. 2001-12-01, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-03-01;
- no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-09-01, *Bulletin* 2002/3 [LAT-2002-3-009].

##### European Court of Human Rights:

- *Golder v. the United Kingdom*, Vol. 18, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1975-S-001];
- *Fayed v. the United Kingdom*, Vol. 294-B, Series A;
- *Delcourt v. Belgium*, Vol. 11, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1970-S-001];
- *Airey v. Ireland*, Vol. 32, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-003].

#### Languages:

Latvian, English (translation by the Court).



*Identification:* LAT-2003-2-009

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 27.06.2003 /
- e)** 2003-03-01 / **f)** On the Compliance of Article 77.7 (sentence three) of the Code of Criminal Procedure of Latvia with Article 92 of the Constitution (*Satversme*) /
- g)** *Latvijas Vestnesis* (Official Gazette), 97, 01.07.2003 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

3.18 General Principles – **General interest.**

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

*Keywords of the alphabetical index:*

Arrest, safeguards / Detention, provisional, right to take part in proceedings / Security, measure, arrest, extension of the term.

*Headnotes:*

The provision of the Code of Criminal Procedure that provides that the term of preventive detention of one year and six months may be extended by the Supreme Court Senate in exceptional cases does not run contrary to the observation of the presumption of innocence by the Court and does not deny the right of the defendant to have the matter reviewed within a reasonable time; however, it is incompatible with Article 92 of the Constitution (*Satversme*) on the ground that a procedure for ensuring the realisation of the right of the accused to be heard is not laid down by the law.

### *Summary:*

Article 77.7 of the Code of Criminal Procedure provides that the term of preventive detention, from the day the Court receives the case until the completion of its review by the first instance court, shall not exceed one year and six months. At the end of that term, the order of preventive detention shall be revoked, and the accused shall be immediately released. The Supreme Court Senate (hereinafter, the “Senate”) may prolong the term of preventive detention in exceptional cases, i.e. – criminal matters involving especially serious crimes connected with violence or threat of violence.

The applicants brought a constitutional claim challenging the compatibility of Article 77.7, sentence 3 of the Code of Criminal Procedure (hereinafter, the “impugned provision”) with the first and second sentences of Article 92 of the Constitution (*Satversme*).

The Court noted that Article 92 of the Constitution requires the State to set up a system under which the Court may review criminal matters in proceedings ensuring fair and impartial adjudication of the matters. Article 92 of the Constitution guarantees the minimum rights enshrined in Articles 5.4 ECHR, 6.1 ECHR and 6.2 ECHR.

The Court stated that the presumption of innocence meant that in carrying out their duties, the Court and its officials are not permitted to voice the assumption that the defendant is guilty of the crime until the announcement of the judgment. Proof and determination of guilt takes place only in court when the case is reviewed on its merits. The justification of the decision to detain a person for a long period of time is to be assessed in every individual case by taking into consideration the particular circumstances of the case. Detaining a person for a long period of time may be justified only in cases where there are specific indications of a true public interest, which – bearing in mind the presumption of innocence – is more important than the right of a person to liberty, guaranteed by Article 5 ECHR. As the impugned provision does not require assessment of the guilt of the accused, a court does not violate the presumption of innocence by asking the Senate to extend preventive detention in a case where there are well-founded suspicions that the person committed the crime and where the Court does not mention the guilt of the accused in its request. Consequently, the impugned provision does not run contrary to the observation of the presumption of innocence by the Court.

The Court held that even though the impugned provision did not determine the maximum term of preventive detention, it did not prevent a court from adjudicating the case within a reasonable time because

neither the Court requesting extension of detention nor the Senate may apply the provision without grounds. When evaluating the amount of time needed for the adjudication of the case, the Court must consider all factors, *inter alia*, the complexity of the case, behaviour of the accused and the activity of the competent institution (the Court). Because of objective reasons, a court is not always able to adjudicate the matter in a year and a half (for example, in especially serious crimes connected with violence or threat of violence). Had the impugned provision not been adopted, an accused would be able to deliberately delay the legal process in such a way as to be released from prison. Moreover, if the accused were released from prison without an assessment of his or her personality, the security of both the witnesses and the public might be endangered. Therefore, the impugned provision does not deny the right of the accused to a review of the matter within reasonable time.

The Court pointed out that the right to be heard follows from the principle of justice, which includes all the guarantees of due process. It is one of the most important procedural guarantees of an accused. This right is realised in several ways. It includes also the right of the person to express his or her viewpoint on facts and legal issues. Implementation of that right, at least in the written form, must be ensured.

The Court held that the impugned provision, when providing that the Senate could extend detention after a year and six months, did not provide for the right of the accused to participate in the court hearing or to express his or her viewpoint in another way. The accused must be given the opportunity of becoming acquainted with the conclusions of the Court on the extension of his or her detention and be given an opportunity to defend himself or herself. However, neither the provisions of the Code nor the case-law of the Senate on the extension of preventive detention safeguard the above-mentioned right. Consequently, the impugned provision did not guarantee the right to a fair court, laid down by Article 92 of the Constitution.

The Court declared that Article 77.7 (third sentence) of the Code of Criminal Procedure was incompatible with Article 92 of the Constitution, and null and void as of 1 October 2003, if by that date the law did not set out a procedure for ensuring the realisation of the right of the accused to be heard.

#### Cross-references:

Constitutional Court:

- no. 2001-08-01, *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-10-01;

- no. 2001-17-0106, *Bulletin* 2002/2 [LAT-2002-2-006];
- no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-06-01.

#### European Court of Human Rights:

- *Sanchez-Reisse v. Switzerland*, Vol. 107, Series A;
- *Niedbala v. Poland*;
- *Bezicheri v. Italy*, Vol. 164, Series A;
- *Süßmann v. Germany*, *Bulletin* 1996/3 [ECH-1996-3-013]; *Reports* 1996-IV;
- *Assenov v. Bulgaria*, *Reports* 1998-VIII;
- *Lavents v. Latvia*.

The Czech Constitutional Court, 10.11.1998, Judgment in no. IV.US 358/98, *Bulletin* 1998/3 [CZE-1998-3-014].

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2003-3-011

- a) Latvia / b) Constitutional Court / c) / d) 29.10.2003 / e) 2003-05-01 / f) On the Compliance of Article 271 of the Criminal Code with Articles 91 and 100 of the Constitution (*Satversme*) / g) Latvijas Vestnesis (Official Gazette), 138(2903), 30.10.2003 / h) CODICES (Latvian, English).**

#### Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
- 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
- 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

#### Keywords of the alphabetical index:

Criminal Law / Official, definition / Libel, through the press / Official, protection against libel.

### **Headnotes:**

The impugned provision of the Criminal Law on libel against a representative of public authority or another State official, or defamation of such a person in connection with that person's professional duties is contrary to Article 100 of the Constitution (*Satversme*) on the ground that the legislator has not specified the range of officials who – in the performance of the duties assigned to them – need the protection of the Criminal Code.

### **Summary:**

Article 271 of the Criminal Code (the impugned provision) under Chapter XXII of the Code entitled "Criminal Offences against Administrative Order" sets out: "a person who commits libel against a representative of public authority or another State official, or defamation of such persons in connection with their professional duties, shall be punished by deprivation of liberty for a term not exceeding two years, or detention, or community service, or a fine not exceeding sixty times the minimum monthly wage".

Chapter XV of the Criminal Code entitled "Criminal Offences against Personal Liberty, Honour and Dignity" incorporates provisions that protect the honour and dignity of every person.

The petitioner is editor-in-chief of the newspaper "Diena". She pointed out that the impugned statutory provision violated her rights under the Constitution (*Satversme*) and international instruments. A State official and any other person are both "persons"; therefore, their situations are comparable. The official has special status. The European Court of Human Rights in its practice has concluded that the limits of permissible criticism (even in reference to dignity and respect) are wider with regard to the politician or an official than with regard to a private person. A different approach, which might have been valid in some periods of history, was not justified in a democratic society.

The petitioner submitted that the restrictions of freedom of expression that follow from the impugned provision were not proportionate and necessary in a democratic society; therefore, they ran contrary to Article 100 of the Constitution (*Satversme*).

The Court stressed that freedom of expression in its public aspect also included freedom of the press. Thus, the term "freedom of expression", which is incorporated into Article 100 of the Constitution, also includes the concept of "freedom of the press". Thus any limitation of freedom of the press in a wider sense shall be understood as limitation of freedom of expression.

The Court pointed out that the right to freedom of expression was not absolute and did not amount to permissiveness. The State may determine restrictions to freedom of expression in cases where the right of a person to freedom of expression may affect the rights of other persons as well as in cases where freedom of expression creates a clear and direct threat to society.

The Court stressed that two fundamental rights guaranteed to the person are directly opposed in the present case: the right to freedom of expression and the right to inviolability of dignity and respect. Just like the right to freedom of expression, the right to inviolability of human dignity and respect is set out in the Constitution and several international human rights conventions binding on Latvia. The Court found reasonable the viewpoint expressed by the parliament (*Saeima*) representative at the Court session. That viewpoint was that when determining limits between freedom of expression and the right to the protection of dignity and respect, it was necessary to strike a fair balance.

The Court reiterated that the fundamental rights might be subject to restrictions only in cases envisaged by the Constitution and by observing the principle of proportionality. That being so, the restrictions of freedom of expression should be:

1. established by law;
2. justified by a legitimate aim; and
3. proportionate to that aim.

The Court held that the impugned provision had a legitimate aim – to protect the rights of other persons, democratic state system, public security and impartiality of courts. A democratic state system would be unthinkable without the alignment and protection of the activities of state administration, which in its turn guarantees both public security and the rights of other persons.

The Court noted that Article 100 of the Constitution envisages not only the right to express one's viewpoint freely and distribute information, but also the right to freely receive such information. In essence, the right to freedom of expression follows from the public right to receive information. The Court agreed with the viewpoint of A. Kleckins, the mass media expert, that the right to freedom of expression and the press was derived from the public right to receive information, and it should not be regarded as a special right of journalists. Thus, the obligation of the press is to distribute correct information. In that respect, freedom of expression also includes duties and responsibilities.



In order to assess whether the restrictions incorporated in the impugned provision were needed in a democratic society and whether they could serve as a means for reaching the legitimate aim, it had to be clear which persons were considered to be State officials by the Criminal Code, and how wide the concept of "the State official" was in the impugned provision.

The Court analysed the use of the concept of "official" in several laws and found that it was too widely defined. The Court could not find any support for the viewpoint that all officials who were covered by the concept of "the State official" in the Criminal Code performed the kind of duties that required the special protection of the State. That being so, the Court found that the impugned provision extended that protection to too wide a range of officials. Consequently, the wording of the impugned provision was not proportionate to the legitimate aim and ran contrary to the right of freedom of expression, guaranteed by Article 100 of the Constitution.

The Court declared Article 271 to be contrary to Article 100 of the Constitution and null and void as of 1 February 2004, if up to that time the legislator failed to specify the range of officials, who – for performing the duties assigned to them – needed the protection of the Criminal Code.

#### *Supplementary information:*

As a consequence of that decision, the Parliament amended the Criminal Code and repealed the impugned provision.

#### *Cross-references:*

##### *Constitutional Court:*

- no. 2001-06-03 of 22.02.2002, *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2003-02-0106 of 05.06.2003, *Bulletin* 2003/2 [LAT-2003-2-007];
- no. 2003-03-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009].

##### *European Court of Human Rights:*

- *Castells v. Spain*, 23.04.1992, Vol. 236, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1992-S-003];
- *Bladet Tromso and Stensaas v. Norway*, 20.05.1999, *Reports of Judgments and Decisions* 1999-III.

#### *Languages:*

Latvian, English (translation by the Court).

*Identification:* LAT-2003-3-012

- a) Latvia / b) Constitutional Court / c) / d) 06.11.2003 / e) 2003-10-01 / f) On the Compliance of Article 83 (Item 4) of the Code of Civil Procedure with Article 92 of the Constitution (*Satversme*) of the Republic of Latvia / g) *Latvijas Vestnesis* (Official Gazette), 07.11.2003, 157(2922) / h) CODICES (Latvian, English).**

#### *Keywords of the systematic thesaurus:*

- 3.16 General Principles – **Proportionality**.  
 4.7.15.2 Institutions – Judicial bodies – Legal assistance and representation of parties – **Assistance other than by the Bar**.  
 5.3.13.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Scope**.  
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.  
 5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

#### *Keywords of the alphabetical index:*

Lawyer, representation, choice, restriction / Lawyer, fee.

#### *Headnotes:*

The impugned provision of the Code of Civil Procedure sets out which persons may act as representatives in civil proceedings. The requirement to retain the services of an advocate and the amount of the remuneration established for his or her services disproportionately restrict the right of a person of access to a court.

A person should be allowed, as much as possible, to freely choose his or her representative, including lawyers. When choosing a representative in civil proceedings, a person must give reasons for his or her choice, and the courts must take a decision as to whether that representative may act.

**Summary:**

An applicant filed an action with the Jelgava Court against the Jelgava City Hospital seeking reinstatement. The Jelgava Court dismissed the action. The applicant's spouse, the authorised representative of the applicant, lodged an appeal. As the case was very complicated, the need for qualified legal assistance at the appellate instance arose. The applicant asked two firms providing legal services to represent her in that court; however, they stated that they could not do so due to the impugned provision.

The applicant brought a constitutional claim. The impugned provision of the Code of Civil Procedure sets out which persons may act as authorised representatives in civil proceedings: "ascending and descending kin, spouse, full brothers and sisters of natural persons as well as persons who are authorised to and actually manage the property of the authorising person."

The applicant submitted that she had been denied the right to freely choose her representative in the civil proceedings, for the reason that the impugned provision permitted only a limited range of persons to act as representatives. The applicant argued that the impugned provision limited without reason her right to freely choose her representative, as she was compelled to retain the services of an advocate – a member of the only profession that, in accordance with the impugned provision, was able to guarantee quality and professional legal representation. However, the services of advocates being expensive, the applicant was "compelled" to represent herself in the civil proceedings or authorise her spouse, who did not have adequate professional knowledge, to do so. She concluded that her right to a fair trial had been violated.

The Constitutional Court pointed out that the right to a fair trial means also free access to a court. Moreover, in cases where a person for some reason may not bring a case before or address an appellate court, free access to a court also means the possibility of addressing the court with the assistance of a representative. A person exercises the right of choosing his or her representative in order to protect his or her rights and legitimate interests in a court.

The Court held that the impugned provision of Article 83 CCP restricted the right of a person to freely choose his or her representative in civil proceedings.

As the Court has concluded before, the right to a fair trial is not absolute and may be limited. Fundamental rights may be subject to restrictions in cases set out in the Constitution (*Satversme*) for the purpose of

protecting important public interests and where the principle of proportionality is observed. Thus, the Court had to assess whether the restriction in question to the right to a fair trial complied with the following requirements:

- a. it had been determined by law;
- b. it was in conformity with the legitimate aim that the state wished to attain by laying down the restriction;
- c. there were no less restrictive means that could have been used; and
- d. it complied with the principle of proportionality.

The Court found that the restriction of the fundamental right had been determined by law. The legitimate aim of the impugned provision was to ensure the effective representation of the parties in court. The means chosen by the legislator were as a whole appropriate for reaching the legitimate aim; however, they amounted to a serious restriction on some persons' ability to exercise their procedural rights.

In assessing whether the legitimate aim (i.e. allowing a limited range of persons to represent a natural person in civil proceedings) determined by the legislator could be reached by less restrictive means, the Court found that the limitation of the choice of the representative prevented the applicants from exercising their rights, as they might only seek the assistance of an advocate.

To ensure maximum free access of persons to courts, natural persons must be given the possibility of choosing adequate representation. In that way, the person, when choosing his or her representative in civil proceedings must give reasons for his or her choice, and the courts must take a decision on whether the representative may act. In cases where the court has concluded that the representative chosen by the party to the proceedings cannot render legal assistance that is compatible with the law, the court has the right to refuse to allow that representative to act for the party in the proceedings.

The Court pointed out that the right to free access to a court might be restricted to ensure more efficient representation in civil proceedings, but that restriction should be effected by the use of less restrictive means. Consequently, the restriction laid down by the legislator was not proportionate on the ground that representation in a court was not accessible to all persons; therefore, the impugned provision did not allow for the exercise of the right to a fair trial.

The Court declared Article 83.4 CCP incompatible with Article 92 of the Constitution (*Satversme*) and null and void as of the day of publication of the judgment.

### Cross-references:

#### Constitutional Court:

- no. 2000-03-01 of 30.08.2000, *Bulletin* 2001/1 [LAT-2000-03-004];
- no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-09-01 of 26.11.2003, *Bulletin* 2002/3 [LAT-2002-3-007];
- no. 2002-20-0103 of 23.04.2003;
- no. 2003-04-01 of 27.06.2003;
- no. 2003-08-01 of 06.10.2003.

#### European Court of Human Rights:

- *Golder v. the United Kingdom*, 21.02.1975, Vol. 18, Series A.

### Languages:

Latvian, English (translation by the Court).



### Identification: LAT-2003-3-013

**a)** Latvia / **b)** Constitutional Court / **c) / d)** 27.11.2003 / **e)** 2003-13-0106 / **f)** On the Compliance of Articles 57.1, 136.3 (Items 2 and 3) and 143.4 (Items 2 and 3) of the Labour Law with Article 106 of the Constitution (*Satversme*), Articles 1, 2 and 4 of the 28 June 1930 Convention Concerning Forced Labour and Article 1 of the 25 June 1957 Convention Concerning the Abolition of Forced Labour / **g)** *Latvijas Vestnesis* (Official Gazette), 27.11.2003, 168(2933) / **h)** CODICES (Latvian, English).

### Keywords of the systematic thesaurus:

5.3.5.2 Fundamental Rights – Civil and political rights – Individual liberty – **Prohibition of forced or compulsory labour.**

### Keywords of the alphabetical index:

Labour Law / Employment, employer, rights / Employment, employee, work, overtime.

### Headnotes:

The impugned provisions of the Labour Law set out that in certain cases and circumstances, an employer has the right to require an employee to perform work not provided for by the employment contract, as well as to demand overtime work from an employee without the employee's written consent. Such provisions, which aim at ensuring the normal operation of an undertaking, are in the interests of both the employer and the employee. Thus, the work envisaged in the impugned provisions cannot be regarded as forced labour within the meaning of Article 106 of the Constitution.

### Summary:

The Prosecutor General, the applicant, challenged the compatibility of Articles 57.1, 136.3 (Items 2 and 3) and 143.4 (Items 2 and 3) of the Labour Law with Article 106 of the Constitution, Articles 1, 2 and 4 of the International Labour Organisation (hereinafter, ILO) Convention (no. 29) Concerning Forced Labour and Article 1 of the ILO Convention (no. 105) Concerning the Abolition of Forced Labour.

The impugned provisions set out the following. An employer has the right to require an employee to perform work not provided for by the employment contract for a period not exceeding one month within a one-year period in order to avert the consequences caused by *force majeure*, an unexpected event or other exceptional circumstances that adversely affect or may affect the normal business activities of the undertaking. In the event of a difficult economic situation, an employer has the right to require an employee to perform work not provided for by the employment contract for a period not exceeding two months within a one-year period. In some exceptional cases, an employer has the right to demand overtime work from an employee, without the employee's written consent.

The applicant argued that the impugned provisions permitted forced labour or compulsory labour as they gave the employer the right to require an employee to perform work not provided for by the employment contract, overtime work or to work during the weekly day of rest, without the consent of the employee. The impugned provisions do not envisage participation in the relief of disasters and their effects, with the exception of cases where there is a need to avert consequences that may adversely affect normal business activities. The applicant pointed out "the requirements of the impugned provisions ... [did] not aim at the use of forced labour for public purposes or as an extraordinary undertaking, but envisage[d] granting the employer the right of requiring an employee – without the latter's consent – to perform unforeseen

work, which ... [was] connected with economic interests of the enterprise, and ensure[d] normal business activities and completion of urgent work".

The Court underlined that Article 106 of the Constitution does not give a definition of forced labour. It only lists the kind of work that shall not be deemed forced labour – participation in the relief of disasters and their effects, and work pursuant to a court order. The European Court of Human Rights uses the definition of forced labour found in Article 2.1 of the ILO Convention no. 29. The European Court of Human Rights regards that definition as binding. As Latvia is a State Party to the Convention, the judgments of the European Court of Human Rights are binding on it, and it must respect the conclusions on the interpretation of international legal rules that are incorporated in the judgments.

The Court pointed out that forced labour is any work or service that is unjust and oppressive, and that the person has not volunteered to perform. Forced labour is prohibited not only in public-law relations but also in civil-law relations and labour-law relations, which are regulated by the Labour Law.

However, the Court established that the objective of the impugned provisions was to avert the consequences caused by *force majeure*, an unexpected event or other exceptional circumstances that might adversely affect or affect normal business activities of the undertaking, as well as to complete urgent unforeseen work within a specified period of time. Therefore, the claim was not true of forced labour being envisaged for the objectives of economic development. The impugned provisions aim at ensuring the normal operation of an undertaking and are in the interests of both the employer and the employee. The impugned provisions did not contain any of the aims and means prohibited by the international instruments. Nor could the work be qualified unjust and cruel. Thus the work, envisaged in the impugned provisions, could not be regarded as forced labour within the meaning of Article 106 of the Constitution.

The Court declared the impugned provisions compatible with Article 106 of the Constitution.

#### Cross-references:

European Court of Human Rights:

- *Van der Mussele v. Belgium*, 23.11.1983, Vol. 70, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1983-S-004].

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2005-1-001

- a) Latvia / b) Constitutional Court / c) / d)** 17.01.2005 /  
**e) 2004-10-01 / f)** On the Compliance of Sections 132.1.3 and 223.6 of the Civil Procedure Code with Article 92 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), no. 9(3167), 18.01.2005 / **h)** CODICES (Latvian, English).

#### Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.  
 4.7.14 Institutions – Judicial bodies – **Arbitration**.  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.  
 5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract**.

#### Keywords of the alphabetical index:

Civil right, principle / Arbitration, procedure, fundamental rights and freedoms, guarantees.

#### Headnotes:

From the right to property guaranteed in the Constitution (*Satversme*) follows also the right to use it freely, notably when concluding civil agreements. This principle of civil freedom would be restricted if the parties did not have the possibility to agree on terms of the agreement they consider acceptable, including envisaging adjudication of eventual disputes in an arbitration court in order to take advantage of this particular procedure.

An agreement between parties providing for adjudication of disputes in arbitration court, as permitted by the Civil Procedure Code, does not infringe on the right of access to a court provided by Article 92 of the Constitution.

**Summary:**

The Constitutional Section 132.1.3 and Section 223.6 of the Civil Procedure Code (hereinafter, the "impugned norms") determine that a judge shall refuse to accept a statement of a claim and terminates proceedings in a matter if "the parties have, in accordance with procedures set out by law, agreed to transfer of the dispute for it to be adjudicated by an arbitration court".

Court recalled that Arbitration courts do not belong to the system of judicial power, which has been determined in Chapter VI of the Constitution and in the Law "On Judicial Power".

It follows from the content of the impugned norms that, when challenging their conformity with Article 92 of the Constitution, the applicant has considered them to be unconformable with concrete rights, guaranteed in the article, namely, the right of access to a court.

With the reference to his previous judgments the Constitutional Court points out, that the substantial and procedural aspects of the right to a fair court are inseparably connected: the fairness of the court process would be of no use if the accessibility to the court were not provided and, vice versa, accessibility to court would be unnecessary if the fairness of the process were not provided.

The Constitutional Court points out, that the right to a fair court, determined in Article 92 of the Constitution neither taken separately nor in the context with the international human rights norms, is not absolute and may be restricted.

The Constitutional Court holds that from the right to property, guaranteed in the Constitution, follows also the right to freely use it, for example, when concluding civil agreements. The impugned norms secure civil freedom as the agreement of the parties on the adjudication of the dispute at the arbitration court would not be possible in its traditional and internationally adopted interpretation, if the proceedings in the court of general jurisdiction, when reviewing the matter on its merit, would be allowed, even though the parties had agreed on adjudication of the dispute at an arbitration court.

The Constitutional Court thus established that the impugned norms have a legitimate aim, namely, it secures quick and effective review of matters, lessens the work-load of the courts as well as provides several other advantages.

The Constitutional Court, when assessing the proportionality of the restriction of access to court, following from the impugned norms, points out, that the restriction itself is restricted. Regardless of the will of a person, the legislator has in certain cases and in a certain manner forbidden to restrict the rights, guaranteed in the Constitution.

In accordance with the general principle the state is not responsible for violations of the fundamental rights in arbitration court proceedings. However, the state has the obligation, first of all, to ensure measures of protection against the above violations of the procedural rights and, secondly, not to authorise the result of such proceedings of the arbitration court. In difference from the greatest number of states, in Latvia both the above obligations merge, as the law does not envisage the possibility to raise objection to the arbitrator or request abrogation of the arbitral award. Therefore the control of arbitration courts is concentrated on the stage of issuance of the writ of execution. One may doubt whether such a solution is optimal, as well as whether it is necessary to resign from the model of control of arbitration courts, which is well-known and well-accepted in the world, however, the state has extensive freedom of action in determining the regulation on the arbitration court procedure.

The Constitutional Court stresses that the impugned norms shall be read in conjunction with other norms of the Civil Procedure Code, which restrict the range of matters to be adjudicated by arbitration court, as well as envisage involvement of the court in solution of such disputes, which – in accordance with the agreement – are subject to arbitration.

The Constitutional Court finds that it is not possible to link the arbitration procedure with the possibility to adjudicate the particular case on its merits by a court of general jurisdiction, as the impugned norms prohibit it. Therefore there is no less encroaching alternative for reaching the identified legitimate aims. In the same way the Constitutional Court concluded that the extent of the restriction to address a court, determined by the impugned norms, is reduced by the provisions of the civil procedure and other norms. Therefore the impugned provisions are proportionate to the aim.

Simultaneously the Constitutional Court noticed several problems of the arbitration court procedure.

The Court declared Sections 132.1.3 and 223.6 of the Civil Procedure Code in conformity with Article 92 of the Constitution.

### *Supplementary information:*

Following the Constitutional Court judgment, significant amendments to the Civil Procedure Code regarding arbitration courts were made.

### *Cross-references:*

#### Constitutional Court:

- no. 2000-03-01, 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2001-08-01, 17.01.2002, *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-10-01, 05.03.2002;
- no. 2002-04-03, 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-09-01, 26.11.2002, *Bulletin* 2002/3 [LAT-2002-3-009];
- no. 2002-20-0103, 23.04.2003, *Bulletin* 2003/1 [LAT-2003-1-005];
- no. 2003-04-01, 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009].

#### European Court of Human Rights:

- *Golder v. the United Kingdom*, 21.02.1975, Vol. 18, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1975-S-001];
- *Deweert v. Belgium*, 27.02.1980, Series A, no. 35, *Special Bulletin – Leading cases ECHR* [ECH-1980-S-001];
- *Fayed v. United Kingdom* [1994], 21.09.1994, Series A, no. 294-B;
- *Albert and Le Compte v. Belgium*, 10.02.1983, Series A, no. 58; [ECH-1983-S-001];
- *De Wilde, Ooms and Versyp v. Belgium*, 18.06.1971, Series A, no. 12; *Special Bulletin – Leading cases ECHR* [ECH-1971-S-001];
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, *Reports of Judgments and Decisions* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-005];
- *Océano Grupo Editorial SA v. Roció Murciano Quintero* [2000];
- *Delcourt v. Belgium*, 17.01.1970, Series A, no. 11, *Special Bulletin – Leading cases ECHR* [ECH-1970-S-001];
- *Piersack v. Belgium*, 01.10.1982, Series A, no. 53.

### *Languages:*

Latvian, English (translation by the Court).



### *Identification:* LAT-2005-2-005

- a) Latvia / b) Constitutional Court / c) / d)** 13.05.2005 / **e)** 2004-18-0106 / **f)** On the Compliance of Section 9.3 of the Transitional Provisions of the Education Law with Articles 1, 91 and 114 of the Constitution, Article 2 Protocol 1 ECHR as well as with Article 14 ECHR (linked with Article 2 Protocol 1 ECHR), Articles 26 and 27 of the International Covenant on Civil and Political Rights, Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination, Articles 2 and 30 of the Convention on the Rights of the Child as well as Article 18 of the Vienna Convention on the Law of Treaties / **g)** *Latvijas Vestnesis* (Official Gazette), 77(3235), 17.05.2005 / **h)** CODICES (English, Latvian).

### *Keywords of the systematic thesaurus:*

- 2.1.1.4.10 Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969**.
- 2.1.1.4.16 Sources – Categories – Written rules – International instruments – **Framework Convention for the Protection of National Minorities of 1995**.
- 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
- 5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.
- 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

### *Keywords of the alphabetical index:*

Language, education / Education, language, official, minimum quota / Minority, Framework Convention for the Protection of Minorities.

### *Headnotes:*

The determination of proportion of language use for acquirement of study content is not at variance with Articles 1, 91 and 114 of the Constitution and international norms.

### *Summary:*

According to the contested norm, from 1 September 2004 not less than three fifths of the total yearly study load, including foreign languages, of the study contents in the tenth form and the first academic years of the educational institutions shall be ensured in the official language. That means that at least 22 out of 36 classes, not less than five study subjects (including foreign languages) should be taught in the official State language.

The claimant – twenty deputies of the 8<sup>th</sup> Saeima – maintained that the contested norm did not comply with Articles 1, 91 and 114 of the Constitution and several international legal provisions.

When assessing the conformity of the contested provision with several legal norms, incorporated within the Constitution and international human rights instruments, the Constitutional Court took into consideration the fact that the above matter could not be reviewed in isolation from the complicated ethno-demographic situation, which came about as the result of the Soviet occupation. The content of the impugned norm was causatively connected with the situation.

By reference to Judgment no. 2BVR 1481/04 of the German Federal Constitutional Court of 14 October 2004, the Constitutional Court pointed out that, when interpreting the Constitution and international liabilities of Latvia, one should look for an interpretation, which was non-confrontational but which would, rather, ensure harmony.

The Court established that the content of Article 91 of the Constitution included the norms of Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination and Article 2.1 of the Convention on the Rights of the Child. Article 114 of the Constitution included not only the norms of Article 30 of the Convention of the Rights of the Child and Article 27 of the International Covenant on Civil and Political Rights. The conformity of the contested provision with Article 2 Protocol 1 ECHR should be analysed in conjunction with Article 112 of the Constitution.

The Court held that the signed Framework Convention for the Protection of National Minorities was not binding on Latvia as it had not yet been ratified. In its turn, the aim of Article 18 of the Vienna Convention on the Law of Treaties is simply to overcome obstacles which make it difficult to ratify international contracts. It could not be established that the contested norm would defeat the aims and objects of the Framework Convention for the Protection of National Minorities. Thus the contested norm complied with Article 18 of the Vienna Convention on the Law of Treaties.

The Court considered that in Latvia possibilities for maintaining and developing their language, ethnic and cultural originality were established for persons belonging to ethnic minorities. Determination of proportion of language use for acquirement of study content was not at variance with Article 114 of the Constitution.

The Court also stressed that the contested norm was not at variance with Article 2 Protocol 1 ECHR on the observance of the religious and philosophical convictions of parents in the process of education.

The Court pointed out that the first sentence of Article 112 of the Constitution, which determines that everyone has the right to education, should be interpreted in exactly the same way as Article 2 Protocol 1 ECHR. In their turn, the second and third sentences of Article 112 of the Constitution envisage more extensive rights for persons. Even though Article 2 Protocol 1 ECHR does not impose the duty of creating an educational system of a certain type upon the state, the second sentence of Article 112 of the Constitution obliged the State to ensure that everyone might acquire primary and secondary education free of charge. The third sentence of this article even determines that primary education shall be compulsory.

As the secondary school educational system was created and still exists in Latvia, the first and second sentences of Article 112 of the Constitution undoubtedly covered the question of accessibility to secondary education. Arguably, the contested norm, taking linguistic factors into account, might be regarded as being restrictive of the right included in this article. However the fact as to whether the restriction is justifiable, taking into consideration the formulation included in the claim, should be assessed as read in conjunction with Article 14 ECHR and Article 91 of the Constitution.

The Constitutional Court recognised that the contested norm only partly envisaged different attitudes to persons, who are in different circumstances, and thus restriction of the right to education was established. Therefore it was necessary to assess the above restriction, namely, to ascertain whether it had been determined by law, whether it had a legitimate aim and whether it complied with the principle of proportionality.

The Court held that the contested norm had legitimate aims – strengthening of the use of the State language and the protection of the rights of other persons. The measure chosen by the legislator – use of the official language in acquiring knowledge of study content by determining the proportion of the use of the language of instruction – was, overall, appropriate for reaching legitimate aims and there were no other more lenient measures to reach the legitimate aims.

The Court established that it was not possible to verify whether the implementation of the contested norm would cause decline in the quality of education and educational process. However the existing controlling mechanism of education and the educational process was not effective enough.

The Court stressed the necessity of finding a balanced solution between ensuring a lenient transition and not violating the interests of other pupils by the determination of such a transition. However, if the norm in question is adequately interpreted, it should be concluded that it was in conformity with Article 91 of the Constitution.

The Court held that the norm in question conformed to Articles 1, 91 and 114 of the Constitution and to the above mentioned international norms.

#### Cross-references:

##### Constitutional Court:

- no. 2002-04-03, 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2003-02-0106, 06.06.2003, *Bulletin* 2003/2 [LAT-2003-2-007];
- German Federal Constitutional Court, 14.10.2004, no. 2BVR 1481/04.

##### European Court of Human Rights:

- *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976), Series A, no. 23; *Special Bulletin – Leading cases ECHR* [ECH-1976-S-002];
- Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. *Belgium (Merits)*, Series A, no. 6;
- *Cyprus v. Turkey*, *Reports of Judgments and Decisions* 2001-IV.

##### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2006-1-002

- a) Latvia / b) Constitutional Court / c) / d) 08.03.2006 / e) 2005-16-01 / f) On the Conformity of Section 13 of 20 December 2004 Law "Amendments to the Law On Residential Tenancy" with Sections 1, 91 and 105 of the Constitution / g) Latvijas Vestnesis (Official Gazette), 40(3408), 09.03.2006 / h) CODICES (Latvian, English).**

#### Keywords of the systematic thesaurus:

- 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
- 3.9 General Principles – **Rule of law**.
- 3.10 General Principles – **Certainty of the law**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
- 5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation**.

#### Keywords of the alphabetical index:

Denationalisation, building / Tenancy, rental payment, maximum.

#### Headnotes:

In a democratic state the principle of legitimate trust (trust in law) does not preclude the implementation of extensive and vital reforms. However, a reform with an unlimited time span may contradict this principle. In carrying out the reform, the State has a duty to bring about a reasonable conclusion. Rent, determined under administrative procedure, would be substituted by a lasting solution, adapted to the conditions of a market economy, which would balance the interests of both pre-reform tenants and property owners.

#### Summary:

I. Denationalisation and the return of buildings to their lawful owners after the renewal of the national independence of Latvia were carried out under the property reform. The legislation governing this reform also covered the relationship between the owners of the properties and those who had occupied the properties before the reform, hereinafter referred to as "pre reform tenants". Previous provisions within the Tenancy Law set out a maximum rental payment covering the period to 31 December 2004.

Parliament passed the legislation containing the impugned norm on 20 December 2004 and it took effect on 1 January 2005. Several amendments were made to paragraph 4 of the Transitional Provisions of the Tenancy Law. A maximum rental period was also set out, covering the period up to 31 December 2007.

The petitioners – who owned several denationalised buildings – claimed that the impugned norm breached their fundamental rights, determined by Articles 1, 91 and 105 of the Constitution. They requested that it be declared null and void from the moment of its adoption. They also pointed out that the impugned norm came

into effect only two days after it had been passed, which resulted in a gross violation of the principle of trust in law. The owners were given no opportunity of adapting to the sudden changes.

II. The Constitutional Court pointed out that in bringing about property reform, for example, when denationalising and returning buildings to their lawful owners, the legislator must observe the rules of a state governed by law. One problem which the petitioners have with the amendments to the legislation is that it was adopted more than ten years after the expiry of the time for submission of applications for restoration of buildings by owners of the buildings.

The Court reiterated that property rights also include the right to derive benefit from ownership, *inter alia* through rental. This not only ensures the maintenance of the respective property but also brings profit to the owner.

The Court observed that the impugned norm restricts owners' rights to demand rental payments from the pre-reform tenants. The rent would cover reasonable maintenance expenses and be substantiated by calculations, the correctness and validity of which the owner could prove in court. As a result, the owners have to cover the expenses from other resources. At the same time, the impugned norm prevents owners from gaining a reasonable profit from renting their property. It therefore restricts the rights of owners of properties which have been denationalised and returned to them, such rights being set out in Article 105 of the Constitution.

The Court stated that the right to property is not absolute. Firstly, property shall serve public interests. Secondly, the right to a property can be restricted if the restrictions are determined by law, have a legitimate aim and are proportionate.

When the legislator is determining rental rights, he must not only take into consideration constitutional property rights, but also the requirement to utilise the property in a socially fair way.

The Court found that the legitimate aim of the impugned norm is the protection of poor and needy pre-reform tenants where there is a shortage of reasonably-priced accommodation. On the whole, this norm is appropriate for reaching the legitimate aim. The problem with it is that it does not link the maximum amount of rental payment with the financial position of the tenants. It offers the possibility of low rent not only to the poor and needy but also to those who might be in a better financial position than the owner of the property which has been denationalised. The aim set out above cannot

therefore justify the restrictions on rental payments for all pre-reform tenants.

The Court acknowledged the duty of the State to safeguard the welfare of its residents. However, it took the view that there were other ways of achieving this, and not just by the onerous regulation of tenancy rights, although a short-term interference in tenancy law might be justifiable. It concluded that the restrictions on the rights of property owners were not proportionate to the public benefit gained from the restrictions.

In a democratic state the principle of legitimate trust (trust in law) does not preclude extensive and vital reforms. A reform with an unlimited time span might contravene this principle. In achieving the reform, the State was obliged to bring it to a reasonable conclusion, under which rent, determined under administrative procedure, would be substituted by a lasting solution, adapted to the conditions of a market economy and which would balance the interests of both pre-reform tenants and the property owners.

The Court declared the impugned norm to be incompatible with Articles 1 and 105 of the Constitution and invalid with effect from 1 January 2007.

#### Cross-references:

##### Constitutional Court:

- no. 2001-12-01, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-01-03;
- no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-12-01, *Bulletin* 2003/1 [LAT-2003-1-004];
- no. 2003-04-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-008];
- no. 2004-10-01, *Bulletin* 2005/1 [LAT-2005-1-001];
- no. 2005-12-0103.

##### Other Constitutional Courts:

- Republic of Estonia Supreme Court, no. 3-4-1-20-04, 02.12.2004;
- German Federal Constitutional Court Judgment (*BVerfGE* 37, 132);
- Constitutional Court of the Czech Republic, no. IV.US 524/03, 23.09.2004, *Bulletin* 2004/3 [CZE-2004-3-015];
- Constitutional Tribunal of Poland, no. K48/01, 02.10.2002, *Bulletin* 2002/3 [POL-2002-3-031];
- Constitutional Tribunal of Poland, no. K 4/05, 19.04.2005.

**European Court of Human Rights:**

- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31, p. 23, § 5; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002].
- *Mellacher and others v. Austria*, 23.11.1989;
- *Velosa Barreto v. Portugal*, 21.11.1995; *Bulletin* 1995/3 [ECH-1995-3-020];
- *Scollo v. Italy*, 28.09.1995, *Bulletin* 1995/3 [ECH-1995-3-018];
- *Immobiliare Saffi v. Italy*, no. 22774/93, 28.07.1999, *Bulletin* 1999/2 [ECH-1999-2-007];
- *Broniowski v. Poland*, no. 31443/96, 30.01.2004;
- *Hutten-Czapska v. Poland*, no. 35014/97, 22.02.2005.

**Languages:**

Latvian, English (translation by the Court).



**Identification:** LAT-2006-3-006

**a) Latvia / b) Constitutional Court / c) / d)** 20.12.2006 / **e) 2006-12-01 / f)** On the Compliance of Sections 1.1, 4.1, 6.3, 22 and 50 of the Law on the Office of the Prosecutor with Sections 1, 58, 82, 86 and 90 of the Constitution / **g) Latvijas Vestnesis** (Official Gazette), no. 206(3574), 28.12.2006 / **h) CODICES** (Latvian, English).

**Keywords of the systematic thesaurus:**

3.4 General Principles – **Separation of powers**.  
4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel**.

**Keywords of the alphabetical index:**

Prosecutor, role / Prosecutor, Council of Europe, recommendation / Prosecutor, independence / Prosecutor, part of judicial power.

**Headnotes:**

The existence of the Office of the Prosecutor – an institution of judicial power – is the most effective means of ensuring the smooth running of the Prosecutor's Office, and the independence of the judiciary. It also complies with the principle of separation of power.

**Summary:**

I. The case was submitted by the Administrative District Court. This Court reviewed the administrative matter of the abrogation by the Acting Prosecutor General, the reinstatement of Aivars Rutks to the post of Prosecutor, and compensation for material loss.

The Administrative District Court sought clarification of two legal issues:

1. In the context of the status of the Prosecutor's Office within the State constitutional system, does Section 1.1 of the Law on the Office of the Prosecutor comply with Sections 1, 58, 82 and 86 of the Constitution?
2. With regard to the criteria of clarity and certainty of the law and the ability of citizens to know their rights, do Sections 4.1, 6.3, 22 and 50 of the Law on the Office of the Prosecutor comply with Section 90 of the Constitution?

II. The Constitutional Court stressed that the status of Office of Prosecutor and its place within the State constitutional system shall be determined in accordance with the principle of the separation of powers. This principle is a pivotal legal issue for contemporary State powers. In the Constitution, the competence of the State of Latvia is divided among the constitutional institutions of State power – citizens, Parliament, the President, the Cabinet of Ministers, courts, the Constitutional Court and State Control. This is an exhaustive division.

The Court noted that Chapter VI of the Constitution regulates the constitutional basis of the judiciary, but that it is specified in the Law on Judicial Power. The first sentence of Section 86 of the Constitution empowers the legislator to pass laws, which would confer on state institutions the function of taking decisions in court proceedings, as well as that of the adoption of procedural laws, which would determine the procedure of adjudication. Section 82 of the Constitution does not contain an exhaustive list of those institutions which adjudicate justice; neither does it enumerate those institutions with judicial power. The institutions to which citizens can apply for the protection of their rights and legitimate interests may be determined in other legislation besides the Constitution.

Reference was made to Recommendation Rec(2000)19, on the Role of Public Prosecution in the Criminal Justice system, adopted on 6 October 2000 by the Committee of Ministers of the Council of Europe. The Court pointed out that the status of Office of Prosecutor might differ from state to state. The integration of the Office of Prosecutor within a specific area of state power is an issue of usage and tradition.

The choice of status of Office of Prosecutor will be dictated by the traditions of the particular state and its judicial system. Any alterations to this state of affairs in a democratic state, under the rule of law, would be made by legislation.

The Court noted that the existence of the Office of the Prosecutor – an institution of judicial power – is the most effective means of ensuring the smooth running of the Prosecutor's Office, and the independence of the judiciary. It also complies with the principle of separation of power. The Court agreed with the opinion that the Office of Prosecutor is an integral part of the judiciary. Control carried out by the executive power and influence on the performance of the Office of the Prosecutor cannot be countenanced. This would be at odds with the notion of democracy, as set out in Section 1 of the Constitution. In a democratic state a prosecutor should act as an independent, inviolable and politically neutral official, within the ambit of the judiciary, which is subordinated only to the law and to rights. Those provisions of the Law on the Office of Prosecutor which regulate the status of the Office of Prosecutor, comply with Sections 1 and 86 of the Constitution.

The Court established that the contested norms also complied with Sections 58, 62, 86 and 90 of the Constitution.

#### Cross-references:

##### Constitutional Court:

- No. 03-05-(99), 01.10.1999, *Bulletin* 1999/3 [LAT-1999-3-004];
- No. 2001-10-01, 05.03.2002;
- No. 2004-06-01, 11.10.2004;
- No. 2004-10-01, 17.01.2005, *Bulletin* 2005/1 [LAT-2005-1-001];
- No. 2004-14-01, 06.12.2004, *Bulletin* 2004/3 [LAT-2004-3-009];
- No. 2004-16-01, 04.01.2005;
- No. 2004-25-03, 22.04.2005;
- No. 2006-05-01, 16.10.2006, *Bulletin* 2006/3 [LAT-2006-3-004].

##### European Court of Human Rights:

- *The Sunday Times v. The United Kingdom*, 26.04.1979, Series A, no. 30, p. 31, paragraph 49, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-001];
- *Kokkinakis v. Greece*, 25.05.1993, Series A, no. 260-A, p. 19, paragraph 40, *Special Bulletin – Leading cases ECHR* [ECH-1993-S-002].

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2007-3-002

**a) Latvia / b) Constitutional Court / c) / d) 11.04.2007 / e) 2006-28-01 / f) On the Compliance of the Second Sentence of Section 22.4 of the Law "On Personal Income Tax" with Article 92 of the Constitution of the Republic of Latvia / g) Latvijas Vestnesis (Official Gazette), no. 62(3638), 17.04.2007 / h) CODICES (Latvian, English).**

#### Keywords of the systematic thesaurus:

- 1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies**.
- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court**.
- 3.4 General Principles – **Separation of powers**.
- 3.16 General Principles – **Proportionality**.
- 3.19 General Principles – **Margin of appreciation**.
- 4.6.6 Institutions – Executive bodies – **Relations with judicial bodies**.
- 4.7.9 Institutions – Judicial bodies – **Administrative courts**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

#### Keywords of the alphabetical index:

Tax, assessment by the Court / Tax, tax authority, rights / Appeal, time-limit / Administration, proper functioning / Evidence, submission, deadline.

#### Headnotes:

The prohibition on the submission of evidence during court proceedings constitutes a restriction on the right to a fair trial under the Constitution. It hampers the implementation of the principles of versatile, objective, and fair examination of cases, as set out in procedural laws. The mechanism of rights protection cannot be

deemed efficient, if due to inefficiency of the contestation phase, there is no reason to contest in a higher institution the corresponding decision.

The objective of administrative courts is to subject actions of executive power to independent, objective, and competent court control. Administrative courts exercise control over the operations and expediency of state administration. It follows from the principle of separation of powers that the administrative court is not entitled to make decisions, the adoption of which is within the competence of the executive power.

Implementation of a correct and fair fiscal regime, and the protection of the rights and legal interests of taxpayers, is not possible without decent, fair, competent and efficient court control.

The duty to pay tax always entails restrictions on property rights, as well as other restrictions established by law. These must be proportionate to the legitimate objective – protection of values of constitutional importance.

The legislator has a considerable margin of appreciation in establishing tax control and procedure, but there are limits to it. Freedom of action is only to be deployed in order to ensure performance of the taxpayer's obligations.

Where such power is used in a way that militates against the objectives of the safeguarding of rights and personal interests, this is not compatible with the principles of a democratic state under the rule of law.

### **Summary:**

I. The Constitutional Court examined a case brought before it in applications by the Department of Administrative Cases of the Senate of the Supreme Court and the Administrative Regional Court.

Under the Law on Personal Income Tax, establishing the amount of taxable income and the amount of personal income tax to be paid, documentation in support of income and expenditure and other material will only be recognised as evidence if it is submitted to the State Revenue Service (the SRS) before the date established by the SRS. Any documentation handed in after that date will not be recognised as evidence.

The applicants argued that this provision disproportionately restricted the right to fair trial.

II. The Constitutional Court emphasised that the objective of a judicial state is to ensure efficient control of operations of state administration. Such control

occurs in two stages – in the superior institution in the frameworks of state administration, and thereafter – in the Administrative Court. The superior institution examines the case repeatedly in point of fact. The Administrative Court implements control over lawfulness or considerations of expediency of an administrative act passed by the institution within the framework of margin of appreciation.

The contested provision provided for mandatory action on the part of the institution, excluding freedom of action. The institution can only assess information and evidence if the taxpayer submits it to before the SRS deadline.

There is nothing to stop the Administrative Court from accepting evidence submitted after SRS deadline. However, the Administrative Court cannot evaluate the case in its terms, since the principle of separation of power prevents courts from undertaking the implementation of state administration functions.

The Court reiterated that the right to fair trial includes fair and impartial adjudication. This, in turn, includes the right to an option to submit evidence. The Court took the view that the provision under scrutiny restricted the right to fair trial. There is no direct provision within the Constitution for cases where the right to fair trial can be restricted. Nonetheless, the rights are not absolute; a certain degree of limitation is possible.

The Court turned to the question of the lawfulness of the restriction. It held that it had a legitimate objective, namely the protection of interests of society as a whole, including human rights and social welfare, the efficient collection of taxes and the prevention of evasion. However, the Constitutional Court concluded that the restriction was disproportionate. Less restrictive means could have been deployed, which would not have had such a restrictive impact on the right to fair trial, whilst simultaneously safeguarding efficient tax administration and operation of court institutions.

The Constitutional Court does not have the power to interfere with the specifics of how the government decides to collect taxes. The Court established that this is in fact the State's responsibility, deriving from the right to fair trial, to ensure a possibility for a person to submit evidence at full extent at any stage of the procedure, as well as express argumentation with respect to the evidence submitted by the opposing party.

The Constitutional Court found the provision to be in conflict with Article 92 of the Constitution.

It postponed the repeal of the provision, to allow the legislator time to develop and implement new regulations. At the same time, in order to safeguard the

rights of those who had brought cases before the Administrative Court prior to the handing down of the present judgment, the Court held that, from their perspective, the provision would be invalid from the date of the adoption of that judgment.

#### Cross-references:

##### Constitutional Court:

- no. 2001-10-01, 05.03.2002;
- no. 2002-04-03, 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008].

##### European Court of Human Rights:

- *Bendenoun v. France*, 24.02.1994, Series A, no. 284, p. 20, para 47, *Bulletin* 1994/1 [ECH-1994-1-004];
- *Golder v. United Kingdom*, 21.02.1975, Series A, no. 18, p. 18, para 38; *Special Bulletin – Leading cases ECHR* [ECH-1975-S-001];
- *Hentrich v. France*, 22.09.1994, Series A, no. 296-A, pp. 19-20, para 39; *Bulletin* 1994/3 [ECH-1994-3-013].

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2007-3-005

**a) Latvia / b) Constitutional Court / c) / d) 18.10.2007 / e) 2007-03-01 / f)** On Compliance of the Words “for an Unlimited Term” of Part 1 of Section 7 of the Constitutional Court Law with Articles 83, 91.1 and 101.1 of the Constitution / **g) Latvijas Vestnesis** (Official Gazette), no. 170 (3746), 23.10.2007 / **h) CODICES** (Latvian, English).

#### Keywords of the systematic thesaurus:

1.1.2.1 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Necessary qualifications**.

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.

4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office**.

#### 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.

#### Keywords of the alphabetical index:

Civil service, term of office, specific rights after expiration.

#### Headnotes:

Rights to fulfil civil service are not confined to those holding the office of a civil servant or a similar position in public administration. They also extend to those fulfilling public service in the position of a public prosecutor or a justice. Rights to fulfil civil service do not bestow a guaranteed right to occupy a certain position in the civil service.

The responsibility to present and justify the legitimate objective behind different treatment during Constitutional Court proceedings falls primarily upon the institution that has passed the contested act. This remains the case where Parliament has not indicated the legitimate objective of the different treatment.

The legitimate objective behind the necessity to impose certain requirements on those who put themselves forward for judicial office and the order according to which persons are admitted to judicial office is the right of other persons to a fair trial.

Article 83 of the Constitution states that judges are to be independent and subject only to the law. It also obliges the legislator to set out clear guidance, in legislation on the judicial system, for the development of judges’ careers. The absence of such rules or a margin of appreciation for the executive power when deciding on the development of a judge’s career may jeopardise the independence of judges.

#### Summary:

I. The Ombudsman and a former Constitutional Court judge submitted an application contending a violation not only of the right to hold a position in the civil service, (including the right to fulfil it in the position of a justice), and the principle of equality. Section 7.4 of the Constitutional Court Law guarantees the rights to the former position of a judge only for somebody who, under the Law on Judicial Power, has been appointed to judicial office for an unlimited term.

II. The Constitutional Court reiterated that rights to fulfil public service do not bestow guaranteed rights to occupy a certain position in the civil service. Article 101 of the Constitution provides in general for the rights of a person to continue fulfilling public service. The fact that

the legislator has not put in place a special procedure for justices of the Constitutional Court to continue civil service once their term of office has expired does not per se violate the basic rights established in Article 101 of the Constitution.

The Constitutional Court noted that Section 7.4 of the Constitutional Court Law sets out different rules for continuation of civil service for justices of the Constitutional Court in the issue of legal policy. This falls within the competence of the legislator. Although the regulation of these issues might be useful, the absence of a separate regulation per se does not violate basic rights.

The establishment of a special order for the continuation of civil service for separate groups of persons is an issue for political determination by the legislator. Nonetheless, the legislator must observe the basic rights and general legal principles established in the Constitution, particularly, the principle of equality before the law.

The Constitutional Court examined the compliance of the contested provision with Article 91 of the Constitution, which guarantees equality of all persons. It found that there was a legitimate objective behind the necessity to impose certain requirements on those standing for judicial office and the order in which persons are appointed to the position of a justice, namely the rights of other persons to a fair trial. In order to justify the different treatment, the legitimate objective must comply with the principle of proportionality.

In order to establish whether the principle of proportionality had been observed, the Constitutional Court investigated whether the means selected by the legislator were appropriate for achieving the legitimate objective, whether methods that are more lenient existed of reaching it, and whether the legislator's actions were commensurate or proportionate. Noting the importance of the Constitutional Court as a constitutional institution and considering the applicant's situation, the Constitutional Court concluded that the means selected were not appropriate for the reaching the legitimate objective. Thus, the contested provision did not comply with Article 91 of the Constitution.

The Constitutional Court assessed whether the principle of judicial independence had been observed. Article 83 of the Constitution requires the legislator to set out clear guidance for the development of a judge's career in the laws on the judicial system. Absence of such order of freedom of action provided by institutions of the executive power when deciding on the development of a judge's career may jeopardise independence of judges. Since the legislator has not

provided for an order of exercise of rights in the contested provision, it does not comply with Article 83 of the Constitution.

One judge submitted a dissenting application. He agreed that the Constitutional Court had to eliminate the violation of the rights of the former justice resulting from the application of the contested provision. However, he disagreed with several of the arguments and conclusions within the judgment.

#### Cross-references:

##### Constitutional Court:

- no. 2006-31-01, 14.06.2007;
- no. 2006-30-03, 02.05.2007;
- no. 2006-12-01, 20.12.2006;
- no. 2005-24-01, 11.04.2006;
- no. 2005-12-0103, 16.12.2005;
- no. 2005-02-0106, 14.09.2005;
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2004-04-01, 05.11.2004, *Bulletin* 2004/3 [LAT-2004-3-008];
- no. 2003-08-01, 06.10.2003, *Bulletin* 2003/3 [LAT-2003-3-010];
- no. 2002-15-01, 23.12.2002;
- no. 2002-06-01, 04.02.2003;
- no. 2001-12-02, 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2001-10-01, 05.03.2002;
- no. 2001-08-01, 17.01.2002; *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-06-03, 22.02.2002; *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2001-02-0106, 26.06.2001, *Bulletin* 2001/2 [LAT-2001-2-003];
- no. 2000-07-0409, 03.04.2001, *Bulletin* 2001/1 [LAT-2001-1-002];
- no. 2000-03-01, 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004].

##### Lithuanian Constitutional Court:

- no. 16/98, 21.12.1999, *Bulletin* 1999/3 [LTU-1999-3-014].

##### European Court of Human Rights:

- *Campbell and Fell v. The United Kingdom*, 28.06.1984, paragraph 78, *Special Bulletin – Leading cases ECHR* [ECH-1984-S-005];
- *Langborger v. Sweden*, 22.06.1989, paragraph 32;
- *Bryan v. The United Kingdom*, 22.11.1995, paragraph 37, *Bulletin* 1995/3 [ECH-1995-3-022];

- *Coeme and others v. Belgium*, 22.06.2000, paragraph 120.

*Languages:*

Latvian, English (translation by the Court).



*Identification:* LAT-2008-2-003

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 09.05.2008 / **e)** 2007-24-01 / **f)** On Compliance of the Second Sentence of the Second Part of Section 50 of the Latvian Penalty Execution Code with Article 92 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), no. 73(3857), 13.05.2008 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.9 General Principles – **Rule of law.**

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

*Keywords of the alphabetical index:*

Convicted person, access to court / Legal aid, absence / Legal aid, right.

*Headnotes:*

In a democratic state governed by the rule of law, the ability to appeal against a court judgment cannot simply depend on somebody's financial status.

The state is under a duty to adopt measures for reducing the expenses of parties to legal proceedings and, in some instances, to exonerate them from this burden altogether. This stems from the right to a fair trial.

The State has other positive duties connected with right of access to court. For instance, it has to cover a prisoner's expenses in corresponding with his or her legal representative, or in posting complaints. The State must defray the expenses of prisoners' correspondence related to access to court in the case if they have no means at their disposal to cover these expenses.

*Summary:*

I. Section 50 of the Latvian Penalty Execution Code regulates the rights of persons sentenced to imprisonment to submit proposals, applications and claims to State authorities, public organisations and officials. It also provides an order for the submission of the above. Under the second sentence of the second part of Section 50 of the Latvian Penalty Execution Code, the State is only obliged to defray the expenses of prisoners' correspondence with UN institutions, the Parliamentary Human Rights and Public Affairs Committee, the Bureau of the Ombudsman Bureau, the prosecutor's office and the court. Foreign citizens convicted of offences are also entitled to coverage of the costs of their correspondence with the diplomatic or consular representation of his or her state, which is authorised to represent his or her interests.

The Administrative Procedure Law requires observance of the procedure of prior out-of-court examination of a case. Thus, a convicted person, before appealing to the administrative court, must submit an application to the higher authority. A convicted person without the wherewithal to pay for correspondence is denied the possibility of addressing the administrative court.

The applicant in the constitutional complaint argued that the contested provision restricts the right to fair trial established in Article 92 of the Constitution in two ways – it restricts the access to court and the rights to receive state-guaranteed legal assistance.

II. The Constitutional Court reiterated that the right to fair trial includes access to court. This includes the duty of the State to ensure, in certain cases, legal aid for persons unable to afford legal representation themselves.

The Constitutional Court pointed out that the State must not only refrain from actions that would restrict a person's right to a fair trial, but it must also take positive steps to protect those rights. Referring to international case-law and international documents binding on the State, the Constitutional Court established that the State must also defray expenses for correspondence of prisoners with their legal team or for posting complaints or applications. If someone is guaranteed the possibility of addressing a court by law, but in practice it proves impossible to implement the pre-conditions for submission of an application, it cannot be said that the State has ensured practical implementation of the rights to access to court.

The judgment established that if someone cannot submit an application challenging an administrative act, he or she is prohibited from access to an administrative court. In view of the above, the Constitutional Court found it necessary, in determining whether prisoners' rights to access to court are being restricted, the Constitutional Court found that it is necessary to assess whether prisoners have the possibility of submitting an application to challenge an administrative act. The Constitutional Court concluded that a prisoner can only submit an application if he or she is challenging an administrative act issued by the administration of the institution where he or she is in custody, since under the law, the application should be submitted to the same institution. If a prisoner wants to appeal against administrative acts issued by other institutions, the application must be posted. That means that the rights of convicted persons to access to court and the rights to legal aid depend on the fact of whether they can pay for posting an application.

The Constitutional Court concluded that the contested provision does not ensure the rights to access to court for those persons who have no financial resources at their disposal and who need to post an application regarding the disputing of an administrative act or a request for legal assistance. Consequently, the State has not fulfilled its positive duty, which follows from the rights to a fair court.

The Constitutional Court held that the contested provision does not comply with Article 92 of the Constitution insofar as it does not provide for payment of the cost of posting applications challenging an administrative act or requests for legal assistance for those prisoners with no financial resources at their disposal.

#### Cross-references:

##### Constitutional Court:

- no. 2000-03-01, 30.08.2000; *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2001-08-01, 17.01.2002; *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-10-01, 05.03.2002;
- no. 2003-04-01, 27.06.2003; *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2003-08-01, 06.10.2003; *Bulletin* 2003/3 [LAT-2003-3-010];
- no. 2003-10-01, 06.11.2003; *Bulletin* 2003/3 [LAT-2003-3-012];
- no. 2004-14-01, 06.12.2004; *Bulletin* 2004/3 [LAT-2004-3-009];
- no. 2004-16-01, 04.01.2005;
- no. 2004-18-0106, 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-07-01, 17.10.2005;
- no. 2005-17-01, 06.02.2006; *Bulletin* 2006/1 [LAT-2006-1-001];
- no. 2005-18-01, 14.03.2006;
- no. 2006-28-01, 11.04.2007;
- no. 2007-03-01, 18.10.2007.

##### European Court of Human Rights:

- *Airey v. Ireland*, 09.10.1979, paragraph 26; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-003];
- *Hornsby v. Greece*, 19.03.1997, paragraph 40; *Bulletin* 1997/1 [ECH-1997-1-008] no. 107/1995/613/701];
- *A.B. v. the Netherlands*, 29.01.2002, paragraphs 90-9;
- *Prodan v. Moldova*, 18.05.2004, paragraph 52;
- *Steel and Morris v. the United Kingdom*, 15.02.2005, paragraph 60;
- *Laskowska v. Poland*, 13.03.2007, paragraph 51.

##### Languages:

Latvian, English (translation by the Court).



### **Identification: LAT-2009-2-003**

**a) Latvia / b) Constitutional Court / c) / d)** 28.05.2009 / **e) 2008-47-01 / f)** On Compliance of the Words "not later than within 60 days" of the Third Part of Section 32 of the Law "On Prevention of Laundering of the Proceeds from Crime and Financing of Terrorism" with Article 105 of the Constitution / **g) Latvijas Vestnesis** (Official Gazette), no. 85(4071), 02.06.2009 / **h) CODICES** (Latvian, English).

### **Keywords of the systematic thesaurus:**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

### **Keywords of the alphabetical index:**

Bank, transaction, prohibition, suspicion of money laundering, remedy / Money laundering, suspicion, prohibition of financial transaction / Terrorism, prevention / Drug, trafficking, prevention.

### **Headnotes:**

The aim of guaranteeing security through a provision whereby banks or credit or financial institutions could not process transactions where there was a suspicion of laundering of the proceeds of crime or the funding of terrorism, could be achieved by less restrictive means and such a provision is therefore disproportionate.

### **Summary:**

I. The provision under dispute prevents the institutions listed in the legislation, such as credit and financial institutions, from processing debits or any other transactions in a client's account if the transaction is related to or suspected of being connected with the laundering of proceeds of crime and the funding of terrorism. It allows for the funds to be blocked for up to sixty days.

A legal entity initiated proceedings, contending that it had been unable to make payments to fulfil contractual obligations or to settle its partners' invoices, as its financial resources had been blocked under the challenged provision.

II. The Constitutional Court concluded that the legitimate objective of the contested norm is to ensure the security of society as a whole; an objective that could, however, be attained by the application of other means with a less restrictive impact on individual rights.

The Constitutional Court also noted the lack of provision in the law to mitigate the negative consequences for those concerned, if the decision to block financial resources proved to be ungrounded. Banks or other financial or credit institutions take decisions as to the blocking of funds, resulting in the restriction of the basic rights of the person concerned for a period of sixty days. He or she does not have a hearing, they have no right of appeal against the decision, neither do they have any right to demand recovery for their losses should the decision prove ungrounded or unlawful.

The Constitutional Court decided that the restriction provided for in the contested provision is not proportionate and out of line with Article 5 of the Constitution.

### **Cross-references:**

#### **Constitutional Court:**

- no. 2001-06-03, 22.02.2002, *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2001-07-0103, 05.12.2001;
- no 2001-12-01, 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-01-03, 20.05.2002;
- no. 2002-04-03, 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-18-01, 14.03.2006;
- no. 2005-19-01, 22.12.2005;
- no. 2005-22-01, 23.02.2005;
- no. 2006-38-03, 26.04.2007, *Bulletin* 2007/3 [LAT-2007-3-003];
- no. 2008-02-01, 21.10.2008, *Bulletin* 2008/3 [LAT-2008-3-004];
- no. 2008-04-01, 05.11.2008, *Bulletin* 2008/3 [LAT-2008-3-005];
- no. 2008-05-03, 12.11.2008;
- no. 2008-09-0106, 16.12.2008;
- no. 2008-12-01, 04.02.2009;
- no. 2008-36-01, 15.04.2009.

#### **European Court of Human Rights:**

- *Gülmez v. Turkey*, 20.05.2008, paragraph 46;
- *AGOSI v. the United Kingdom*, 24.10.1986, paragraph 48;

- *Air Canada v. the United Kingdom*, 05.05.1995, paragraphs 29 and 30, *Bulletin* 1995/2 [ECH-1995-2-008];
- *Saccoccia v. Austria*, 18.12.2008, paragraphs 85 and 86.

Court of Justice of the European Communities:

- C-283/81, 06.10.1982, *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health (CILFIT)*, *European Court Reports*, p. 3415.

Federal Constitutional Court of Germany:

- no. 2 BvR 1075/05, 19.01.2006.

*Languages:*

Latvian, English (translation by the Court).



*Identification: LAT-2011-2-004*

**a) Latvia / b) Constitutional Court / c) / d) 17.02.2011 / e) 2010-20-0106 / f)** On the compliance of Paragraph 1 of the Transitional Provisions of the Law on State Pensions (the part regulating accrued work, length of service periods and equivalence for non-citizens of Latvia in terms of the length of the period of insurance) with Article 14 ECHR in conjunction with Article 1 Protocol 1 thereof and Article 91 of the Constitution / **g) Latvijas Vestnesis** (Official Gazette), no. 29(4427), 22.02.2011 / **h) CODICES** (Latvian, English).

*Keywords of the systematic thesaurus:*

- 3.16 General Principles – **Proportionality**.
- 3.21 General Principles – **Equality**.
- 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals**.
- 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
- 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
- 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
- 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

*Keywords of the alphabetical index:*

Citizen, rights and guarantees / Pension, amount / Insurance, social / Pension, length of service, calculation / State, successor, liability for obligations of former state / Independence, state, restoration.

*Headnotes:*

A state which manages to restore its statehood, when its independence has been unlawfully discontinued, is entitled to recognise itself, based on the doctrine of state continuity, as a state having undergone an unlawful dissolution.

Under the principle *ex iniuria jus non oritur*, states and parts of them can be annexed to the territory of other states on a voluntary basis and by observing the procedures established in international and national law.

Acts of illegally established public authorities of the other State in the field of public law are not binding on a state that has re-established its independence.

Having restored its independence on the basis of the doctrine of continuity, a state is entitled to take its own decisions where necessary on issues arising from the existence of the state under its constitutional regime and legal rules.

The application of absolute prohibition of discrimination in relation to social rights may have significant financial consequences.

The fact that a person is denied the possibility of enjoying certain social rights does not constitute infringement of fundamental rights. Infringement is caused where no reasonable grounds exist for such a breach of rights.

A state that has been occupied as the result of aggression by another state is not under a duty to guarantee social security for persons who have travelled to its territory from the occupant state as a result of immigration policy, particularly in light of the duty not to recognise and justify breaches of international law.

*Summary:*

I. One of the provisions of the Law on State Pensions sets out a list of work and equivalent periods accrued in the former territory of the USSR which are to be made equivalent to the length of period of insurance. It therefore has a bearing on pension calculations. For Latvian non-citizens, by comparison to Latvian citizens,

the list of these periods is considerably shorter. Only education and periods of repression are provided for as equivalents to the length of period of insurance. The applicants contended that differing regulatory frameworks for the calculation of period of insurance for citizens and non-citizens were discriminatory.

II. The Constitutional Court found that in this case citizens and non-citizens of the Republic of Latvia had received different treatment. It went on to assess whether the difference in treatment, in terms of calculating old age pensions, was justifiable and whether there were objective and reasonable grounds for it, taking note as well of international rights and the doctrine of state continuity in its assessment of proportionality.

The Constitutional Court indicated that, under the state continuity doctrine, Latvia had not inherited the rights and duties of the USSR. It did not, therefore, need to assume another state's obligations (i.e. by guaranteeing an old age pension for a service period accrued outside Latvian territory).

Latvia has entered into various agreements aimed at ensuring mutual recognition of length of service with several states, including Lithuania, Estonia, the Russian Federation, Belarus and Ukraine. The issue of the inclusion of service periods accumulated outside Latvian territory within the period of insurance could be resolved by concluding bilateral agreements regarding co-operation in the social field or dealt with in accordance with legal acts of the European Union.

The Constitutional Court therefore recognised the norm as compliant with Article 91 of the Constitution and Article 14 ECHR in conjunction with Article 1 Protocol 1 thereof.

#### Cross-references:

##### Constitutional Court:

- no. 2001-02-0106 of 26.06.2001; *Bulletin* 2001/2 [LAT-2001-2-003];
- no. 2001-11-0106 of 25.02.2002; *Bulletin* 2002/1 [LAT-2002-1-003];
- no. 2004-15-0106 of 07.03.2005; *Bulletin* 2005/1 [LAT-2005-1-004];
- no. 2004-18-0106 of 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-19-01 of 22.12.2005;
- no. 2007-10-0102 of 29.11.2007; *Bulletin* 2008/2 [LAT-2008-2-001];
- no. 2009-43-01 of 21.12.2009; *Bulletin* 2009/3 [LAT-2009-3-005].

##### European Court of Human Rights:

- *Gaygusuz v. Austria*, 16.09.1996, paragraph 42, *Bulletin* 1996/3 [ECH-1996-3-012];
- *Jasinskij and Others v. Lithuania*, f 09.09.1998;
- *Jankovic v. Croatia*, 12.10.2000;
- *Kuna v. Germany*, 10.04.2001;
- *Hadzic v. Croatia*, 13.09.2001;
- *L.B. v. Austria*, 18.04.2002;
- *Saarinen v. Finland*, 28.01.2003;
- *Koua Poirrez v. France*, 30.11.2003;
- *Kjartan Asmundsson v. Iceland*, 12.10.2004, paragraph 39;
- *Zdanoka v. Latvia*, 16.03.2006, paragraph 112, *Bulletin* 2006/1 [ECH-2006-1-003];
- *Epstein and others v. Belgium*, 08.01.2008;
- *Kireev v. Moldova and Russia*, 01.07.2008;
- *Kovacic and Others v. Slovenia*, f 03.10.2008, paragraph 256;
- *Carson and Others v. the United Kingdom*, 04.11.2008, paragraph 73;
- *Andrejeva v. Latvia*, 18.02.2009, paragraphs 83, 87, 89, 90;
- *Si Amer v. France*, 29.10.2009;
- *Zubczewski v. Sweden*, Decision of 12.01.2010;-  
*Carson and Others v. the United Kingdom*, 16.03.2010, paragraph 88;
- *Tarkoев and Others v. Estonia*, 04.11.2010, paragraph 53.

##### Languages:

Latvian, English (translation by the Court).



# Liechtenstein

## State Council

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### Important decisions

*Identification:* LIE-2003-3-004

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 17.11.2003 /  
**e)** StGH 2003/44 / **f)** / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***

5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

*Keywords of the alphabetical index:*

Enrichment, money laundering / Confiscation, assets, penalty / Penalty, nature.

*Headnotes:*

The provision set out in § 20b.2 of the Criminal Code, whereby assets obtained through punishable behaviour must be confiscated, is not to be regarded as a criminal penalty pursuant to the criteria established by the European Court of Human Rights in the *Welch v. the United Kingdom* Judgment no. 1/1994/448/527, and accordingly subject to the principle of non-retrospective application of penal provisions under Article 7 ECHR, nor is it to be assimilated with the penalties referred to in Article 33.2 of the Constitution.

*Summary:*

The Court dismissed a constitutional appeal lodged following the freezing of an account. It found no violation of the principle of non-retrospective of criminal penalties by § 20b.2 of the Criminal Code. Applying the criteria established by the European Court of Human Rights, the Court gave the following reasons for its decision.

A confiscation measure under § 20b.2 of the Criminal Code:

a. was not necessarily linked to a criminal penalty, according to the clearly worded terms of the law;

b. should not constitute a(n) (ancillary) penalty – the provision's character and purpose were to deprive someone of an unlawful pecuniary benefit as part of the efforts to combat money laundering;

c. was, from the standpoint of its characteristics, more civil than criminal in nature, since the primary focus was on elimination of enrichment through assets acquired by criminal means; in addition, the unlawful behaviour's specific consequence under property law was ample reason to conclude that it was mainly a matter of the civil-law implications of a criminal offence. This followed, in particular, from the fact that, in the event of refusal to pay, execution measures must be ordered without any possibility of imprisonment for non-payment;

d. was, from a procedural standpoint, concerned solely with property, unlike deprivation of enrichment, which affected persons. The question of fault was not entered into, with the result that the courts had no discretionary power; and

e. must eliminate the enrichment derived from an offence. Regarding the seriousness of such measures, it should be noted that this was a mere “disenrichment” by way of a “*contrarius actus*”.

*Cross-references:*

European Court of Human Rights:

- *Welch v. the United Kingdom*, Vol. 307-A, Series A; *Bulletin* 1995/1 [ECH-1995-1-002].

*Languages:*

German.



# Lithuania Constitutional Court

## Important decisions

*Identification:* LTU-1995-1-001

a) Lithuania / b) Constitutional Court / c) / d) 24.01.1995 / e) 22/94 / f) European Convention on Human Rights / g) *Valstybes Zinios* (Official Gazette), 9-199, 27.01.1995 / h) CODICES (Lithuanian).

*Keywords of the systematic thesaurus:*

1.2.1.3 Constitutional Justice – Types of claim – Claim by a public body – **Executive bodies**.

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions**.

3.3 General Principles – **Democracy**.

5.3 Fundamental Rights – **Civil and political rights**.

*Keywords of the alphabetical index:*

European Convention on Human Rights, compatibility with Constitution / Human rights, domestic protection / Human rights, international protection / Norms, national, international, interaction.

*Headnotes:*

The European Convention for the Protection of Human Rights and Fundamental Freedoms performs the same function as constitutional guarantees for human rights, but the Constitution establishes guarantees within a State, the Convention on the international plane. In order to avoid obstacles in the application by courts and other authorities providing legal protection, the provisions of the Convention must become a constituent part of the domestic law of a State. Because the Convention itself does not provide any mechanisms for the implementation of these rights, it is necessary that some human rights guaranteed by the Convention are given effect by a direct application of domestic law.

The fact that fundamental rights, freedoms and guarantees are formulated in one or another verbal form in the Constitution does not mean that such wording is in all cases to be applied in an absolute manner. A law may provide for a more extensive formulation of human rights, freedoms and guarantees than their literal expression in a concrete article or part of the Constitution. Therefore, their broader application is possible only if it is provided for in another legal act which has the status of law (in this case, by the Convention and its Protocols).

In all cases, the Constitution shall have determining significance because it establishes the principle of incorporation of international agreements ratified by the Seimas, which have to be applied on an equal rank with laws in the legal system of the Republic of Lithuania.

It is in many cases impossible to interpret the contents of constitutional provisions concerning concrete human rights and freedoms separately from other provisions of the Constitution.

*Summary:*

The case was brought as a result of a petition submitted by the President of the Republic of Lithuania concerning the question whether Articles 4, 5, 9 and 14 ECHR, as well as Article 2 Protocol 4 ECHR, are in compliance with the Constitution.

On 14 May 1993, the Minister of Foreign Affairs of the Republic of Lithuania signed the Convention and its Protocols 1, 4 and 7. Before the ratification of those documents in the Lithuanian Parliament, a special working group was formed to conduct a comparative analysis of the Convention and its Protocols and the Constitution of Lithuania. When some doubts arose, the petitioner requested the Constitutional Court to give an opinion on the matter. The Constitutional Court concluded that Articles 4, 5, 9 and 14 ECHR, and Article 2 Protocol 4 ECHR, were in compliance with the Constitution of the Republic of Lithuania.

The Court underlined that the Convention is a particular source of international law, the purpose of which is different from that of many other acts of international law. This purpose is universal, i.e. striving for the universal and effective recognition of the rights declared in the Universal Declaration of Human Rights and to achieve that they are observed while protecting and further implementing human rights and fundamental freedoms. With respect to its purpose, the Convention performs the same function as the constitutional guarantees of human rights. That is why it is very important to evaluate and establish the relation between the Convention and the Constitution.

The interpretation of the compatibility (relation) of the norms of the Constitution and the Convention must be semantic, logical and not only literal. Literal interpretation of human rights alone is not acceptable because of the nature of human rights protection. When interpreting a legal norm, not the particular wording of a certain rule is most significant, but the fact that the text should provide an understanding beyond doubt that the any obligations imposed on individuals is subject to certain conditions and allows for acting in appropriate way.

Following a general analysis of the texts, the Constitutional Court observed that no provision of the Constitution and no provision establishing human rights and freedoms in the Convention could be interpreted as meaning that the Constitution would forbid some actions whereas the Convention defined them as a right or freedom.

#### *Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2007-1-003

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 21.12.2006 / **e)** 30/03 / **f)** On Lithuanian Radio and Television funding and radio frequencies / **g)** Valstybes Zinios (Official Gazette), 141-5430, 28.12.2006 / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

3.18 General Principles – **General interest**.  
 5.2 Fundamental Rights – **Equality**.  
 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.  
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.  
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

#### *Keywords of the alphabetical index:*

Media, broadcasting, public broadcasting company / Media, broadcasting, advertising.

#### *Headnotes:*

The activity of the public broadcaster cannot be commercialised. Its programmes and broadcasts should not be aimed at attracting the biggest audience possible, or to achieving commercial success. Public broadcasters must not tailor their output to suit the audience or the market, neither must they flatter consumer tastes. Rather, they should inform and educate society, and seek to disseminate the cultural attributes entrusted to the public broadcasting service by the Constitution. To decide otherwise would not only harm, the constitutional mission of the public broadcaster, but would also negate the *raison d'être* of the public broadcaster.

There is no problem, however, with the public broadcaster broadcasting or receiving funds from advertisements, whether commercial or otherwise.

#### *Summary:*

I. A group of members of the Lithuanian Parliament asked the Constitutional Court to determine whether Articles 6.1, 6.3, 6.4 and 15.1 of the Law on Lithuanian National Radio and Television complied with the Constitution. Under Article 15.1, Lithuanian National Radio and Television (hereinafter, "LRT"), which is the public broadcaster in Lithuania, is funded from the receipts obtained for advertising and from commercial activity. Article 15.2 of the same law requires the LRT to implement commercial activity independently. The petitioners suggested that these provisions infringed Article 46.2, 46.3 and 46.4 of the Constitution.

Article 5.5 of the Law on Lithuanian National Radio and Television allows the LRT priority rights to newly co-ordinated electronic communication channels or radio frequencies. Under Article 10.1.3 of the above law and Article 31.4 of the Law on Provision of Information to the Public, channels (radio frequencies) for LRT broadcasts are assigned without a tender. It was suggested that that this was at odds with Articles 29.1, 46.2, 46.3 and 46.4 of the Constitution. In the petitioners' opinion, commercial advertising distorts the activity of the LRT as a public broadcaster and hinders the implementation of the purposes and tasks of the LRT. If the state supports one economic entity when others are carrying out the same activities without state support, this is constitutionally unjustifiable. The petitioners contended that because, under the Law on Lithuanian National Radio and Television, the LRT can implement both economic and commercial profit-making activity independently, this is at odds with the status of the LRT as a public non-profit institution established by the state. The petitioners argued that the Law on the Lithuanian National Radio and Television does not prevent the direct and indirect use of state

support rendered to the LRT as the national broadcaster for development of LRT commercial activity.

II. The Constitutional Court observed that the nature and constitutional mission of the public broadcaster imply a duty on the part of the state not simply to establish the public broadcaster, but also to ensure that it has sufficient funding to carry out its mission and deliver appropriate public broadcasting services. The Court held that in formulating and implementing cultural policy (including creative activities), one must pay heed to the material and financial resources of the state and society, as well as other important factors, such as expediency.

The Constitutional Court stated that no constitutional grounds existed to prevent the LRT, as the national public broadcaster, broadcasting and receiving funds from advertisements, whether commercial or otherwise. There was nothing to stop the LRT receiving funding from the broadcasting of non-advertising content material from other customers. Any regulations that allow the LRT to broadcast advertisements and receive funding from them do not necessarily violate the constitutional principles of fair competition, and equality.

The Constitutional Court also pointed out if the LRT could only fund itself through advertising, this would be neither desirable nor constitutional. It would become exposed and vulnerable, and subject to commercial or political pressure. It would have to tailor its output to attract the largest possible audience and to flatter prevailing consumer tastes, instead of acting in the public interest. Such broadcasts and programmes would be neither informative nor educational. Moreover, such a situation would jeopardise or even negate the special constitutional mission of the national public broadcaster.

The legislator may, however, impose a complete ban on advertising on national radio and television. This only happens very rarely, where there are sufficient resources within society to fund the public broadcaster and where this does not encroach on the constitutional mission of the national public broadcaster.

The Constitutional Court held that there were no constitutional arguments to prevent the LRT from being allocated priority rights, in the absence of a tender, to channels and radio frequencies under Article 5.5 of the Law on Lithuanian National Radio and Television and Article 31.4 of the Law on Provision of Information to the Public. This did not breach the constitutional principle of equality and fair competition.

The provisions mentioned from the Law on Lithuanian National Radio and Television and the Law on Provision of Information to the Public were not contrary to the Constitution.

#### *Cross-references:*

Court of Justice of the European Communities:

- C-280/00, 24.07.2003, *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] *European Court Reports I-7747*;
- T-46/97, 10.05.2000, *SIC-Sociedade Independente de Comunicação SA v. Commission of the European Communities*, [2000] *European Court Reports II-02125*.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2008-3-006

- a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.12.2008 / **e)** 47/04 / **f)** On connecting to electricity network / **g)** *Valstybes Zinios* (Official Gazette), 140-5569, 06.12.2008 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

- 2.1.1.3 Sources – Categories – Written rules – **Community law**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 3.17 General Principles – **Weighing of interests**.
- 3.19 General Principles – **Margin of appreciation**.
- 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.
- 5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection**.

#### *Keywords of the alphabetical index:*

Consumer, protection / Energy law / Electricity, transmission.

### **Headnotes:**

The case concerned a legal provision to the effect that a customer's equipment may be connected to transmission network only in cases where the operator of the distribution network refuses, due to established technical or maintenance requirements, to connect the equipment of the customer to the distribution network which is on the territory indicated in the licence of the distribution network operator. It was held that this provision did not result in an absolute limitation on customers' opportunities to choose their electricity provider (either the operator of the distribution network or the operator of the transmission network). Neither did it create any preconditions for discrimination against the customer. This provision is aimed at protection of the interests of electricity customers; it also seeks to ensure the protection of the general welfare of the Nation.

### **Summary:**

The petitioner, a group of members of parliament, requested an assessment of the compliance with Articles 5.2 and 46 of the Constitution and the constitutional principle of a state under the rule of law of Article 15.2 of the Law on Electricity. This provision states that the equipment of a customer may be connected to transmission network only in cases where the operator of the distribution network refuses, due to established technical or maintenance requirements, to connect the equipment of the customer to the distribution network which is on the territory indicated in the licence of the distribution network operator.

The petitioner stated that the freedom of economic activity of an individual does not *per se* guarantee competition. The state must accordingly protect fair competition; the possibility for competition is diminished or competition is removed from the corresponding market when a monopoly becomes dominant in it; the state must limit monopolistic tendencies by legal means. Legal acts of European Union (Directive no. 2003/54/EC) do not impose a direct obligation on customers to connect their equipment to the electricity transmission network, neither does it oblige them only to connect to the electricity distribution network. It does not establish the right and freedom of consumers to connect to any electricity network at their discretion.

While preparing the case for hearing and taking account of the fact that the Law on Electricity implements Directive no. 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive no. 96/92/EC the Constitutional Court decided to apply to the Court of

Justice of the European Communities for a preliminary ruling on clarification of Article 20 of Directive no. 2003/54/EC. The preliminary ruling was adopted on 9 October 2008.

In its ruling, the Constitutional Court noted that:

- the formula "the State shall regulate economic activity" of Article 46.3 of the Constitution does not mean the right of the state to administer all or certain economic activity at its discretion, but its right to establish legal regulation of economic activity, i.e. establishment of limitations (prohibitions) and conditions of economic activity, regulation of procedures in legal acts;
- legal regulation of economic activity is not an end in itself, it is a means of social engineering and a method of seeking the welfare of the Nation through law; the content of the notion "general welfare of the Nation" is revealed in each concrete case by taking account of economic, social and other important factors;
- the introduction of monopolies is prohibited; thus it is not permissible to grant exceptional rights to an economic entity to operate in a certain sector of economy which would result in a monopoly within that sector. However, it is permissible, under certain circumstances, to state in the law the existence of monopoly in a certain sector of economy or to reflect factual monopolistic relations otherwise and to regulate them accordingly;
- the prohibitions provided for in the law must be reasonable, adequate to the objective sought, non-discriminatory and clearly formulated;
- the Constitution allows a degree of limitation on individual rights and freedoms, as well as freedom of economic activity, provided that this is achieved by means of legislation; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally important objectives; the limitations do not deny the nature and essence of the rights and freedoms; the constitutional principle of proportionality is followed;
- individual economic activity may be restricted when it is necessary to protect the interests of consumers, fair competition and the other values entrenched in the Constitution; the special measures of protection of the interests of consumers are: restriction of establishment of discriminatory prices, state regulation of the size of prices and tariffs for the goods of the monopolistic market, establishment of the requirements for the quality of goods as well as other requirements for monopolistic entity of economy, etc.
- due to complexity of economic activity and the dynamics of particular relations, regulation in this area may be subject to change.

The Constitutional Court noted that under the legal provision in dispute, the equipment of the customer is connected to the distribution network, while this equipment can only be connected to the transmission network in cases where, due to established technical or maintenance requirements, the operator of the distribution network refuses to connect the equipment (which is in the territory of the activity of the distribution network operator specified in the licence) of the customer to the distribution network. Such legal regulation does not deny the right of the consumer to have access to the electricity energy system and this regulation applies to all customers; thus it equally ensures this right of all customers.

The limitation of the opportunity for customers to choose their electricity provider (either the operator of the distribution network or the operator of the transmission network) under the disputed provision of Article 15.2 of the Law on Electricity is not absolute, and it does not create any preconditions for the discrimination of the customer. It does not in itself result in discrimination for a certain group of persons, neither are privileges bestowed on a certain group of persons. On the contrary, this legal regulation is aimed at the equal protection of electricity customers. Thus, such legal regulation seeks to ensure the general welfare of the Nation as well.

The Constitutional Court also took into account a preliminary ruling adopted by the Court of Justice of European Communities.

The Constitutional Court held that the disputed provision of the Law on Electricity is not in conflict with the Constitution.

#### *Cross-references:*

Court of Justice of the European Communities:

- C-304/07, 09.10.2008, *Directmedia Publishing GmbH v. Albert-Ludwigs-Universität Freiburg*, [2008] European Court Reports I-07565.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2010-1-001

- a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.02.2010 / **e)** 36/2006-8/2009-49/2009 / **f)** On payments of insured amount of compulsory insurance against civil liability of holders of vehicles for non-pecuniary damage / **g)** *Valstybes Zinios* (Official Gazette), 16-758, 06.02.2010 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

5.2.1 Fundamental Rights – Equality – **Scope of application.**

#### *Keywords of the alphabetical index:*

Damage, compensation, loss, non-economic / Insurance, compulsory / Expectation, legitimate / Civil liability.

#### *Headnotes:*

The Constitution places the legislator under an obligation to put in place measures to facilitate the implementation of the right to compensation for material and moral damage inflicted on a person.

#### *Summary:*

The Vilnius District Court and two regional courts sought an assessment of the constitutional compliance of Article 11.1 (wording of 5 March 2004) of the Law on Compulsory Insurance against Civil Liability of Holders of Vehicles. Concerns were expressed over the maximum insurance sum of 500 Euros set for non-pecuniary damage. Often, this sum does not cover all the damage caused.

The Court stressed the need to compensate the person for the material and moral damage inflicted. The Constitution places the legislator under an obligation to put in place measures to facilitate the implementation of this right to compensation. The legislation must create all the necessary preconditions for fair compensation of the damage inflicted. The constitutional principle of justice also implies that the damage should under normal circumstances be covered by the person who caused it or somebody else liable for his or her actions.

In its endeavours to ensure that any damage caused to a person is compensated in a timely and efficient manner, the legislator may establish legal regulation to the effect that, on the basis of the contract, the obligation to recover damage caused to other persons is undertaken by a person other than the one who

caused the damage or was liable for the actions of the latter, in order to establish what is known as the "insured method of damage recovery". When setting out the basic principles and conditions of compulsory insurance, the legislator may prescribe maximum sums of insurance. It often happens that, on the basis of a compulsory insurance contract, certain entities undertake to compensate for damages caused by another. In such cases, the legislator is under no obligation to prescribe a sum of the magnitude to ensure recovery of all damages inflicted in full. However, he or she must not deny the constitutional right of a person to claim, on general grounds, full reimbursement of the damage that was caused to him or her, when the insurance sum does not cover the full amount of the damage inflicted. This includes the right to claim damages from the person who caused the damage or from somebody else who is liable for their actions.

Also, in setting out the conditions of compulsory insurance, the legislator must make sure that the performance of the duty to pay insurance contributions does not become too onerous for the person who has to insure his or her civil liability for causing damage.

The legal regulation in question requires the insurer to pay compensation of up to 500 euros for non-pecuniary damage. The Court noted that the legislator's intention here was to create conditions which would allow insurers to fulfil their obligations under the insurance contract instead of allowing them to avoid recovery for non-pecuniary damage, as the petitioners had suggested. It does not jeopardise a person's constitutional right to claim, on general grounds, full reimbursement for the damage they have suffered, either from the person who caused the damage or somebody responsible for his or her actions.

The petitioners also argued that the legal regulation breached the principle of equality, as the maximum insurance sum operated more in favour of the interests of insurance companies than those of injured parties, who would not receive all of their compensation, or the insured, who would have to make up the rest of the compensation.

The Court noted that the legal regulation affected the interests of the following:

1. insurers who pay compulsory insurance sums as required by law, to cover the insured event;
2. persons who have caused damage with a motor vehicle and have insured their civil liability;
3. those who have suffered damage during road accidents and who receive appropriate insurance compensation.

Insurers, insurance premium payers and victims have different rights and obligations, and fall into different categories of persons, with differing legal positions. The same legal regulation is established and applies to all three categories. There are therefore no grounds to state that the rights and interests of victims have less protection than that of insurance companies, or that victims are discriminated against by comparison with insurance companies.

There was one dissenting opinion to the ruling, signed by two judges.

#### Cross-references:

Court of Justice of the European Communities:

- C-518/06, 28.04.2009, *Commission of the European Communities v. Italian Republic*, [2009] European Court Reports I-03491;
- C-348/98, 14.09.00, *Mendes Ferreira and Delgado Correia Ferreira*, [2000] European Court Reports I-06711;
- C-356/05, 19.04.2007, *Elaine Farrell v. Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland*, [2007] European Court Reports I-03067;
- C-537/03, 30.06.2005, *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paaninen v. Vahinkovakuutusosakeyhtiö Pohjola and Jarno Ruokoranta*, [2005] European Court Reports I-05745;
- C-166/02, 24.07.2003, *Daniel Fernando Messejana Viegas v. Companhia de Seguros Zurich SA and Mitsubishi Motors de Portugal SA*, [2003] European Court Reports I-07871.

#### Languages:

Lithuanian, English (translation by the Court).



*Identification:* LTU-2012-1-003

a) Lithuania / b) Constitutional Court / c) / d) 22.12.2011 / e) 13/2010-140/2010 / f) On the Law on Science and Studies / g) *Valstybes Zinios* (Official Gazette), 160-7591, 28.12.2011 / h) CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities**.

5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom**.

*Keywords of the alphabetical index:*

Autonomy, universities / Education, higher, school / Education, academic community / Self-government.

*Headnotes:*

The autonomy of schools of higher education does not deny the legislator's right to regulate activities of these schools, *inter alia*, to establish, by taking account of the interests of society and its changing needs, various types of institutions of science and studies, different limits of these institutions' autonomy, and the basis of their organisational and governance structure. While not denying their autonomy, *inter alia*, the self-government thereof based on the democratic principles of governance, the legislator may establish various models of these schools' governance structure.

*Summary:*

I. The constitutional justice case was initiated by a group of parliamentarians and the Supreme Administrative Court. The applicants asked whether some provisions of the Law on Science and Studies are compatible with the Constitution.

II. In this ruling, the Court, among other issues, has developed the notion of autonomy of schools of higher education. The Court emphasised that their autonomy, as guaranteed in Article 40.3 of the Constitution, implies academic and institutional autonomy. Academic autonomy and institutional autonomy are inseparably interrelated: without academic autonomy, institutional autonomy cannot be guaranteed. The self-government of a school of higher education stems, *inter alia*, from the constitutional freedom of science and research. Thus, autonomy implies self-government of these schools' academic community (scientific community),

which is implemented, *inter alia*, through governance institutions of a particular school of higher education that represent the said community of that school. Self-government of the schools' academic community should relate to democratic principles of governance. In the context of their autonomy, the said principles include, *inter alia*, the direct participation of the academic community and its decisive influence in forming the school's governance institution that is vested with the greatest powers. It also includes limiting the number of office terms of members of the other governance, control and supervision institutions of the schools, and the number of office terms of people discharging functions of one-person institutions or holding the office of the head of a collegial institution. While establishing the governance and organisational structure of these schools and, *inter alia*, regulating the reorganisation of that structure, the legislator should heed the democratic principles of governance and not create preconditions that would violate these principles. Legal regulation that is not in line with these principles could create preconditions, *inter alia*, for the state to unreasonably interfere with the governance of these schools and/or to deny self-government of the academic community of these schools and, thus, to violate their autonomy.

Even while recognising the schools' autonomy, the legislator can still use their broad discretion to choose and regulate a concrete model of the organisation of science and studies to build on the state and society's progress for a particular period of time. Without denying their autonomy and, *inter alia*, the self-government thereof based on the democratic principles of governance, the legislator may establish various models of the schools' governance structure. One of the various models is an institution that would directly represent the academic community and implement the self-government of that community, which would be empowered to decide on all the most important questions relating to both the schools' academic and institutional autonomy. Alternatively, several of such institutions could decide on the most important governance questions relating to academic autonomy and institutional autonomy separately. Another consideration is that an institution of control and supervision, which would be composed not only of or not of members of the academic community, could perform the advisory functions in the course of adopting decisions of governance of these schools.

The constitutional guarantee of these schools' autonomy implies that the legislator is obliged to provide for special legal regulation, most of which should be composed by local legal regulation established by these schools. Therefore, the general legal regulation established by laws and applicable to all these schools should neither be too detailed nor limit

the right of these schools. From the principle of their autonomy, they should be able to regulate their activities by means of local legal acts.

The Constitution neither prohibits differentiation of the legal status of schools of different types nor of the rights and limits of autonomy of schools of higher education of the same type. It needs to be noted that in differentiating the status of these schools according to various important criteria, one must consider, *inter alia*, the historical traditions and established traditions of self-government based on democratic principles of governance peculiar to a concrete school, as well as the continuation of these traditions. Regarding concrete schools of higher education, one may establish special norms defining the rights, limits of autonomy, and the organisational and governance structure, which will differ from those established by the general legal regulation provided for by laws with respect to all the schools of higher education.

The Constitutional Court addressed the possibility of establishing, by laws, different limits of autonomy for different types of schools of higher education. If the legislator has chosen such a model of governance structure under which the senate is a collegial governance body that directly represents the academic community and is the sole body implementing self-government of that community, then such legal regulation would confine the senate's competence only to academic affairs. It does not participate, or participates only in an advisory capacity. Adopting strategic and other important decisions of governance of these state schools, *inter alia*, decisions on the use of financial funds and other assets for the purpose of implementing the mission of these schools, however, is incompatible with their autonomy.

#### Cross-references:

Court of Justice of the European Communities:

- C-307/97, 21.09.99, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, [1999] European Court Reports I-06161;
- C-196/04, 12.09.06, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, [2006] European Court Reports I-07995;
- C-19/92, 31.03.93, *Dieter Kraus v. Land Baden-Württemberg*, [1993] European Court Reports I-1663;
- C-55/94, 30.11.95, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] European Court Reports I-04165;

- C-212/97, 09.03.99, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, [1999] European Court Reports I-01459.

#### Languages:

Lithuanian, English (translation by the Court).



*Identification:* LTU-2012-1-004

- a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.02.2012 / **e)** 46/2010-47/2010-48/2010-49/2010-51/2010-52/2010-70/2010-77/2010-82/2010-83/2010-84/2010-85/2010-86/2010-87/2010-94/2010-100/2010-101/2010-109/2010-114/2010-123/2010-124/2010-128/2010-129/2010-133/2010-134/2010-142/2010-143/2010-1/2011-2/2011-5/2011-8/2011-16/2011-21/2011-23/2011-25/2011-29/2011-32/2011-37/2011-39/2011 / **f)** On the recalculation and payment of pensions upon occurrence of an especially difficult economic and financial situation in the state / **g)** *Valstybes Zinios* (Official Gazette), not published yet / **h)** CODICES (English, Lithuanian).

#### Keywords of the systematic thesaurus:

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

#### Keywords of the alphabetical index:

Social payments, reduction / Pension, state / Pension, old-age / Compensation / Economic crisis / Economic and financial situation, extremely difficult / Pensioner, working.

#### Headnotes:

Under the Constitution, upon occurrence of an extreme state situation, *inter alia*, a very difficult economic and financial situation, it is impossible to accumulate the amount of funds necessary to pay pensions. Legal regulation of pensionary relations may be amended, *inter alia*, by reducing the awarded and paid pensions. However, the legislator must heed the constitutional principles of equality of rights and proportionality, and establish an equal and non-discriminatory scale to reduce the pensions. The reduced pensions may be

paid only temporarily after proving for a mechanism of compensation for incurred losses.

**Summary:**

I. The case was initiated by 39 petitions from the administrative courts, asking the Constitutional Court to review whether legal provisions addressing the state's extremely difficult economic and financial situation actually conflict with the Constitution. The petitioners challenged legal provisions related mostly to the reduction of social payments for, *inter alia*, old-age pensions and state pensions, and legal provisions that would significantly reduce the old-age and state pensions for pensioners who were working at the moment of paying the pensions.

The petitioners' doubts are substantiated by the fact that because the challenged legal regulation reducing the social payments implies legal uncertainty and indefiniteness of acquired rights, it denies a person's legitimate expectations and violates the principle of inviolability of ownership. In addition, upon recalculating the pensions, the constitutional principles of a state under the rule of law and proportionality were also violated. The reason is that the awarded pensions were disproportionately reduced for working pensioners through the disputed legal regulation only because they were receiving a salary at the same moment. Meanwhile, the constitutional principle of equality of rights was also violated.

II. After examining all the circumstances, the Constitutional Court noted that the Provisional Law was adopted with the aim to limit the rising deficit of the state budget and the budget of the State Social Insurance Fund caused by the economic crisis. The Court stated that such a procedure to recalculate and pay social payments, which implied reduction of awarded social payments, was established in light of the state's particularly difficult economic and financial situation, and in pursuit of decreasing, *inter alia*, the expenditures of the State Social Insurance Fund.

Thus, by establishing such a procedure to recalculate pensions, which created preconditions to reduce awarded pensions, the legislator was addressing an extreme situation whereby, *inter alia*, the difficult economic and financial situation had made it impossible for the state to accumulate the amount of the funds necessary to pay pensions. Envisaging the reduction of pensions including old-age pension, the legislator applied to everyone the same amount of the current year's insured income, which the Government had approved. As such, the Court stated that the social payments were reduced proportionately, uniformly and indistinguishably, with exception of the old age pension

amount received by people who did not exceed the established limit of LTL 650.

The Court noted that the constitutional principles of a state under the rule of law and of proportionality do not mean that the state is prohibited from establishing a pension amount limit below an amount that the pension would not be reduced even when there is a particularly difficult economic and financial state situation. The Court emphasised that a pension that secures only minimal socially acceptable needs and living conditions compatible with human dignity to the person who receives the pension, however, may not be reduced at all. Thus, the legislator did not violate the requirements arising from the constitutional principles of equality of rights and proportionality because the Provisional Law set forth that old-age and state pensions that did not exceed the marginal amount (established in the law), which was LTL 650, could not be recalculated (reduced). For pensions that exceeded the said amount in the course of their recalculation, they could not be reduced below this amount either.

In establishing the procedure to recalculate pensions in Article 6.1 of the Provisional Law, it also stipulated that the reduced pensions would be paid only temporarily, namely until 31 December 2011.

And lastly, by proposing that the Government prepare and approve the inventory schedule of such a procedure to compensate for the reduced state social insurance pensions of old-age and of lost capacity to work, the legislature has undertaken an obligation to establish the essential elements of compensation for the reduced pensions and provide for compensation for the losses incurred due to the reduced old-age pensions. Hereby, the legal regulation to reduce awarded social payments was recognised as compatible with the Constitution.

While assessing the major reduction of pensions for the pensioners who had been working at the moment of paying pensions, the Court held that the challenged regulation created a legal dilemma whereby a person had to choose either to have a certain job or conduct a certain business and receive a pension reduced to a greater extent; or not to have any job and not to conduct any business and receive such a pension that is paid to all the receivers of the same pension who do not have any job and do not conduct any business. The disputed legal regulation created preconditions to reduce the pensions of pension recipients who have a certain job or conduct a certain business due to the fact that they have a job or conduct a business, to a greater extent than pension recipients who neither have any job nor conduct any business. By distinguishing pension recipients in this way, the legislator restricted the right of the said former persons to freely choose a job or

conduct a certain business, which is entrenched in Article 48.1 of the Constitution. That is, upon the implementation of that right, the pension awarded to these persons, solely due to the fact that they had a job or conducted a business, was reduced to a greater extent in comparison to pension recipients who did not have any job and did not conduct any business.

III. This ruling had one dissenting opinion in which one judge disagreed with the method of interpretation chosen by the Constitutional Court.

#### Cross-references:

European Court of Human Rights:

- *Fredin v. Sweden* (no. 2), 23.02.1994, Vol. 283-A, Series A, *Bulletin* 1994/1 [ECH-1994-1-003];
- *Döry v. Sweden*, 12.11.2002, no. 28394/95;
- *Håkansson and Sturesson v. Sweden*, 21.02.1990, no. 11855/85;
- *Helmers v. Sweden*, 29.10.1991, no. 11826/85;
- *Schuler-Zgraggen v. Switzerland*, 24.06.1993, no. 14518/89;
- *Lundevall v. Sweden*, 12.11.2002, no. 38629/97.

#### Languages:

Lithuanian, English (translation by the Court).



#### Identification: LTU-2012-2-009

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.09.2012 / **e)** 8/2012 / **f)** On the prohibition for a person, who was removed from office under procedure for impeachment proceedings, to stand in elections for a Member of the Seimas / **g)** Valstybes Zinios (Official Gazette), 105-5330, 08.09.2012 / **h)** CODICES (English, Lithuanian).

#### Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions**.

3.3.1 General Principles – Democracy – **Representative democracy**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

#### Keywords of the alphabetical index:

Treaty, international, conflict / Constitution, supremacy / Re-interpretation / Impeachment / Constitutional doctrine, overruling.

#### Headnotes:

By establishing a legal regulation that ignores the constitutional liability for a gross violation of the Constitution and breaches the oath decided in the Constitutional Court ruling of 25 March 2004, the legislator had tried to overrule the power of the aforesaid Constitutional Court's ruling. By doing so, the legislator violated the constitutional prohibition to repeatedly establish, by adopting corresponding laws, a legal regulation inconsistent with the concept of the Constitution set in the ruling, as well as with the principle of integrity of the Constitution and the principle of supremacy of the Constitution.

When the legal regulation entrenched in a ratified international treaty competes with the one established in the Constitution, the provisions of such an international treaty do not have priority with regard to their application. Consequently, the judgment of the European Court of Human Rights itself may not be a ground to ignore the Constitutional Court's jurisprudence.

#### Summary:

I. The case was initiated by the group of parliamentarians. The origins of this case arise from a Constitutional Court Decision of 25 May 2004, when the Constitutional Court judged that a person removed from office or his or her mandate under impeachment proceedings, could never be re-elected to the position that requires the swearing of an oath, e.g. President of the State, a Member of the Parliament, a judge, etc. After this decision, the privy former President of Lithuania who had been dismissed from office because of a breach of the oath addressed its petition to the European Court of Human Rights, insisting that its electoral rights had been violated. The challenged Law, which established the legal regulation impugned in the case at issue, was adopted while reacting to the Judgment of the Grand Chamber of the European Court of Human Rights in the case of *Paksas v. Lithuania* (no. 34932/04) of 6 January 2011. In that

case, the permanent and irreversible prohibition for a person, who was removed from office in accordance with impeachment proceedings for a gross violation of the Constitution and a breach of the oath, to stand in elections to the *Seimas* was recognised as disproportionate and a violation of the right entrenched in Article 3 Protocol 1 ECHR. In the judgment, it was noted that the aforesaid prohibition is set in constitutional stone.

The petitioner claims that this Law is unconstitutional, because the former wording of the Constitution prohibiting the re-election to all offices requiring a swearing in is still valid. The simple Law cannot overrule the existing constitutional jurisprudence even after the decision of the European Court of Human Rights. While establishing the same legal regulation that had already been recognised as unconstitutional, the *Seimas* exceeded the powers of the parliament established in the Constitution. This occurred when the *Seimas* had adopted the Law which establishes a legal regulation (which is still different from the one established in the Constitution) permitting the election to the *Seimas* of a person, who has been removed from office, or whose mandate as a parliamentarian had been revoked under impeachment proceedings.

II. The Constitutional Court recognised that the challenged Law conflicts with the Constitution. First of all, the Court recalled that it is bound by its own precedents and by official constitutional doctrine that it has formed, which substantiates those precedents. The necessity to reinterpret certain official constitutional doctrinal provisions so that the official constitutional doctrine would be corrected (as required in the decision of the European Court of Human Rights) may be determined only by circumstances necessary to increase the possibilities to implement the innate and acquired rights of persons and their legitimate interests. This also includes the need to better defend and protect the values enshrined in the Constitution, to create better conditions to reach the country's aims set in the Constitution, on which the Constitution itself is based, and to expand the possibilities of the constitutional control in this country. However, in this case, the Court did not envisage the aforesaid necessity to re-interpret the constitutional doctrine.

The Court stated that the aforesaid judgment of the European Court of Human Rights means that provisions of Article 3 Protocol 1 ECHR insofar as they imply the international obligation of the Republic to guarantee the right of a person especially a person whose mandate as a Member of the *Seimas* has been revoked through impeachment proceedings and a person who has been removed through impeachment proceedings for a gross violation of the Constitution and a breach of the oath from the offices where the person

needs to be sworn in, to stand in elections for a Member of the *Seimas* are incompatible with the provisions of the Constitution.

The main responsibility for the effective implementation of the European Convention on Human Rights and its Protocols falls upon the states. Parties to the European Convention on Human Rights and its Protocols, therefore, enjoy broad discretion to choose the ways and measures to apply and implement the European Convention on Human Rights and its Protocols, including the execution of judgments of the European Court of Human Rights. However, such discretion is limited by the peculiarities (related to the established system of harmonisation of the national (domestic) and international law) of the legal systems of the states, including their constitutions and the character of the human rights and freedoms guaranteed under the European Convention on Human Rights and its Protocols. In this context, the Court underlined that the European Court of Human Rights plays a subsidiary role in the implementation of the European Convention on Human Rights and its Protocols. However, it neither replaces the competence and jurisdiction of national courts, nor is it an appeal or cassation instance with regard to judgments of the latter. Even though the case-law of the European Court of Human Rights, as a source for the construction of law, is important also for construction and application of Lithuanian law, the jurisdiction of the said Court does not replace the powers of the Constitutional Court to officially construe the Constitution.

In the course of the implementation of international obligations of the Republic in domestic law, one must take account of the principle of superiority of the Constitution entrenched in Article 7.1 of the Constitution. Emphasised by the Constitutional Court, the legal system of the Republic is grounded on the fact that any law or other legal act, as well as international treaties of the Republic, must not conflict with the Constitution. In itself, the constitutional provision of Constitutions' supremacy cannot invalidate a law or an international treaty, but it requires that the provisions thereof not contradict the provisions of the Constitution.

While construing the necessity to implement the decision of the European Court of Human Rights, the Court said that the constitutional institutions of impeachment, the oath and electoral right are closely interrelated and integrated. Changing any element of these institutions would change the content of other related institutions, i.e. the system of values entrenched in all aforementioned constitutional institutions would be changed. So in itself the judgment of the European Court of Human Rights may not serve as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine (provisions thereof) if

such reinterpretation, in the absence of corresponding amendments to the Constitution, changed the overall constitutional regulation (*inter alia* the integrity of the constitutional institutions impeachment, the oath and electoral right) in essence. This also applies if it disturbed the system of the values entrenched in the Constitution and diminished the guarantees of protection of the superiority of the Constitution in the legal system.

On the other hand, the Court emphasised that respecting international law (i.e. the observance of international obligations undertaken on its own free will) and respect of universally recognised principles of international law (as well as the principle *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania. Therefore from Article 135.1 of the Constitution, a duty arises for the Republic to remove the aforesaid incompatibility of the provisions of Article 3 Protocol 1 ECHR with Articles 59.2 and 74 of the Constitution. While taking account of the fact that, as mentioned, the legal system is grounded upon the principle of superiority of the Constitution, the adoption of the corresponding amendment(s) to the Constitution is the only way to remove this incompatibility.

III. There were two dissenting opinions in this decision. Their main argument was that the Constitutional Court should have chosen another way to implement the decision of European Court of Human Rights without changing the text of the Constitution itself to re-interpret the constitutional jurisprudence. Both judges considered (in addition to other arguments) that the decision of the European Court of Human Rights was sufficient ground to re-interpret the Constitutional provisions and that the Constitution should be construed harmoniously with the state commitments under international law.

#### Cross-references:

European Court of Human Rights:

- *Chapman v. the United Kingdom*, 18.01.2001, 27238/95, *Bulletin* 2001/1 [ECH-2001-1-001];
- *Sisojeva and others v. Latvia*, 15.01.2007 no. 60654/00.

#### Languages:

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2012-C-001

- a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 06.12.2012 / **e)** / **f)** On civil written procedures / **g)** *Valstybes Zinios* (Official Gazette), 142-7341, 08.12.2012 / **h)**.

#### *Keywords of the systematic thesaurus:*

- 4.7.2 Institutions – Judicial bodies – **Procedure**.  
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.  
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.  
 5.3.13.9 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public hearings**.  
 5.3.13.12 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the decision**.

#### *Keywords of the alphabetical index:*

Proceedings, written / Parties to the case / Oral hearing / Public consideration.

#### *Headnotes:*

Under the Constitution, public consideration of cases is not an end in itself. Public consideration of cases is one of the conditions for the administration and efficiency of justice. The public consideration of cases in court creates preconditions to ensure the implementation of the right expressed in the Constitution, the laws and other legal acts, to guarantee the supremacy of the law and to protect the rights and freedoms of the person. While ensuring the principle of the public consideration of cases in court, the legislator is obliged to heed the norms of the Constitution and other principles and not to create preconditions to violate the values (*inter alia* the rights and freedoms of the person) consolidated in, defended and protected by the Constitution.

The constitutional principle of public consideration of cases in courts may be ensured by means of various forms established by the legislator. The discretion of the legislator is bound by the Constitution, *inter alia* the rule of law, justice and reasonableness. The Constitution, by guaranteeing *inter alia* the principle of justice as well as the constitutional right to apply to the Court to defend rights and freedoms, gives rise to the requirement of promptness and efficiency of court proceedings. When regulating the relations of consideration of cases in court, the legislator must establish a legal regulation that creates the necessary conditions to investigate a

case and execute a decision without any unjustified interruptions, thus precluding the procrastination of consideration of cases in court, *inter alia* in the cases where persons abuse their procedural rights.

#### **Summary:**

I. This constitutional justice case was initiated by a group of parliamentarians challenging the provisions of the Code on Civil Procedure claiming that while the case is examined under written proceedings, parties to the case are not invited to take part in the proceedings.

II. The Court emphasised that proper court proceedings are a necessary condition for solving the case justly. The constitutional right of a person to a fair trial implies a duty for the legislator to establish by law such proceedings for all cases in court that are in line with the norms and principles of the Constitution. The legislator, when regulating, by means of a law, the relations of consideration of cases in court, must heed the Constitution, *inter alia* the principles laid down in Article 117 thereof, as well as the constitutional principle of a state governed by the rule of law and those of equality of arms, justice, impartiality and the independence of judges.

The Court noted that the principle of public consideration of cases in court, the interest of the public to be informed, as well as the constitutional principle of a state governed by the rule of law, *inter alia* the requirement of legal clarity, imply a duty of the legislator to regulate, by law, the relations of consideration of cases in court so that the conditions are provided for the parties to the proceedings and the public to, *inter alia*, be aware of the cases considered in Court, the composition of the Court considering the case, the disputes decided in the cases and the adopted decisions.

The Court invokes the jurisprudence of the European Court of Human Rights, under which the obligation to hold a public hearing is not an absolute one, and an oral hearing may be dispensed with if a party to the case unequivocally waives his or her right thereto and there are no questions of public interest; a hearing may not be necessary due to exceptional circumstances of the case, for example, when it raises no questions of fact or law that cannot be adequately resolved on the basis of the case-file and the parties' written observations; provided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance may be justified accordingly.

The Court stated that when a case is considered under written procedure, one must follow the principles for proceedings (those of speed and efficiency of the

proceedings, public hearings, publicity of case materials, disposition, etc.) and the persons participating in the case have the right to *inter alia* be notified of the place and time of the consideration of the case, submit, in writing, their responses to the appellate complaint and set out in them their opinion regarding the filed appealed complaint and receive court decisions (final acts of the respective court). Thus, the challenged legal regulation under which, when a case is considered under a written procedure, the parties to the case are not invited to the Court sitting and the Court sitting takes place without their participation, created no preconditions to violate the principles of civil proceedings, nor to restrict the procedural rights of the parties to the proceedings. The aforesaid legal regulation ensured the right of the parties to the proceedings to public court proceedings (*inter alia* ensured the right to express their opinion regarding all the issues to be decided in the case) as well as the public interest to be informed about court proceedings and the adopted decisions and created the conditions to consider a case and execute a decision without any unjustified interruptions, thus precluding the procrastination of the consideration of cases in court.

#### **Cross-references:**

#### **European Court of Human Rights:**

- *Fredin v. Sweden*, no. 18928/91, 23.02.1994, *Bulletin* 1994/1 [ECH-1994-1-003];
- *Helmers v. Sweden*, no. 11826/85, 29.10.1991;
- *Håkansson and Sturesson v. Sweden*, no. 11855/85, 21.02.1990;
- *Döry v. Sweden*, no. 28394/95, 12.11.2002;
- *Schuler-Zgraggen v. Switzerland*, no. 14518/89, 24.06.1993;
- *Lundevall v. Sweden*, no. 38629/97, 12.11.2002.

#### **Languages:**

Lithuanian, English (translation by the Court).



# Malta

## Constitutional Court

### Important decisions

*Identification:* MLT-1998-2-002

a) Malta / b) Constitutional Court / c) / d) 18.08.1998 / e) 466/94 / f) Dr Lawrence Pullicino v. The Hon. Prime Minister et al / g) / h).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

3.10 General Principles – **Certainty of the law.**

3.17 General Principles – **Weighing of interests.**

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**

*Keywords of the alphabetical index:*

Judge, pre-trial decisions / Publicity of proceedings / Note, confiscation / Media, newspaper articles, prejudicial / Media, press campaign, virulent / Judge, challenging / Text-book, legal, confiscation.

*Headnotes:*

Although publicity is a means of guaranteeing the fairness of a trial, a balance must be struck between the right to a fair trial and the freedom of expression enjoyed by the media in terms of Article 10 ECHR.

The taking of certain pre-trial decisions by a judge presiding over a trial by jury does not in itself justify fears as to his impartiality.

The confiscation of notes written by an accused during a trial by jury constitutes a breach of his fundamental right to a fair hearing. However, account could be taken of the proceedings in their entirety when deciding whether to grant a remedy.

*Summary:*

The applicant had been condemned to a term of fifteen years imprisonment, having been found guilty of complicity in the crime of grievous bodily harm followed by death of a person while in police custody. The crime was committed at the time when the applicant occupied the office of Police Commissioner. The judgement delivered by the Criminal Court was confirmed by the Court of Criminal Appeal on 15 April 1994.

The applicant filed a constitutional application alleging that during the criminal proceedings his right to a fair trial had been breached.

Although in his application the applicant raised various grievances, those of major interest were that during the criminal proceedings the presiding judge:

1. Had been negatively influenced against the accused as a result of the various press reports which were published in the local newspapers.
2. Was prejudiced against the applicant since prior to the commencement of the trial by jury he had already expressed himself in the sense that the applicant was not a credible person.
3. Had ordered that prior to the applicant giving evidence in the trial by jury, all his personal papers and law text-books which were in his possession be removed from his cell.

#### 1. Virulent press campaign

In respect of the publicity campaign which the applicant complained of, the Constitutional Court expressed the view that publicity is to be considered as a guarantee of the fairness of a trial. Furthermore, the right to a fair trial was to be counter – balanced with the right of the freedom of the press as laid down in Article 10 ECHR. There is general recognition of the fact that the Courts cannot operate in a vacuum. Whilst they are the forum for settlement of disputes, this does not mean that there can be no proper discussion of disputes elsewhere, be it in specialised journals, in the general press, or amongst the public

at large. The media also has an obligation to impart information on matters which come before the Courts.

It is true that certain articles published in the local newspapers were not written in an objective manner and were prejudicial to the applicant. However these were the exception and not the rule. Furthermore, some press comments on a similar trial involving a matter of public interest must be expected. One had also to consider that the objectionable articles were published after the jury had reached its final verdict, although the appeal was still pending. Thus, one could not conclude that a virulent press campaign was directed against the applicant, and which if present would have prejudiced the applicant's fundamental right to a fair hearing.

Although in trials by jury the risk that the jury is influenced by public opinion is more pronounced, this is difficult to prove as no written statement of reasons is provided by the members of the jury. No proof was produced that the articles in question produced a negative effect on the members of the jury or the presiding judges. According to the Constitutional Court, the articles which contained a prejudicial comment were also countered by the judge himself during the proceedings, by his direction towards the jury intended to discount such comments. Furthermore, the long period of time during which the jury deliberated, the vote expressed by the jury and the objective conclusion it reached, are a confirmation that the jury was in no way influenced by the press. Although the jury was not composed of professional judges, nonetheless it provided every guarantee of integrity and impartiality. In this respect the Constitutional Court concluded that it did not find any appearance of a violation of the rights and freedoms of the applicant as set in the Maltese Constitution and the European Convention on Human Rights.

## 2. Impartiality of the presiding Judge

The applicant alleged that the presiding judge in the trial by jury was not objectively impartial. The applicant contended that in the early stages of the jury, the judge delivered certain decisions which instilled the appearance that he was prejudiced against the applicant. The applicant claimed prejudice in the sense that prior to the commencement of the jury, the presiding judge had already formed an opinion of the character of the person to be judged. This could be seen, argued the applicant, when the judge revoked the applicant's bail and ordered his immediate arrest. The applicant argued that in a case which revolved around the credibility of witnesses and under such circumstances the presiding judge could not be said to be objectively impartial. The applicant further contended that during the proceedings he had not

requested the presiding judge to withdraw from taking cognisance of the case, in order not to prolong proceedings. Furthermore, had he made such a request, then if refused the bias against him would have been of a larger scale.

The Constitutional Court held that in applying the objective test, what is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. Justice must not only be done; it must also be seen to be done. It further held that according to jurisprudence of the European Convention on Human Rights, the mere fact that a judge has made pre-trial decisions cannot be taken as in itself justifying fears as to his impartiality. What matters is the extent and the nature of those decisions.

Respondents contended that prior to the commencement of the trial, the applicant could have raised a plea requesting the presiding judge to abstain from sitting in the proceedings. In this respect, the Constitutional Court held that Article 734 of the Code of Organisation and Civil Procedure (Chapter 12) stipulated that a judge was to abstain from sitting in a case if he had previously taken cognisance of the case as a judge. However, this was only applicable where the previous decision delivered by the judge definitely disposed of the merits. Thus, the Constitutional Court held that a judge who had not expressed himself on the merits of the case could not be challenged. Furthermore, the judge had taken no part in the preparation of the case for trial or the decision to prosecute. The preliminary decision delivered by the judge concerning the issue whether the applicant should be remanded in detention had no connection with the merits of the case.

Another remedy was to request the Criminal Court to refer the issue to the First Hall of the Civil Court sitting in its constitutional jurisdiction, in terms of Article 46 of the Maltese Constitution.

Furthermore, the Constitutional Court held that notwithstanding this preliminary decision, at no point in time did the judge express an opinion on the character of the applicant. This is apart from the consideration that under the Maltese legal system the final decision concerning the guilt or otherwise of the accused is the responsibility of the members of the jury and not the judge. No proof was produced that the presiding judge had influenced the members of the jury in an adverse manner. The manner in which the judge addressed the jury is added proof that no such bias was present. In particular, throughout his address the judge warned the members of the jury that they had to deliver the verdict on the facts as produced to them.

3. Sequestration of personal notes and legal textbooks during the trial by jury

The Constitutional Court opined that the criminal proceedings were lengthy and it was evident that the final decision depended much on the credibility of the evidence heard throughout the trial. It was thus essential for the applicant to be placed in the best possible position to rebut evidence given by witnesses produced by the Prosecution. The Constitutional Court contended that for this to be achieved the applicant had a right to refer to the various notes he had compiled throughout the trial. Although the Criminal Court of Appeal had made specific reference to this incident, it concluded that notwithstanding such an irregularity, no miscarriage of justice had occurred during the trial.

On this issue the First Hall of the Civil Court concluded that the fact that the notes were in the possession of the accused during the whole criminal proceedings, except while he was giving evidence, and the fact that they were at the disposal of his defence counsel, were determinate in permitting the applicant to prepare his defence.

The Constitutional Court referred to Article 583 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) which stipulates:

"A witness may refresh his memory by referring to any writing made by himself or by another person under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing; but in such case, the writing must be produced and may be seen by the opposite party".

The Court argued that according to Article 463 of the Criminal Code (Chapter 9 of the Laws of Malta), in criminal proceedings the accused has a right to be furnished with a copy of the transcript of the evidence submitted, and of all the documents which form part of the acts of proceedings (Article 519 of the Criminal Code — Chapter 9 of the Laws of Malta).

Thus, as the accused enjoys the right to such documents he must also have the right to take notes of the evidence produced during the trial. In terms of Article 583 (Chapter 12 of the Laws of Malta) he has the right to refresh his memory by referring to these notes.

The scope of this Article is to ensure that evidence produced in court is genuine and not contaminated. This provides a further guarantee that during the proceedings the truth is established. The applicant's evidence during the trial was one of the means

whereby he could defend himself from the accusations. Therefore, the courts were bound to ensure that the defendant was afforded all the guarantees of a fair trial. Furthermore, reference to legal text-books would have assisted the applicant in the preparation of his defence.

The order for the immediate removal of all applicants' notes and legal textbooks from his cell had a negative effect on the evidence given by the applicant both from the factual and psychological point of view. Furthermore, according to the principle of equality of arms, one of the features of the concept of fair trial, each party was to be afforded a reasonable opportunity to present its case in conditions which do not place him at a disadvantage in respect to his adversary. In this respect the Constitutional Court declared that the applicant's right to a fair hearing was breached, notwithstanding the fact that the Court of Criminal Appeal had declared that no miscarriage of justice had occurred.

However, the Constitutional Court expressed the view that while proceedings were still pending before the Court of Criminal Appeal, the applicant should have requested that he give evidence with the assistance of the notes seized from his possession. Although the applicant had this remedy, for some reason he failed to make use of it. Consequently, the Constitutional Court was entitled to refuse the granting of a remedy to applicant.

The Constitutional Court further stated that in similar proceedings, account had to be taken of the entirety of proceedings in the domestic legal order. Where it ensued that as a whole, the proceedings were fair, then the applicant's grievances could not be entertained. The Court concluded that when the criminal proceedings instituted against the applicant are examined as a whole, one could safely declare that they were fair.

#### Cross-references:

In its reasoning the Constitutional Court referred to judgments delivered by the European Commission and European Court of Human Rights amongst which were:

- *De Cubber v. Belgium* (1984);
- *Hauschildt v. Denmark*, 24.05.1989, *Special Bulletin – Leading cases ECHR* [ECH-1989-S-001];
- *Stanford v. the United Kingdom*, 23.02.1994;
- *Fey v. Austria*, 24.02.1993;
- *Padovani v. Italy*, 26.02.1993;
- *The Sunday Times v. the United Kingdom*, 26.04.1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-001];

- *The Sutter Case, X v. the United Kingdom*, 16.05.1969, [Decision of the Commission];
- *X v. Austria*, 23.07.1963, [Decision of the Commission];
- *Jespers v. Belgium*, 14.12.1981 [Decision of the Commission];
- *Can v. Austria*, 14.12.1983. [Decision of the Commission];
- *F. v. the United Kingdom*, 13.05.1986, [Decision of the Commission];
- *Windisch Case*, 27.09.1990;
- *Delta Case*, 19.12.1990;
- *Vidal v. Belgium*, 22.04.1992.

*Languages:*

Maltese.



*Identification:* MLT-2000-1-001

- a)** Malta / **b)** Constitutional Court / **c)** / **d)** 06.10.1999 /  
**e)** 595/97 / **f)** John Mousu' et v. Director of Public Lotto  
 et / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.4.3 Constitutional Justice – Procedure – **Time-limits for instituting proceedings.**

3.18 General Principles – **General interest.**

5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation.**

*Keywords of the alphabetical index:*

Property, enjoyment / Property, possession / Property, right to dispose / President, declaration, effect.

*Headnotes:*

A deprivation of property effected for no reason other than to confer a private benefit in favour of a private party can never be in the public interest. However, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means of promoting the public interest. A fair balance must necessarily be struck between the demands of the general interest of the

community and the requirements of the protection of the individual's fundamental rights.

According to Section 7 of the European Convention Act (Chapter 319 of the Laws of Malta) no breach of human rights and fundamental freedoms committed before 30 April 1987 will give rise to an action invoking the European Convention on Human Rights.

*Summary:*

The applicants were the owners of a Lotto Office, which had been leased in 1965. By means of a Notice published in the Government Gazette, a Presidential Declaration on 22 November 1977 declared the premises to be expropriated for a public purpose. The Constitutional Court held that from the evidence produced by both parties, it was evident that notwithstanding the expropriation order, the premises in question were still to be used as a Lotto Office by third parties. The effect of the expropriation order was merely that of giving an advantage to a third party to occupy premises without payment. It was evident that as a result of the expropriation order there was no apparent advantage to the public interest and the common good. Therefore, the expropriation was not justified.

In terms of Chapter 319 of the Laws of Malta, the Courts are prohibited from investigating complaints of a breach of fundamental human rights that occurred prior to 1987 (when the law was enacted). The respondents argued that the President's declaration was issued prior to 1987, and therefore the Court had no jurisdiction to hear and determine the matter under the terms of the law. On their part, the applicants contended that notwithstanding the Presidential Declaration they continued to enjoy the physical possession of the Lotto Office. In fact they argued that rent was paid up to 31 May 1997.

The Constitutional Court held that Article 1 Protocol 1 ECHR guaranteed the peaceful enjoyment of possessions, including the right to have, to use, to dispose of, to pledge, to lend and even to destroy one's possessions. Following the publication of a Presidential Declaration in terms of Article 3 of the Ordinance for the Acquisition of Land for a Public Purpose (Chapter 88 of the Laws of Malta), the government was empowered to dispose of the property in issue. From that moment, the owner is divested of the enjoyment of his property or his right to dispose of the same. However, until a formal deed is published whereby the property is transferred to the competent authority, the ownership of the property is not transferred. The law itself envisages the possibility that notwithstanding a Presidential Declaration, the competent authority chooses not to take possession of the property in question. In this respect Article 32.1 stipulates: "Nothing in this

Ordinance shall be taken to compel the competent authority to complete the acquisition of any land unless the competent authority shall have entered into possession of the land...”.

Therefore, the declaration issued by the President of Malta did not have the effect of divesting the owner of all his proprietary rights over the property. Thus, it is possible for the competent authority to permit the owner to remain in possession of the expropriated property. This is what actually took place in the present case. Although legally speaking the Declaration had disturbed the owners' peaceful enjoyment of their property, it could not be stated that there was such a disturbance in practice. The fact that for so many years the owners continued to enjoy the property and continued to receive rent for it, entitled them to presume that the competent authority had changed its decision in respect of the expropriation. It was only in 1997 that the competent authority definitely took over the possession of the premises. Therefore, the Court had jurisdiction to decide the merits of the case in terms of the European Convention.

#### Cross-references:

##### European Court of Human Rights:

- *Sporrong and Lönnroth v. Sweden*, 23.09.1982, Series A, no. 52; *Special Bulletin – Leading cases ECHR* [ECH-1982-S-002].

#### Languages:

Maltese.



#### Identification: MLT-2000-3-003

- a) Malta / b) Constitutional Court / c) / d)** 11.08.2000 /  
**e) 526/95 / f) Constantino Consiglio et al. v. Air Supplies and Catering Company Limited / g) / h).**

#### Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

3.13 General Principles – **Legality**.

4.7 Institutions – **Judicial bodies**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms**.

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents**.

5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

#### Keywords of the alphabetical index:

Employment, termination / Agreement, labour, collective.

#### Headnotes:

As a general rule, an individual has fundamental human rights against the state, and the state has a duty to protect those rights. However, it is a misconception to argue that an individual has no human rights against a private body. Although it is an established principle that the state must guarantee the enjoyment of fundamental human rights and freedoms, bodies other than the state or its agencies are capable of violating such rights. To argue otherwise would mean that an individual employed by a corporation which was an agency or subsidiary of the state would enjoy a privileged position compared to an employee of a private company. It is unacceptable to apply such a restricted interpretation of human rights as this would only serve to discriminate between citizens.

A Disciplinary Board was declared not to qualify as a tribunal for the purposes of Article 6 ECHR. Therefore, their procedure was not subject to the guarantees established for a fair hearing, and a decision delivered by such a board could not be considered as being conclusive and binding on the respective parties. The decision of the Board was subject to an appeal and it was also possible to go to an Industrial Tribunal. Such proceedings were decisive for the private law rights and obligations of the applicants.

Notwithstanding this, the Court identified the possibility of a breach of the applicants' right to a fair hearing in the determination of their civil rights and obligations, both during the course of the judicial process as well as prior to its commencement.

### **Summary:**

The applicants were employed with Air Supplies Company Limited, a subsidiary of the national airline company, whose majority shareholder was the state. The applicants complained of a breach of their fundamental right to a fair hearing at the Industrial Tribunal, as the company principal had refused their request to submit a copy of the report issued by the Disciplinary Board.

The Constitutional Court expressed the view that the Disciplinary Board did not qualify as a tribunal in terms of Article 6 ECHR. The Court emphasised that a tribunal for the purposes of Article 6 ECHR is characterised by its judicial function, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must satisfy a series of other requirements relating to independence from the executive, impartiality, duration of members' term of office, and guarantees afforded by its procedure, several of which appear in Article 6 ECHR. Furthermore, the Disciplinary Board was not established by law but by a collective agreement concluded between the respondent company and the respective trade unions.

The Court held that under these circumstances the Disciplinary Board could not be considered as a competent judicial authority to determine the civil rights and obligations of an individual. Consequently, proceedings held before the Disciplinary Board were not governed by the guarantees established for a fair hearing. This was notwithstanding that under the collective agreement, the Board was bound to observe the principle of natural justice in the course of proceedings. Furthermore, any decision taken by the Board which concerned the termination of employment of an employee was not final. The Board's decision was subject to the review of a tribunal established by law. The employee could refer the matter to the Industrial Tribunal under the Industrial Relations Act (Chapter 266 of the Laws of Malta). Such a tribunal had to satisfy the requirements stipulated in Article 6 ECHR, which provides for procedural and institutional safeguards including that the court is established by law, that it must be independent and impartial, and that a decision is delivered within a reasonable time.

The Court held that Article 6 ECHR applied to proceedings the results of which are decisive for private rights and obligations. Therefore, the character of the legislation that governs how the matter is to be determined and the authority vested with jurisdiction in the matter is of little consequence. The Board's refusal to provide the applicants with a copy of the report placed them at a disadvantage compared with the respondent company. The copy of the report was required by the

applicants so that they could prepare the appeal proceedings following the decision delivered by the Disciplinary Board, a right granted to all employees in terms of the collective agreement. The right to a fair hearing requires compliance with the principle of equality of arms, which is a central feature of the concept of a fair hearing. Everyone who is a party to proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage *vis-a-vis* his opponent. The breach of an individual's right to a fair hearing was not restricted to violations which occur in the course of proceedings, but equally applies to actions performed prior to the commencement of proceedings and which might prejudice the outcome of the proceedings.

The Court delivered judgement in favour of applicants.

### **Cross-references:**

European Court of Human Rights:

- *Ringeisen v. Austria*, 16.07.1971, Series A, no. 13;
- *König v. Germany*, 28.06.1978, Series A, no. 27, *Special Bulletin – Leading cases ECHR* [ECH-1978-S-003];
- *Kaufman v. Belgium* (1986);
- *Belilos v. Switzerland*, 29.04.1988, Series A, no. 132;
- *H. v. Belgium*, 30.11.1987, Series A, no. 127-B;
- *H. v. France*, 24.10.1998, Series A, no. 162-A.

### **Languages:**

Maltese.



**Identification:** MLT-2000-3-004

- a) Malta / b) Constitutional Court / c) / d) 11.08.2000 / e) 700/99 / f) Marthесe Azzopardi v. Maltacom plc / g) / h).**

**Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

4.7 Institutions – **Judicial bodies**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

**5.3.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.**

**Keywords of the alphabetical index:**

Employment / Confidentiality, obligation, breach / Promotion, aspiration / Promotion, right.

**Headnotes:**

The issue referred to disciplinary proceedings held before an Appeals Board. The applicant was accused of breaching her confidentiality obligation under a collective agreement signed between the respondent company and the union which represented the applicant. A decision of a disciplinary board that involves the determination of an employee's civil rights and obligations (for instance a decision ordering dismissal) could not be deemed to be decisive until the merits of the case are considered and determined by a tribunal established by law. The tribunal is to satisfy the conditions imposed by Article 6 ECHR. Article 6 ECHR was not applicable to proceedings that are not decisive for private rights and obligations.

**Summary:**

Proceedings were filed against the applicant before the Disciplinary Appeals Board, appointed by the employer to investigate her conduct at the place of work, in particular whether she was in breach of her confidentiality obligation.

A decision was delivered and the applicant was declared to have breached the conditions of her employment. The Board was composed of three directors of the respondent company. The applicant alleged that due to the disciplinary board's decision, she forfeited her right to promotion. This meant a loss of income. The applicant contested the composition of the Appeals Board. The Court held that the proceedings were not decisive for private rights and obligations. The disciplinary proceedings did not necessarily affect the applicant's prospects of promotion. The proceedings were decisive in establishing whether or not the employee was responsible.

The Constitutional Court emphasised that internal appeal procedures in commercial enterprises should not be cramped by impracticable legal requirements. It was almost inevitable that the person who would make the original decision to dismiss would normally be in daily contact with the manager who would hear the appeal and make a final decision. As long as the disciplinary and appeal bodies acted fairly and justly, their decisions were to be supported. However, any

overt expression of bias or other indications that a decision is reached prior to the hearing of evidence, must be avoided.

Furthermore, where the decision of a disciplinary board would determine an employee's civil rights and obligations, that decision would not be declared to be binding and conclusive unless it was subject to the scrutiny of a tribunal established by law which satisfied all the requirements of Article 6 ECHR. The Court then considered whether the decision delivered by the disciplinary board, which adversely affected the applicant's aspirations of promotion, could be qualified as one determining the applicant's civil rights and obligations.

The Court held that for Article 6 ECHR to apply:

1. there must be a genuine and serious claim or dispute relating to rights or obligations recognised at least on arguable grounds in domestic law;
2. the outcome of the dispute must be directly decisive of the rights and obligations in question; and
3. those rights or obligations must be civil in character.

The Court did not believe there was a right to promotion in domestic law. Although the applicant was entitled to aspire to promotion, the ultimate decision was clearly at the employer's discretion. Disciplinary matters which did not involve the dismissal of the employee were not disputes over civil rights. With respect to dismissal from employment, it was established that the law itself prohibited dismissal except for a just cause and for reasons stipulated by law. In such circumstances, the person concerned is entitled to have the matter dealt with by a tribunal. If the administrative or disciplinary body concerned is not itself a tribunal meeting the requirements of Article 6 ECHR, it must be subject to subsequent control by a judicial body which does comply with that article. The judicial body must moreover have full jurisdiction to deal with the dispute, and judicial review of the lawfulness of an administrative body's decision may not be sufficient. The same principle applied where the right to a pension or to social benefits regulated by law were in issue.

**Cross-references:**

**European Court of Human Rights:**

- *Le Compte v. Belgium*, 23.06.1981, Series A, no. 43, *Special Bulletin – Leading cases ECHR* [ECH-1981-S-001];
- *Francesco and Gian Carlo Lombardo v. Italy*, 26.11.1992, Series A, no. 249-B.

**Languages:**

Maltese.



**Identification:** MLT-2001-2-001

- a) Malta / b) Constitutional Court / c) / d) 17.01.2001 /  
 e) 579/97AJM / f) Giovanni Psaila v. the Advocate General / g) / h).

**Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

3.18 General Principles – **General interest**.

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State**.

**Keywords of the alphabetical index:**

Witness, detention / Informant, identity, disclosure / Witness, obligation, fulfilment.

**Headnotes:**

The applicant contended that Article 522.2 of the Criminal Code (Chapter 9 of the Laws of Malta) was in violation of Article 5.1 and 5.4 ECHR and Article 34.1 of the Maltese Constitution. The article stipulated that “it shall be in the power of the court to order any witness, who shall refuse to be sworn in or to make a deposition, to be arrested and detained as long as may be necessary, or as the court may think proper, having regard to the insubordination of the witness and the importance of the matter”.

The law provided guarantees which secured the fulfilment of the obligation of the witness to reply to questions. Judges had to use their discretion in deciding if this obligation had been fulfilled, taking into

account the supreme interest of the proper administration of justice.

The fact that Article 522.2 of the Criminal Code did not impose any limitation on the period of detention was in violation of Article 5.1.b ECHR and Article 34 of the Constitution. The Court held that in terms of the article it was possible for a hostile witness to be detained in custody even after the conclusion of the trial.

Article 522.2 was also held to be in breach of Article 5.4 ECHR in that it did not afford the witness an opportunity to contest the court's order and request a review thereof.

**Summary:**

The applicant was summoned as a witness in the course of criminal proceedings instituted against a third party accused of homicide. During his deposition, the applicant refused to answer a question made by the prosecuting officer whereby he was requested to reveal the identity of a person. The Court of Magistrates ordered the arrest of the applicant under Article 522.2 of the Criminal Code. The applicant alleged that he was detained for a period of seven days.

The Constitutional Court emphasised that the Court had every right to adopt legitimate measures provided by legislation to ensure that a witness, declared to be hostile, understands that he has an obligation towards society to state the truth, and nothing but the truth. The witness had no right to refuse to disclose the identity of an individual. This was not a case where the witness could invoke the privilege of professional secrecy. His claim was based on the promise he made to his informant not to disclose his identity.

Under the disputed provision, detention was intended to secure the fulfilment of the obligation imposed on the witness to reply to questions. Detention in order to ensure the fulfilment of an obligation, rather than to act as a punishment for breaching such an obligation, cannot be justified under Article 5.1.b ECHR.

The law outlined the criteria for retaining a witness in detention in terms of Article 522.2 of the Criminal Code, and declared that they were not based on time but on the attitude of the witness and the circumstances under which he refused to co-operate. However, the Court took exception to that part of the provision which did not establish a maximum period during which the witness could be detained. The obligation of the witness to tender evidence should subsist during the course of the proceedings and no further. On conclusion of the court proceedings, the obligation of the witness ceased and his evidence would no longer be essential. The words “detained as long as may be necessary, or as the court

may think proper”, without any limitation or qualification, could theoretically lead to a situation where the witness is remanded in custody notwithstanding the closure of the trial.

Furthermore, the law itself did not provide a right to appeal or to contest the detention once the court ordered the arrest of the witness or during the course of arrest. Article 5.4 ECHR was held to apply in all those cases where it was possible for an individual to be deprived of his liberty. The Convention intends ensuring the right of an individual to contest his detention in all circumstances, even where his arrest ensues for non-compliance with the lawful order of a court or to secure the fulfilment of an obligation imposed by law. A state must provide recourse to the courts in all cases whether the detention is justified by Article 5.1 ECHR or not. Therefore, although a detention has been found to be lawful under the European Convention on Human Rights, Article 5.4 ECHR must nonetheless be considered.

The respondent argued that in terms of Article 137 of the Criminal Code, a magistrate was empowered to attend to a lawful complaint dealing with an unlawful detention. Therefore, the decision to remand in custody a hostile witness was subject to revision by a court of law. However, the Constitutional Court referred to a Judgment delivered by the European Court of Human Rights, *T.W. v. Malta* (App. no. 25644/94) on 29 April 1999, and upheld the view that:

“The review must be automatic. Furthermore, even in the context of an application by an individual under Section 137, and having regard to Section 353, the scope of the review has not been established to be such as to allow a review of the merits of the detention. Apart from the cases where the time limit of 48 hours was exceeded, the government has not referred to any instances in which Section 237 of the Criminal Code has been successfully invoked to challenge either the lawfulness of, or the justification for, an arrest on suspicion of a criminal offence...”.

The Constitutional Court concluded that the arrest of a witness to ensure that he submits his evidence and replies to questions was a legitimate measure to ensure the proper administration of justice.

Article 522.2 of the Criminal Code was in breach of an individual’s fundamental rights, in that it did not stipulate that the period of detention could not exceed the duration of the trial in which the witness was summoned to give evidence. Furthermore this provision of law failed to provide for a system whereby the court’s order could be challenged.

In this particular case, the period of detention was not disproportionate to the scope of the Criminal Code, namely establishing an adequate mechanism in the search for the truth.

No compensation was due. The mere fact of violation of one or more of the first four paragraphs of Article 5 ECHR does not in itself constitute a sufficient ground for an award of compensation.

#### Cross-references:

European Court of Human Rights:

- *Egg v. Switzerland*, no. 7341/76;
- *Johansen v. Norway*, no. 10600/83;
- *De Wilde, Ooms and Versyp v. Belgium*, 18.06.1971, *Special Bulletin – Leading cases ECHR* [ECH-1971-S-001];
- *T.W. v. Malta*, no. 25644/94, 29.04.1999.

#### Languages:

Maltese.



*Identification: MLT-2001-3-002*

- a)** Malta / **b)** Constitutional Court / **c)** / **d)** 02.11.2001 /  
**e)** 582/97FGC / **f)** Francis Xavier Mifsud v. Advocate General / **g)** / **h)**.

#### Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

#### Keywords of the alphabetical index:

Bias, judicial officer / Bias, suspicion / Criminal proceedings / Damages, compensation, non-economic loss.

### **Headnotes:**

Where a victim of a crime joins a criminal prosecution as a civil party claiming compensation for injury caused by the crime, such proceedings will involve the determination of his civil rights and obligations. This principle is applicable where such a claim is the remedy provided by national law for the enforcement of a civil right, such as the right to protection of one's reputation. In such a situation, Article 6 ECHR is applicable as the outcome of the criminal proceedings is decisive for the civil rights of the injured party.

### **Summary:**

The applicant filed three separate complaints with the police requesting the institution of criminal proceedings against a third party who had allegedly insulted and defamed him verbally. In the criminal proceedings, the accused was discharged for different reasons. The applicant (the civil party in the criminal proceedings) alleged that in each case his right to a fair trial was breached by the Court.

Defamation proceedings were filed in terms of Article 252 of the Criminal Code, since this particular crime is separate and distinct from that contemplated under the Press Act (Chapter 248 of the Laws of Malta). In the latter case, the complainant may resort to criminal or civil proceedings and in the civil proceedings the aggrieved party has a right to claim for the payment of damages (real and moral damages). Where the defamation consisted merely of words uttered to the complainant, he could only resort to the action contemplated in Article 252 of the Criminal Code. It was in the criminal proceedings that the aggrieved party could obtain a judicial declaration that his reputation had been damaged. Although Article 3 of the Criminal Code provides that "a crime gives rise to a criminal action and a civil action", the complainant could not institute civil proceedings to defend his honour if he is not in a position to prove that he suffered actual harm as a consequence of the defamation.

The Constitutional Court concluded that in the criminal prosecution the aggrieved party (the victim) was defending his honour and reputation and therefore the outcome of the proceedings was decisive for his civil rights. Under such circumstances the individual had a right to invoke the protection of Article 6 ECHR, notwithstanding that he was only a civil party to the criminal proceedings. Therefore, since the result of the criminal proceedings were directly decisive of the applicant's right to his reputation, Article 6 ECHR was applicable.

Nevertheless, the Constitutional Court dismissed the application due to lack of evidence that the presiding Magistrate was prejudiced or biased. The Court observed that there is a presumption in law that the magistrate or judge is impartial until there is proof to the contrary. As to the subjective test, the question is whether it can be shown on the facts that a member of the court acted with personal bias against the applicant. Although a judge has personal emotions, he must not permit himself to be led by them during the hearing of the case and in the formation of his opinion. On the other hand, not every comment passed by a judge to ensure the proper conduct of the judicial proceedings would signify bias.

### **Cross-references:**

European Court of Human Rights:

- *Boeckmans v. Belgium* (1965);
- *Golder v. United Kingdom*, 21.02.1975, *Special Bulletin – Leading cases ECHR* [ECH-1975-S-001];
- *Moreira de Azevedo v. Portugal*, 23.10.1990, Series A, no. 189;
- *Helmers v. Sweden*, 29.10.1991, Series A, no. 212-A;
- *Tomasi v. France*, 27.08.1992, Series A, no. 241-A, *Special Bulletin – Leading cases ECHR* [ECH-1992-S-005];
- *Fayed v. United Kingdom*, 21.09.1994, Series A, no. 294-B.

### **Languages:**

Maltese.



**Identification:** MLT-2001-3-003

- a)** Malta / **b)** Constitutional Court / **c)** / **d)** 02.11.2001 /  
**e)** 706/99RCP / **f)** Victoria Cassar v. Malta Maritime Authority / **g)** / **h)**.

### **Keywords of the systematic thesaurus:**

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

2.1.1.4.12 Sources – Categories – Written rules – International instruments – **Convention on the Elimination of all Forms of Discrimination against Women of 1979.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

#### *Keywords of the alphabetical index:*

Employment, access / Woman, advancement of rights / Convention on the Elimination of all Forms of Discrimination against Women.

#### *Headnotes:*

Legislation permitting only men to apply for employment as port workers is unconstitutional inasmuch as it treats men differently from women although there is no objective and reasonable justification for such differentiation.

#### *Summary:*

In terms of Legal Notice 13 of 1993, eligibility to fill a vacancy as a port worker was limited to the eldest son of a port worker who retires or leaves work on medical reasons. In the absence of a son, eligibility to fill a vacancy is limited to the eldest brother of the port worker.

The applicant was the eldest daughter of a retiring port worker. Prior to her father's retirement, the applicant filed an application for the job. Her application was refused since only men were eligible for the post.

The Court emphasised that the advancement of the equality of the sexes today plays a major role in all member states of the Council of Europe. Differences in treatment are an exception and must strike a fair balance between the protection of the community and the respect for the rights and freedoms safeguarded by the European Convention on Human Rights. It is for the government to prove that there is an objective and reasonable justification for such differentiation in treatment. The respondents contended that port work required physically strong workers and women were not adapted to carry out such work. The Court expressed the view that the evidence produced did not justify this type of reasoning:

a. although prior to engagement a medical examination was carried out on the applicant, the scope of the medical test was not aimed at establishing the physical capability and strength of the applicant with respect to port work;

- b. as a result of technological advancement, the work was mainly carried out by the use of machinery which did not require any physical strength to operate;
- c. an employee was eligible to continue in his employment as port worker until he reaches the age of retirement. There were port workers who were sixty years old and during employment no medical tests were carried out to establish whether the employee was still physically capable of performing his duties as a port worker;
- d. records showed that since 1992 there were only a handful of cases where a port worker was retired for medical reasons.

In the Court's opinion, these facts confirmed that there was no rational basis and no evidential foundation for making the differentiation between men and women. Therefore, the discrimination had to be eliminated. The Constitutional Court also referred to the Convention on the Elimination of all Forms of Discrimination against Women (Malta became a signatory to this Convention in March 1991). Article 11 stipulates:

"State parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on a basis of equality of men and women the same rights, in particular... (b) the right to the same employment opportunities including the application of the same criteria for selection in matters of employment; (c) the right to a free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and re-training including apprenticeship, advanced vocational training and recurrent training."

Therefore, the Court concluded that Legal Notice 13 of 1993 violated Article 45.4.d of the Constitution which protected, amongst other things, an individual's right against discrimination on the basis of sex.

#### *Cross-references:*

European Court of Human Rights:

- Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (1968), 23.07.1968, Series A, no. 6, *Special Bulletin – Leading cases ECHR* [ECH-1968-S-003];
- *Abdulhaziz, Cabales and Balkandali Case v. the United Kingdom*, 28.05.1985, Series A, no. 94, *Special Bulletin – Leading cases ECHR* [ECH-1985-S-002].

#### *Languages:*

Maltese.



### *Identification:* MLT-2002-H-001

**a) Malta / b) Constitutional Court / c) / d) 15.01.2002 / e) 567/1996 / f) Maurice Mizzi v. Attorney General / g) / h).**

#### *Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
 3.16 General Principles – **Proportionality.**  
 3.17 General Principles – **Weighing of interests.**  
 3.19 General Principles – **Margin of appreciation.**  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**  
 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**

#### *Keywords of the alphabetical index:*

Child, paternity / DNA, testing / Family, paternity, contestation / Paternity, contestation, time-limit.

#### *Headnotes:*

The statutory time limitation which prevents the father from filing proceedings to contest the paternity of the child is not contrary to Article 8 ECHR. The Court assessed whether such a limitation was legitimate and necessary in a democratic society, for the protection and freedom of others.

#### *Summary:*

Applicant alleged that a DNA test had confirmed that he was not the father of the child which his wife gave birth to during their marriage. The test had been carried out approximately a year and a half prior to the commencement of this case, and his daughter had voluntarily submitted herself to such a test.

According to law applicant had to file judicial proceedings to repudiate paternity within three months (subsequently amended to six months in 1993).

The essential object of Article 8 ECHR is to protect the individual against arbitrary action by the public authorities. A fair balance has to be struck between the competing interests, those of the individual and the community as a whole. In this respect the State enjoys a certain margin of appreciation. The Court held that it had to assess whether there was a fair balance

between the interest of the husband who had a right to know whether he was the father or not and regulate his family life according to such information, and the interest of the child to enjoy certainty of her civil status as she was known and brought up, whether such was a status of legitimacy or illegitimacy.

The introduction of time-limits for the institution of paternity proceedings by the husband was justified by the desire to ensure legal certainty and most significantly to protect the interests of the child.

Although it is true that the ideal situation is where legal certainty corresponds to factual reality, however a State is justified in protecting the stability of a family nucleus and above all the interests of a child. In the circumstances the State had not transgressed the principle of proportionality. In this case the evidence did not show that the social reality in which the child was brought up did not correspond to what was stated in her birth certificate. The child had been raised as the daughter of the applicant.

#### *Cross-references:*

#### *European Court of Human Rights:*

- *Rasmussen v. Denmark*, 28.11.1984, Series A, no. 87; *Special Bulletin – Leading cases ECHR* [ECH-1984-S-008];
- *Keegan v. Ireland*, 26.05.1994, Series A, no. 290; *Bulletin 1994/2* [ECH-1994-2-008];
- *Kroon and others v. the Netherlands*, 27.10.1994, Series A, no. 297-C; *Bulletin 1994/3* [ECH-1994-3-016];
- *Nylund v. Finland*, no. 27110/95, 29.06.1999;
- *Ibrahim Yildrim v. Austria*, no. 34308/96, 19.10.1999.

#### *Languages:*

Maltese.



### *Identification:* MLT-2005-1-003

**a) Malta / b) Constitutional Court / c) / d) 15.02.2005 / e) 519/1995 / f) Nazzareno Mercieca v. Hon. Prime Minister et al / g) / h) CODICES (Maltese).**

***Keywords of the systematic thesaurus:***

- 5.3.13.17 Fundamental Rights – Civil and political rights  
– Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**
- 5.3.13.19 Fundamental Rights – Civil and political rights  
– Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**
- 5.3.13.28 Fundamental Rights – Civil and political rights  
– Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

***Keywords of the alphabetical index:***

Magistrate, right to examine / Witness, examination by both parties / Defence, right.

***Headnotes:***

A defendant has the right to confront or cross-examine witness, although such a right is not absolute. Furthermore, a conviction should not rest solely or mainly on a disputed statement. There are circumstances where witnesses cannot be produced. However, any measures restricting the rights of the defence should be strictly necessary. Where a less restrictive measure can suffice then that measure should be applied.

***Summary:***

Applicant was accused and found guilty of voluntary homicide. He was condemned to twenty (20) years imprisonment. He claimed a breach to his fundamental right for a fair hearing in that a part of the transcript of a statement he made to the Inquiring Magistrate, was incorrect. According to the applicant the punctuation used by the Magistrate changed the implication of the whole sentence. He claimed that he was illiterate and had not read the transcript as written by the Magistrate. Applicant filed a request to summon the Magistrate as witness. His request was refused. He therefore claimed a breach of his right to a fair hearing and equality of arms.

The Court confirmed that all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to an adversarial argument. What is essential is:

- a. The defendant's right to confront or cross-examine every prosecution witness. This right although important, is not absolute;
- b. A trial would be unfair if the conviction rested solely or mainly on the disputed statement;
- c. There are some cases where the impracticability of producing the witness at the trial might lead the Court to adopt a more flexible approach to

Article 6.3.d ECHR, example where a witness has gone missing and is not traceable;

- d. Any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice than that measure should be applied.

Applicant was contesting the Magistrate's transcript of the statement made by the accused who at the time was still a suspect. During the criminal inquiry, the Magistrate although acting more as an investigator rather than an adjudicator, is nonetheless a judicial authority. The prevailing opinion is that the inquiring magistrate cannot be produced as a witness on something which is in the *procès-verbal*. This does not mean that it is not possible to have the *procès-verbal*, for a valid reason at law, declared inadmissible as evidence. For example where it transpires that the Magistrate did not give a warning to the suspect that he has a right to remain silent and that anything he states could be used against him in a court of law.

Article 550 of the Criminal Code (Chapter 9 of the Laws of Malta) states:

- "1. The *procès-verbal*, if regularly drawn up, shall be received as evidence in the trial of the cause, and it shall not be necessary to examine the witnesses, experts or other persons who took part in the inquest.
2. Nevertheless it shall be lawful for either of the parties to produce the persons mentioned in the *procès-verbal* in order that they may be heard *viva voce*".

Therefore, both the prosecution and the accused can produce evidence which shows that what is stated in the *procès-verbal* is not correct. However, the fact that the inquiring magistrate cannot be produced as a witness does not in itself give rise to a lack of fair hearing. Whatever is stated in the *procès-verbal* compiled by the Inquiring Magistrate is subject to control and verification. However, the Court did not totally exclude the possibility that under remote circumstances where the Magistrate is the only witness that can be produced for purposes of control and verification, he is produced as a witness to ensure that justice is done.

From the evidence it did not transpire that during the compilation proceedings or when the accused filed his list of witnesses, the inquiring magistrate was ever mentioned as a witness. The matter was put in issue when defence lawyers were making their final submissions to the jurors. Furthermore, it was highly improbable that the Magistrate would remember such a fine detail, since approximately three years had lapsed since the accused released his statement to the Inquiring Magistrate.

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Furthermore, the Court expressed the view that this incident was not the decisive factor which led the jurors to deliver a guilty verdict. There was no evidence which indicated that the jurors based their decision solely or principally on that part of the transcript being contested by the applicant. This matter had also been dealt with at length by the Court of Criminal Appeal, and the judgement delivered by the Criminal Court was confirmed.

Finally, the Constitutional Court held that a mistake which occurs during an investigation or a trial, does not automatically give rise to a breach to one's right to a fair trial. There can be other remedies which can adequately rectify such a mistake, for example the right to appeal. For arguments sake even if one had to concede that a mistake was committed by the Magistrate while transcribing the statement made by the suspect, such a fact did not in itself give rise to a breach of Article 6 ECHR.

Applicant's request was rejected.

#### Cross-references:

European Court of Human Rights:

- *Barbera, Messegué and Jabardo v. Spain*, 06.12.1988, (1989); Series A, no. 146; *Special Bulletin – Leading cases ECHR* [ECH-1988-S-008];
- *Ludi v. Switzerland*, 15.06.1992, (1993), Series A, no. 238; *Special Bulletin – Leading cases ECHR* [ECH-1992-S-004];
- *Artner v. Austria*, 28.08.1992, Series A, no. 242-A;
- *Asch v. Austria*, 26.04.1991, (1993); Series A, no. 203;
- *Van Mechelen and others v. the Netherlands*, 23.04.1997, (1998); *Reports* 1997-III.

#### Languages:

Maltese.



**Identification:** MLT-2005-H-001

**a)** Malta / **b)** Constitutional Court / **c)** / **d)** 25.02.2005 /  
**e)** 1033/1996 / **f)** Joseph John Edwards *proprio et nomine* v. Director of Social Housing / **g)** / **h)**.

#### Keywords of the systematic thesaurus:

- 3.5 General Principles – **Social State**.
- 3.17 General Principles – **Weighing of interests**.
- 3.18 General Principles – **General interest**.
- 3.19 General Principles – **Margin of appreciation**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

#### Keywords of the alphabetical index:

Compensation, fair / Compensation, right / Competence, *ratione temporis* / Housing / Property, right to enjoyment / Requisition, vacant dwellings / Social policy, aim, legitimate.

#### Headnotes:

The Court was not competent to deal with claims of breach of fundamental human rights in terms of the European Convention Act (Chapter 319 of the Laws of Malta), where the breach occurred prior to the 30 April 1987.

The Housing Act (Chapter 125 of the Laws of Malta) aims at establishing a fair balance between social needs of the community and the right of an owner to enjoy his property. The Convention did not guarantee a right to full compensation in all circumstances. Legitimate objectives of public interest, such as measures aimed to achieve greater social justice, may call for less than reimbursement of the full market value.

#### Summary:

Applicant owned property which the Government requisitioned in September 1975, and allocated to a third party for residential purposes. The premises consisted of a number of rooms, a small back garden and a field adjoining the back garden and accessible only through the back garden.

The applicant claimed that:

- a. The field became part of the requisitioned premises as a result of the requisition order and not because it was so at the time of the issue of the requisition order. In terms of law, property could only be requisitioned for providing accommodation, and the applicant claimed that the field could not qualify as accommodation.

The Constitutional Court held that the evidence showed that the field was at a lower level from the rest of the property, and its only access was through the house. In terms of Article 2 of the Housing Act (Chapter 125 of

the Laws of Malta), “building” means a house or other building, or part thereof, used or capable of use for residential purposes, and includes any land or garden forming an integral part, or enclosed within the precincts, of such a house or other building....”.

The Court concluded that at the time of issue of the requisition order, the field was an integral part of the requisitioned premises. Furthermore, it was not apparent that at the time the applicant made a serious objection to the requisition order and in fact he continued to receive rent from the tenant (i.e. the person to whom the Government allocated the property) for a period of twenty years.

The complaint was rejected.

b. Article 1 of Protocol 1 ECHR was applicable to this particular case.

In terms of Article 7 of the European Convention Act (Chapter 319 of the Laws of Malta), the European Convention on Human Rights does not apply with regards to a breach committed prior to the 30 April 1987.

The Constitutional Court held that it was evident that applicant's objection referred to the time when the requisition order was issued (i.e. September 1975), since he was claiming that the order was not issued in the public interest. The Court held that the requisition commenced with the issue of the order, it continued when the owner/applicant was requested to deposit the keys of the premises with the Housing Department, and concluded by the taking over of the premises. Facts which dated prior to the 30 April 1987. Therefore the Court lacked competence *ratione temporis*.

However, applicant also complained that due to the requisition he was not receiving adequate compensation. This was ‘a continuing situation’ whenever the rent was paid to the applicant. Therefore Article 7 was not applicable with respect to this complaint, and the Court had jurisdiction to deal with this matter.

c. The applicant was not receiving adequate compensation and he was being deprived of his property for an indefinite period of time.

The Court contended that a requisition is a *pro tempore* measure concerning the use and administration of the requisitioned premises. The scope of Act 125 of the Laws of Malta is “To make provision for securing living accommodation to the homeless, for ensuring a fair distribution of living accommodation and for the requisitioning of buildings”. It is evident that this particular law has a social aim and intended to create a

fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The requisition aimed at providing the property in question for habitation purposes.

As to payment of compensation, it was not apparent that the applicant exhausted his ordinary remedies prior to filing this case. In terms of Act 125 of the Laws of Malta, the applicant had every right to request the Rent Regulation Board to establish the fair rent. Applicant failed to make such a request. Notwithstanding, the Court also referred to judgements delivered by the European Court of Human Rights which confirmed that the Convention did not guarantee a right to full compensation in all circumstances. Legitimate objectives of public interest, such as measures aimed to achieve greater social justice, may call for less than reimbursement of the full market value. State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. This is an area where the legislator's margin of appreciation in implementing social and economic policies is wide.

The Court rejected applicant's complaint.

#### Cross-references:

European Court of Human Rights:

- *Rasmussen v. Denmark*, 28.11.1984, Series A, no. 87; *Special Bulletin – Leading cases ECHR* [ECH-1984-S-008];
- *Allan Jacobsson v. Sweden*, 25.10.1998, Series A, no. 163;
- *Pine Valley Developments Ltd and Others v. Ireland*, no. 12742/87) – European Commission, Series A, no. 222;
- *Holy Monasteries v. Greece*, 09.12.1994, Series A, no. 301-A; *Bulletin* 1994/3 [ECH-1994-3-020];
- *James & Others v. the United Kingdom*, 21.02.1986, Series A, no. 98;
- *Connie Zammit et v. Malta*, 12.01.1991 – European Commission.

#### Languages:

Maltese.



# Mexico

## Electoral Court of the Federal Judiciary

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### Important decisions

*Identification:* MEX-2012-1-002

- a) Mexico / b) Electoral Court of the Federal Judiciary /
- c) High Chamber / d) 09.03.2011 / e) SUP-JRC-028/2011 / f) / g) *Official Collection of the Decisions of the Electoral Court of the Federal Judiciary of Mexico* /
- h) CODICES (Spanish).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies**.

3.13 General Principles – **Legality**.

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

*Keywords of the alphabetical index:*

Reply, right / Censorship, prior.

*Headnotes:*

The right of reply protected by Article 6 of the Constitution cannot be restricted to allow for prior censorship or any further limitations not established by the Constitution. Although a state or local Electoral Institute can issue

guidelines to protect and enforce the right of reply, these should not impose additional restrictions, at the risk of being revoked due to their unconstitutionality.

*Summary:*

I. On 16 January 2011 a local newspaper published an article titled “Aguirre lies again” referring to Angel Aguirre, a candidate of a coalition named “Guerrero Unites Us” (hereinafter, the “Coalition”) for governor of the State of Guerrero. That day the Coalition filed a request before the Electoral Institute of the State of Guerrero (hereinafter, the “Institute”) in order to invoke the right to reply in accordance with Article 203 of the Law of Electoral Institutions and Procedures of the State of Guerrero (hereinafter, “State Electoral Law”). On 20 January 2011 the Institute issued Guidelines to Guarantee and Enforce the Right of Reply (hereinafter, the “Guidelines”). On 23 January 2011 the Coalition initiated a trial of constitutional electoral review against the Guidelines, which was referred on 25 January 2011 to the Electoral Court of the Federal Judiciary. The Coalition argued that the Guidelines contravened Article 6 of the Constitution as well as the Law on Printing Offenses.

II. In order to properly address the constitutionality of the Guidelines, the Electoral Court first analysed questions related to the freedom expression, specifically pertaining to the right of reply and prior censorship. To that end, the Court considered relevant criteria established by international instruments such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. In addition, the Court’s analysis of the interplay of the right of reply and prior censorship drew upon the case-law of the European Court of Human Rights and the Inter-American Court of Human Rights, as well as case-law of the Constitutional Court of Spain. In addition, the Electoral Court considered the interpretation provided by the Supreme Court of Justice of the prohibition of prior censorship, which implies that the State cannot submit expressive or communicative activities of individuals to a permission granted by the authority in advance since it enables the authority to deny it for reasons of content.

All things considered, the Electoral Court concluded that restrictions on the exercise of the right of reply, which is guaranteed by Article 6 of the Constitution, have to be in accordance with the cases and conditions envisaged in Article 1 of the Constitution. Thus, although the Electoral Court recognised the competence of the Institute to issue the Guidelines, in its current version the Guidelines were proven unconstitutional inasmuch as they imposed more restrictions than Article 6 Constitution and Article 203 of State Electoral Law contemplated. Moreover, the Electoral Court concluded that it did not need to examine whether the Guidelines complied with the Law on Printing

Offenses, since the unconstitutionality of the Guidelines had already been established. Consequently, the Electoral Court revoked the Guidelines.

III. Electoral Justice Flavio Galván Rivera issued a dissenting opinion as he considered that the trial of constitutional electoral review before the Electoral Court of the Federal Judiciary was not the adequate legal recourse to challenge the Guidelines. Electoral Justice Galván Rivera was of the view that the claim should have been referred as an appeal to the State Electoral Court of Guerrero.

Electoral Justice Manuel González Oropeza issued a concurring opinion due to the fact that he considered that both the Electoral Court of the Federal Judiciary and the State Electoral Court of Guerrero are competent to solve the claim, since the State Electoral Courts can judge on matters of constitutionality and legality.

#### *Supplementary information:*

Project presented by: Electoral Justice María del Carmen Alanis Figueroa.

#### *Cross-references:*

- *Bulletin* 1999/3 [ESP-1999-3-023];
- *Bulletin* 1998/1 [ECH-1998-1-003];
- *Special Bulletin – Leading cases ECHR* [ECH-1991-S-004];
- Inter-American Court of Human Rights, “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) v. *Chile*, 05.02.2001;
- Inter-American Court of Human Rights, *Ricardo Canese v. Paraguay*, 31.08. 2004;
- *Gaweda v. Poland*, no. 26229/95, 14.03.2002, European Court of Human Rights (Former Section I).

#### *Languages:*

Spanish.



#### *Identification: MEX-2011-3-007*

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 02.11.2011 / **e)** SUP-JDC-9167/2011 / **f)** The Cherán Case / **g)** Official Collection of the Decisions of the Electoral Court of the Federal Judiciary of Mexico / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

3.3.1 General Principles – Democracy – **Representative democracy**.

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting**.

5.2 Fundamental Rights – **Equality**.

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

#### *Keywords of the alphabetical index:*

Election, electoral right, protection / Election, local / Minority, ethnic, indigenous / Minority, electoral privilege / Minority, representation.

#### *Headnotes:*

Article 2 of the Federal Constitution recognises that an indigenous community constitutes a cultural, economic and social unit, settled in a territory and that recognises its own authorities, according to their own uses and customs.

Additionally, Article 2.A.III of the Constitution recognises and protects indigenous peoples'right to self-determination and, consequently, the right to autonomy so that they can “[E]lect, in accordance with their traditional rules, procedures and customs, their authorities or representatives to exercise their own form of government, guaranteeing women's participation under equitable conditions before men, and respecting the federal pact and the sovereignty of the States and the Federal District”.

#### *Summary:*

I. On 6 June 2011, 2,312 *Purépecha* indigenous inhabitants of the community of San Francisco Cherán – located in the state of Michoacán, Mexico – presented a claim to the Electoral Institute of Michoacán to request that their municipal (local) elections be held under the system of uses and customs instead of the electoral system of political parties established in the local Constitution of that federal entity. However, the Electoral Institute of Michoacán determined that it lacked the competence to solve this case and denied admission of the petition submitted by the people of San Francisco Cherán.

Therefore, the claimants initiated a *per saltum* action and presented a Proceeding for the Protection of the

Political and Electoral Rights of Citizens to the Electoral Court of the Federal Judiciary.

II. The High Chamber of the Electoral Court revoked the statement of the Electoral Institute of Michoacán and favoured the petitions of the claimants. The argument of the Court considered that both the Federal Constitution and the C169 Indigenous and Tribal Peoples Convention of the International Labour Organisation (ILO) guarantee indigenous collectivities complete access to justice considering their traditional rules, procedures and customs if these duly respect constitutional principles.

With this determination of autonomy, the necessity to eliminate any technical or factual obstacle that could impede or inhibit the exercise of indigenous communities to complete access to justice was recognised. The Electoral Court also established that no federal entity can remain indifferent regarding the obligations derived from the recently reformed Article 1 of the Constitution, which states that all individuals shall be entitled to the human rights granted by the Constitution and the international treaties signed by Mexico, as well as to the guarantees for the protection of these rights. Thus, every federal entity has to abide by national and international instruments that are binding on the Mexican state and that require recognition and protection of the ethnic and cultural diversity of indigenous peoples.

These issues regarding the relevance of compliance with international treaties of human rights are in line with paragraph 239 of the Decision of the European Court of Human Rights in *Ireland v. The United Kingdom* (Judgment of 18 January 1978) which specifies that “[u]nlike international treaties of the classic kind, the [European] Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which [...] benefit from a ‘collective enforcement’.”

Consequently, the Electoral Court determined by majority that the people of the community of San Francisco Cherán had the right to request the election of their own authorities following their rules, procedures and traditional practices.

III. Electoral Justice Flavio Galván, in a dissenting opinion, considered that neither the General Council of the Electoral Institute of Michoacán nor the Electoral Court were competent to solve the claims presented by the people of San Francisco Cherán. The body that, in his opinion, should have solved this question was the Congress of Michoacán, inasmuch as it has the attributions to modify the electoral system from a political party model to one governed by the uses, traditions and customs of the indigenous population.

Opinion presented by: Chief Electoral Justice José Alejandro Luna Ramos.

#### *Cross-references:*

European Court of Human Rights:

- *Ireland v. The United Kingdom*, 18.01.1978, Series A, no. 25; *Special Bulletin – Leading cases ECHR* [ECH-1978-S-001].

#### *Languages:*

Spanish.



*Identification:* MEX-2012-1-005

- a) Mexico / b) Electoral Court of the Federal Judiciary / c) High Chamber / d) 23.11.2011 / e) SUP-JRC-292/2011 / f) / g) Official Collection of the Decisions of the Electoral Court of the Federal Judiciary of Mexico / h) CODICES (Spanish).**

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies**.

3.13 General Principles – **Legality**.

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

*Keywords of the alphabetical index:*

Reply, right / Censorship, prior.

*Headnotes:*

The right of reply protected by Article 6 of the Constitution cannot be differentiated amongst individuals on the basis of their respective roles in electoral matters. Requiring that the right of reply should be first sought from the organ of the mass media that presented the message that affected the rights of the petitioner does not constitute a form of prior censorship.

*Summary:*

I. On 9 March 2011 the High Chamber of the Electoral Court of the Federal Judiciary (hereinafter, the "Electoral Court") revoked the Guidelines to Guarantee and Enforce the Right of Reply (hereinafter, the "Guidelines") issued by the Electoral Institute of the State of Guerrero (hereinafter, the "Institute"). In compliance with the Decision of the Electoral Court, on 29 September 2011 the Institute issued a new version of the Guidelines. On 5 October 2011 the Party of the Democratic Revolution (hereinafter, the "PRD") appealed the new version of the Guidelines before the Electoral Court of the State of Guerrero (hereinafter, the "State Electoral Court"). The State Electoral Court found the appeal partially substantiated.

However, the PRD challenged the decisions of the State Electoral Court and filed an action for constitutional electoral review before the Regional Chamber of the Electoral Court. On 17 November 2011 the High Chamber asserted jurisdiction of the constitutional electoral review. In the complaint, the PRD contended that the State Electoral Court's decision unlawfully confirmed the Guidelines in that it excluded citizens, pre-candidates and leaders of political parties from exercising their right of reply in electoral matters, which contravenes Article 6 of the Constitution. The PRD also argued that the Guidelines favoured prior censorship inasmuch as they require that a formal request must first be made to the director or other person in charge of an organ of the mass media to exercise the right of reply in order to make a petition before the Institute. Additionally, the PRD contended that the terms for the procedure to exercise the right of reply before the Institute established in the Guidelines and modified by the State Electoral Court are excessive.

II. The High Chamber agreed with the arguments presented by the PRD that the Guidelines excluded citizens, pre-candidates and leaders of political parties from exercising their right of reply. Thus, the High

Chamber deemed the Guidelines contrary to Article 6 of the Constitution and to Article 14 ACHR in that they unlawfully differentiated the right of reply in electoral matters.

However, the High Chamber did not agree with the PRD's contention that the requirement that a request regarding the right of reply must first be made directly to the director or other person in charge of the relevant organ of the mass media is a form of prior censorship. To arrive to that conclusion, the High Chamber considered the relevant international instruments and the national legislation and concluded that they all indicate that the right of reply should be first sought from the organ of the mass media that presented the message that affected a person's right to dignity or right to respect for one's honour and reputation. Finally, after carefully studying the time needed for each part of the procedure to exercise the right of reply before the Institute, the High Chamber deemed that the term is adequate and reasonable.

Consequently, the Electoral Court revoked the judgment of the State Electoral Court and modified the Guidelines so as to include a provision that ensures that the leaders of political parties can exercise their right of reply in electoral matters.

*Supplementary information:*

Project presented by: Electoral Justice María del Carmen Alanis Figueroa.

*Cross-references:*

- *Bulletin* 1999/3, [ESP-1999-3-023];
- *Bulletin* 1998/1, [ESP-1998-1-003];
- *Special Bulletin – Leading cases ECHR* [ECH-1991-S-004];
- Inter-American Court of Human Rights, "The Last Temptation of Christ" (*Olmedo-Bustos et al.*) v. Chile, 05.02.2001;
- Inter-American Court of Human Rights, *Ricardo Canese v. Paraguay*, 31.08.2004;
- *Gaweda v. Poland*, no. 26229/95, 14.03.2002, European Court of Human Rights (Former Section I).

*Languages:*

Spanish.



# Netherlands

## Supreme Court

### Important decisions

*Identification:* NED-1993-1-003

- a) The Netherlands / b) Supreme Court / c) First Division (Civil Law) / d) 22.01.1993 / e) 14.926 / f) / g) / h) *Rechtspraak van de Week*, 1993, 39; *Administratiefrechtelijke Beslissingen*, 1993, 198; *Nederlandse Jurisprudentie*, 1994, 734; CODICES (Dutch).

*Keywords of the systematic thesaurus:*

5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

*Keywords of the alphabetical index:*

Body, public, injury / Freedom of expression, holder of rights.

*Headnotes:*

The injunction cannot be imposed on the ground that the State has acted unlawfully in respect of the members of the former resistance and their organisations, it being a basic assumption in an open parliamentary debate that these decisions were in accordance with the law. What is at issue is an opinion on a legal question, namely the question as to whether decisions were made in accordance with the law, in which question the claimants are not immediately involved. The government has expressed this opinion in a public debate on a public matter. The right of freedom of expression, laid down in the Constitution as well as in international treaties, to which right the government too is entitled, prevents the State from being sued on the grounds that its opinion is wrong.

The right of freedom of expression, especially in a public debate such as this, in principle extends to opinions which may offend or shock others. The European Court of Human Rights has repeatedly emphasised this aspect of the right (see for example the Decision in *Castells v. Spain*, 23 April 1992, Series

A, no. 236, 22, § 42, *Special Bulletin – Leading cases ECHR* [ECH-1992-S-003]).

*Summary:*

In civil proceedings, World War II resistance organisations and their members claimed:

1. a declaration that decisions made shortly after the war concerning the pension of the widow of a member of parliament whose party collaborated in the occupation are contrary to law;
2. an injunction prohibiting the State from declaring in public that these decisions were in accordance with the law.

*Languages:*

Dutch.



*Identification:* NED-1995-3-015

- a) The Netherlands / b) Supreme Court / c) First Division / d) 08.12.1995 / e) 8659 / f) / g) / h) *Rechtspraak van de Week*, 1995, 261; CODICES (Dutch).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

3.17 General Principles – **Weighing of interests**.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

*Headnotes:*

The mere fact of birth does not create a relationship between father and child that may be characterised as family life. Acknowledgement affects a child's interests as protected under Article 8 ECHR. The child's interests must therefore be weighed against those of the man acknowledging paternity.

### **Summary:**

On 16 January 1987 a child was born out of the relationship between a man and a woman, who were both unmarried. They had not lived together before the child's birth. After the child was born, the man and the woman lived together for a year with the woman's grandmother, in the latter's home. The relationship then came to an end, after which the man lived abroad for two and a half years, during which time he had no contact with the woman or the child. He returned to the Netherlands in 1991. The woman consistently refused to give permission to the man to acknowledge the child. She died on 15 February 1994. In accordance with the woman's wishes expressed in her will, the child was being cared for and brought up in her brother's family. The man applied to the registrar of births, deaths and marriages to add to the register of births a certificate containing the man's acknowledgement of the child.

The Supreme Court based its ruling on the principle that the child was not born of a relationship which, in the opinion of the Appeal Court, could be equated with a marriage. The Supreme Court also held that it had been established that the man had not lived with the woman before the child's birth, while there was nothing in the documents in the case to demonstrate the existence of any other circumstances which could justify the conclusion that the relationship between the man and the woman was nonetheless sufficiently lasting to be equated with marriage (cf. European Court of Human Rights Judgment of 27 October 1994 in the case of *Kroon v. the Netherlands*, Series A, no. 297-C, no. 30, p. 56, *Bulletin* 1994/3, 301 [ECH-1994-3-016]). A relationship which could be described as family life did not therefore exist between the man and the child by virtue of the mere fact of the child's birth.

The Supreme Court then held that legally valid acknowledgement by the man would create a family-law relationship between the child and the man acknowledging her. As a result of this far-reaching consequence, acknowledgement affects interests of the child which are protected by Article 8 ECHR. Although acknowledgement may serve these interests, it is equally possible for these interests to be opposed to acknowledgement. The latter case involves both the law's defence of respect for the ties of family life which exist between the child and others and the freedom of choice regarding one's own life which forms part of everyone's right to respect for personal privacy. Since it was argued on the child's behalf, with reasons, that this latter situation was the case in the proceedings in question, the Appeal Court could not ignore such an argument. Indeed, the Appeal Court was bound, in accordance with the ECHR provision referred to above, to weigh the man's interest, assuming that a relationship which could be described as family life

existed between him and the child, in having this relationship recognised under family law against the child's interests which enjoyed the protection of Article 8 ECHR in equal measure.

The factors which could be taken into account were the importance to the child of a stable place of residence, the nature and depth of the assumed relationship between the father and the child, the fact that the father had never previously indicated a desire actually to assume responsibility for caring for the child, and the fact that he had not been able to argue convincingly that he would be able to assume this responsibility in a proper manner. It also had to be borne in mind that recognition would give the child the father's name, so that she would have a different name from the other members of the family in which she was growing up, a situation which would not be in her interest. The Supreme Court took the view that the Appeal Court had been right in concluding that the interests of the child must prevail in this case.

### **Languages:**

Dutch.



### **Identification:** NED-1995-3-016

**a)** The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 22.12.1995 / **e)** 8643 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 10; CODICES (Dutch).

### **Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

*Keywords of the alphabetical index:*

Paternity.

*Headnotes:*

The mere fact of a child's birth does not create a relationship between the father and the child which may be described as family life. The right of a child to know his or her parents does not extend to the right to enforced contact with the child's biological father against the latter's wishes.

*Summary:*

In June 1985 a child was born out of the relationship between a man and a woman who had never lived together. The man broke off the relationship when he learned that the woman was pregnant. The child expressed a wish to meet his father. The man was married and had no contact with the child since his birth, nor did he wish to; there was never any agreement between the man and the woman concerning contact with the child. In the proceedings the woman applied for an arrangement for meetings between father and child.

In response to the woman's application, the Supreme Court held that the requirements which should determine the existence of family life depend on the context in which Article 8 ECHR is invoked and on who invokes it. If a child invokes the protection of Article 8 ECHR in order to establish some form of contact with his biological father the conditions to be met are not the same as those which would apply if the biological father were seeking some form of contact with a child he had fathered but not acknowledged. The Supreme Court was of the opinion that, in view of the case-law of the European Court of Human Rights, it must be assumed that a relationship which could be described as family life within the meaning of Article 8 ECHR could not be said to exist simply because the child was fathered by its biological father, even in the context of a request by the child for access arrangements involving him and his biological father. The nature and the permanency of the relationship between the mother and the biological father prior to the child's birth could not be overlooked.

Article 7.1 of the Convention on the Rights of the Child states that a child has, as far as possible, the right to know and be cared for by his or her parents. The Supreme Court believed that the right of a child to know his or her parents, as referred to here, embraces more than the simple right to know the parents' names. However, the Supreme Court did not deem it likely that the States Parties to the Convention intended to confer a right that extends to the point where, if a biological

father has not acknowledged his child and has refused to have any personal contact with the child, the child has the right to enforce personal contact against the father's wishes. In the opinion of the Supreme Court, the District Court was correct to declare the woman's application inadmissible, as the arguments on which her application was based are insufficient to render it admissible.

*Supplementary information:*

The Supreme Court would refer in particular to the following Judgments handed down by the European Court of Human Rights:

- *Berrehab v. Nethrelands*, 21.06.1988, Series A, no. 138, NJ 1988, p. 746; *Special Bulletin – Leading cases ECHR* [ECH-1988-S-005];
- *Keegan v. Ireland*, 26.05.1994, Series A, no. 290, NJ 1995, 247; *Bulletin* 1994/2, 178 [ECH-1994-2-008];
- *Kroon and others v. Nethrelands*, 27.10.1994, Series A, no. 297, NJ 1995, 248; *Bulletin* 1994/3, 301 [ECH-1994-3-016].

The Convention on the rights of the Child was concluded in New York on 20 November 1989 and approved by the Netherlands by Kingdom Act of 24 November 1994 (*Bulletin of Acts and Decrees*, no. 862). It entered into force for the Netherlands on 8 March 1995 (*Netherlands Treaty Series* 1995, no. 92).

*Languages:*

Dutch.



*Identification:* NED-1996-2-013

**a)** The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 10.05.1996 / **e)** 8722 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1996, 112; CODICES (Dutch).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

3.18 General Principles – **General interest**.

5.1.4 Fundamental Rights – General questions –  
**Limits and restrictions.**

5.3.21 Fundamental Rights – Civil and political rights –  
**Freedom of expression.**

5.3.22 Fundamental Rights – Civil and political rights –  
**Freedom of the written press.**

*Keywords of the alphabetical index:*

Media, journalist, source, disclosure, refusal, right.

*Headnotes:*

Article 10.1 ECHR gives a journalist the right to refuse to answer questions, except in special circumstances, if he would risk exposing his source by doing so.

*Summary:*

This case concerns the refusal of two journalists to answer questions put to them when they were being questioned as witnesses. The purpose of this questioning was to ascertain the journalists' sources and hence to discover what information the latter had supplied to them.

The Supreme Court held that it follows from the Judgment of the European Court of Human Rights of 27 March 1996 (*Goodwin v. United Kingdom, Bulletin 1996/1 [ECH-1996-1-006]*) that it must be accepted that Article 10.1 ECHR entitles a journalist in principle to refuse to answer a question put to him if he would risk exposing his source by doing so. The court is not obliged to accept an invocation of this right, however, if it is of the opinion that in the particular circumstances of the case, revealing the source is necessary in a democratic society with a view to protecting one or more of the interests referred to in Article 10.2 ECHR, provided that the person hearing the journalist as a witness cites such an interest and, where necessary, provides a plausible case for its existence.

In the case at hand, the Supreme Court took the view that the only interest the plaintiffs had in exposing the journalists' sources was their desire to locate the "leak" so that they could go on to bring legal proceedings against the State and the parties involved, personally, both to obtain compensation and to forbid those involved, personally, to "leak" any more information to the press. On the basis of the aforementioned judgment of the European Court of Human Rights, it must however be assumed, according to the Supreme Court, that this interest is in itself insufficient to offset the compelling public interest at stake here in the protection of the journalists' sources.

*Languages:*

Dutch.



*Identification:* NED-1998-1-001

- a) The Netherlands / b) Supreme Court / c) First Division / d) 12.09.1997 / e) 16.309 / f) / g) / h) *Rechtspraak van de Week*, 1997, 168.

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**

*Keywords of the alphabetical index:*

Right to hear and be heard / Public prosecution, advisory opinion, response.

*Headnotes:*

Pursuant to Article 6 ECHR, parties had the right to respond to the advisory opinion of the Public Prosecution Service as they saw fit, unless this would prejudice due process, taking into account the interests of the other party.

*Summary:*

Insofar as Article 328 of the Code of Civil Procedure prevented parties from responding to the advisory opinion of the Public Prosecutions Department as they saw fit, it should be deemed inapplicable, because it was incompatible in this context with the relevant provision of Article 6 ECHR, which was to be interpreted according to the case-law of the European Court of Human Rights ruling of 20 February 1996, *European Court Reports 1996-I*, pp. 224 ff.). In this regard, no constraints were applicable other than those relating to due process, e.g. in relation to the other party's interests.

**Languages:**

Dutch.



*Identification: NED-1998-1-003*

- a)** The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 21.10.1997 / **e)** 105.652 / **f)** / **g)** / **h)** Nederlandse Jurisprudentie 1998, 173.

**Keywords of the systematic thesaurus:**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

**Keywords of the alphabetical index:**

Evidence, obligation to give, exemption / Statutory obligation to supply information.

**Headnotes:**

The witness's right not to be forced to incriminate himself, as enshrined in the right to a fair trial in accordance with Article 6.1 ECHR, is not an absolute right that takes precedence over a statutory obligation to supply information.

**Summary:**

In the case at hand, the suspect refused to permit officials monitoring the observance of the Driving Hours Decree to inspect written documents when instructed to do so pursuant to Section 19 of the Economic Offences Act.

In this connection the Supreme Court considered that the right of the accused not to be forced to incriminate himself, as enshrined in the right to a fair trial in accordance with Article 6.1 ECHR, was not an absolute right that prevailed over a statutory obligation to supply information even if the accused would incriminate himself by supplying that information. In the opinion of

the Supreme Court, it followed from the *Saunders Judgment* (European Court of Human Rights, 17.12.1996) that Article 6.1 ECHR was not incompatible with the use as evidence of material obtained from an accused under coercion where this material existed independently of the will of the accused. The demand made in this case under Section 19 of the Economic Offences Act to permit the inspection of certain documents was therefore not incompatible with Article 6.1 ECHR, even if the person concerned was suspected at that point of having committed a criminal offence.

**Languages:**

Dutch.



*Identification: NED-1998-1-010*

- a)** The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 19.12.1997 / **e)** 8974 / **f)** / **g)** / **h)** Rechtspraak van de Week, 1998, 3.

**Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

5.3.13.21 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Languages.**

**Keywords of the alphabetical index:**

Interpreter, right, civil proceedings / Language of civil proceedings, interpreter.

**Headnotes:**

Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms.



### **Summary:**

The Supreme Court held that it was right that in the cassation proceedings of this civil case it was not being contested that the right to the free assistance of an interpreter in the verbal hearing of these divorce proceedings could be derived from Article 6.3.e ECHR. Where civil proceedings were concerned, Dutch law did not provide for any such right, so that the question arose of whether it could be directly derived from the provisions of Article 6.1 ECHR.

In the opinion of the Supreme Court, this question should be answered as follows. The mere fact that the European Convention of Human Rights provided for such a right in the treatment of criminal cases but not in that of civil cases did not justify the conclusion that such a right could never be held to exist in relation to civil cases (cf. European Commission of Human Rights 9 December 1981, no. 9099/80, *D&R* 27, p. 210). Under certain circumstances, the failure in civil cases to provide the assistance of an interpreter free of charge could conflict with the requirements of a fair hearing, including the principle of equality of arms. Hence in principle, the same applied to the right to the free assistance of an interpreter as to the right to free legal assistance. The member States had an obligation to provide free legal assistance under Article 6.3.c ECHR, but the European Convention of Human Rights included no such express provision in regard to civil cases. Even so, the obligation to provide free legal assistance sometimes existed in civil cases, namely if such legal assistance was necessary to ensure that the fair trial requirement of Article 6.1 ECHR was met (cf. European Court, 23 November 1983 in the case of *Van der Mussele v. Belgium*, Series A, no. 70, § 29, p. 14); whether this applied depended entirely on the circumstances of the case at hand, in particular the question of whether free legal assistance was indispensable to a fair hearing of the case (cf. European Court, 9 October 1979, case of *Airey v. Ireland*, Series A, no. 32, §26, p. 16; *Nederlandse Jurisprudentie*, 1980, 376).

In the present case, the Supreme Court held that it could not be said in the present case that the failure to provide the woman with the free assistance of an interpreter at hearings by the two courts that dealt with the facts of her case was in breach of the requirements embraced by the concept of a fair hearing.

### **Languages:**

Dutch.

### **Identification: NED-1998-1-015**

**a) The Netherlands / b) Supreme Court / c) Third Division / d) 28.01.1998 / e) 32.732 / f) / g) / h) Beslissingen in Belastingzaken, 1998, 147.**

### **Keywords of the systematic thesaurus:**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**  
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**  
 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

### **Keywords of the alphabetical index:**

Identification, compulsory / Criminal prosecution / Criminal charge, disproportionate.

### **Headnotes:**

The fact that an employee was required to allow his employer to verify his identity for income tax and national insurance salary deductions by handing over proof of identity to his employer for inspection could not be regarded as a violation of the employee's right to privacy.

The application of the higher "anonymous" rate on the grounds that an employee had failed to comply with the aforementioned compulsory identification was not a sanction of such a nature or weight as to merit in itself the appellation "criminal". Furthermore, consideration of the nature of the offence together with the nature and severity of the sanction did not lead to the conclusion that these had any criminal connotation.

### **Summary:**

At dispute in these proceedings was whether it was right to deduct income tax and national insurance contributions from an employee's salary at what is called the anonymous rate (60%) on the grounds that she had failed to comply with the obligation laid down in Section 29.1 of the Wages and Salaries Tax Act to hand over proof of identity to the employer responsible for making deductions at source from her salary. In

appeal proceedings, the court of appeal held that the obligation imposed on the employee to provide proof of identity for the employer's inspection constituted a violation of Article 8.1 for which there was no justification as there were no other grounds in this case for doubting her identity.

In cassation proceedings, the Supreme Court considered that it could not be regarded as an infringement of an employee's privacy that the employee was obliged to have his or her identity verified by his employer by allowing the latter to inspect an identity document. Insofar as the employer's obligation to pass on to the tax authorities the information thus supplied by the employee did amount to such an infringement, the Supreme Court held that this was fully justified, because the information was needed to process the salaries tax deducted at source prior to the determination of income tax, whereby the tax authorities had to be able to assess whether the right amount of salaries tax had been deducted at source, and whether an income tax demand had to be imposed as well. The desirability of combating fraud, and in particular tax and social insurance fraud, made it reasonable, and – insofar as it might result in a more serious violation – justifiable both that the employer had imposed on the employee the obligation to confirm his or her identity by handing over proof of identity for his inspection (which meant at least that he or she was obliged to show this document to the employer, to give him the opportunity to include the information on the employee's identity in his files and to retain a copy of the document) and that the legislature had imposed on the employer the obligation to include this information in his files and to retain a copy of the proof of identity submitted for his inspection. In such matters, the legislature had a certain margin of discretion that should be taken into account. Finally, the Supreme Court considered that the legislature was entitled, again taking into account its margin of discretion, with a view to the practical application of the regulations, to decide that only certain types of identity papers would be deemed adequate, and that no exceptions would be made for cases such as the one at issue here, in which there was no reason to doubt the employee's identity.

In cassation proceedings the question was also raised of whether the application of the "anonymous rate" was incompatible with Article 6 ECHR, as such application would amount to a criminal charge that was disproportionate and in relation to which the employee was not guaranteed the right of access to the courts.

In this connection the Supreme Court ruled as follows. As it was clear that the "anonymous rate" was not applied in pursuance of Dutch criminal law, the point was to consider the nature of the offence and the nature and severity of the penalty, viewed in the light of

this provision of international law. The obligation at issue applied to all members of the public in their capacity of taxpayers, not only to a limited group, and the legislature had attached a penalty, namely a fine (under Section 69 of the State Taxes Act), as well as the application of the "anonymous rate" at issue here, to failure to comply with this obligation. These facts supported the argument that the general nature of the contravention of the norm should be regarded as criminal in the sense referred to. In assessing the nature of the offence in this regard, however, it was also important to determine if the object of the penalty was preventive and/or punitive (European Court ruling, *Nederlandse Jurisprudentie* 1988, 937 (*Özürk*) and *Nederlandse Jurisprudentie* 1988, 938 (*Lutz*)). The application of the same rate to employees whose identity was indeed unknown to the tax authorities did not constitute a punitive or deterrent measure. If tax was levied in accordance with a differentiated system of tax rates and the taxpayer's identity was unknown, it was reasonable, partly in order to prevent any loss being incurred by imposing too low a rate, to set the tax deducted at source at the highest sum that the taxpayer could possibly pay from his salary, given the possibility of other unknown income. This was not a punishment, but a logical consequence of the differentiated rates of taxation. This was not altered by the fact that the tax rate system for "anonymous" employees led to a tax rate equal to the highest rate of salaries tax and income tax, whereas in general persons working without paying tax, etc. and/or illegally would not come into the highest tax bracket if their particulars were known. In that regard, the regulation had a preventive and deterrent effect that did not, therefore, bring the application of the highest tax rate to employees whose identity particulars were unknown within the definition of a criminal charge within the meaning of Article 6 ECHR.

The Supreme Court went on to consider that the primary point of the regulation was to help ensure that the tax rate differentiation was applied to all employees correctly. That in cases such as that of the employee at issue here (cases that it was fair to assume would be largely confined to the initial period after the introduction of compulsory identification) the regulation made it essential to check and record identity particulars that had already been made known by other means, but that the taxpayer did not want to have checked in the way prescribed by law, did not imply that the application thereby acquired a punitive or deterrent character that made the offence "criminal". Another important point in this connection was the possibility of a refund, a corrective mechanism that punitive penalties did not generally have. Partly on the basis of this possibility, it could not be said that the application of the "anonymous" rate was a penalty of such a nature and of such severity that it should be regarded in itself as a "criminal charge". Nor did a consideration of the nature

of the offence and the nature and severity of the penalty taken together lead to the conclusion that they had a criminal connotation (cf. European Court of Human Rights *Beslissingen in Belastingzaken* 1994/175 (*Bendenoun*) and European Court 24 September 1997 (*Garyfallou AEBE*)).

#### *Languages:*

Dutch.



#### *Identification:* NED-1998-1-018

- a)** The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 20.02.1998 / **e)** 9041 / **f)** / **g)** / **h)** *Rechtspraak van de Week*, 1998, 54.

#### *Keywords of the systematic thesaurus:*

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself**.

#### *Keywords of the alphabetical index:*

Right to remain silent / Criminal charge / Benefit, application, produce evidence obligation.

#### *Headnotes:*

A person who is under an obligation to produce information and particulars concerning all matters relating to the granting or continuation of benefit, in connection with an application for benefit, does not have the right to remain silent concerning the question of whether or not he has committed a crime.

#### *Summary:*

In cassation proceedings it was complained that the district court, ruling on appeal, had not addressed the question of whether a person who had committed a crime was required by law to report this fact to the benefit-

awarding body, and that the district court had therefore violated that person's statutory right to remain silent.

In this connection the Supreme Court considered that this complaint must be dismissed insofar as "the right to remain silent" referred to the definition in Article 29.1 of the Code of Criminal Procedure of the right of someone being interviewed as a suspect to refrain from making a statement. This right of silence was not enjoyed by someone who was not being heard as a suspect, but who was required, in relation to an application for benefit, to produce information and particulars concerning all matters relevant to the granting or continuation of benefit.

Insofar as the "right to remain silent" cited in the complaint referred to the right laid down in Article 14.3.g of the International Covenant on Civil and Political Rights or – according to established case-law of the European Court of Human Rights (see most recently European Court Judgment of 20 October 1997 in the case of *Serves v. France*) – the "right to remain silent and the right not to incriminate oneself" that may be inferred from Article 6 ECHR, the complaint must likewise be rejected. For in the opinion of the Supreme Court, these rights presupposed the existence of a criminal charge, which was no more at issue than the circumstance of being heard as a suspect within the meaning of Article 29 of the Code of Criminal Procedure.

#### *Languages:*

Dutch.



#### *Identification:* NED-1998-1-020

- a)** The Netherlands / **b)** Supreme Court / **c)** Second Division / **d)** 14.04.1998 / **e)** 106.758 / **f)** **g)** / **h)** *Delikt en Delinkwent*, 1998, 258.

#### *Keywords of the systematic thesaurus:*

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses**.

***Keywords of the alphabetical index:***

Witness, right of defence to examine.

***Headnotes:***

It was permissible for a statement made to the police by a witness who was not heard by the defence to be used in evidence if the involvement of the accused in the offences on the charge sheet was confirmed by other evidence.

***Summary:***

In this case, the court of appeal used as evidence a statement that a co-accused had made to the police, even though the defence had not been given an opportunity to examine this witness in court.

The Supreme Court observed that it had determined in relation to a previous case that if the defence had not had an opportunity to examine, or have examined, a person who had made a statement to the police, Article 6 ECHR did not impede the use of such a statement as evidence, provided that the statement concerned was corroborated to a substantial extent by other items of evidence. The Supreme Court continued that having regard to the European Court of Human Rights of 26 March 1996, no. 54/1994/501/583, Judgment of the Nederlandse Jurisprudentie 1996/74, the phrase "to a substantial extent" should be understood to mean that it was sufficient for the involvement of the accused to have been confirmed by other evidence. Thus if this involvement derived sufficient support from other items of evidence, Article 6 ECHR did not present an obstacle to its admission as evidence.

***Languages:***

Dutch.

***Identification:*** NED-1998-3-022

a) The Netherlands / b) Supreme Court / c) First Division / d) 08.05.1998 / e) 16.608 / f) / g) / h) Nederlandse Jurisprudentie 1998/496; CODICES (Dutch).

***Keywords of the systematic thesaurus:***

2.1.3.2.1 Sources – Categories – Case-law – International case-law – European Court of Human Rights.

2.3.6 Sources – Techniques of review – Historical interpretation.

3.20 General Principles – Reasonableness.

4.7.1 Institutions – Judicial bodies – Jurisdiction.

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – Age.

***Keywords of the alphabetical index:***

Review of constitutionality, prohibition / Age, limit for post.

***Headnotes:***

The age limit of 72 laid down in Article 2:252 of the Civil Code for the appointment of a member of the supervisory board of a private company with limited liability does not constitute unjustifiable discrimination on the grounds of age within the meaning of Article 26 of the International Covenant on Civil and Political Rights (hereinafter, "ICCPR") of 1966.

***Summary:***

Parliament concluded, on adequate grounds that did not exceed the bounds of reasonableness, that objective and reasonable grounds existed to justify the discrimination on the basis of age in Article 2:252.4 of the Civil Code. Where this distinction is made in the pursuit of a legitimate aim and can be regarded as appropriate means for achieving this aim, there is no unjustifiable discrimination on the grounds of age within the meaning of Article 26 ICCPR.

Nonetheless, as the developments that culminated in the introduction of a Bill to prohibit age discrimination in job recruitment and selection make clear, the social climate has changed since the introduction of Article 50b (old) of the Commercial Code and Article 2:252 of the Civil Code, such that distinguishing on the grounds of age is now more likely than in the past to be regarded as unjustified. It cannot be said, however, that setting age limits beyond which certain positions can no longer be held is no longer compatible with the conception of law of a large proportion of the population. Against this background, the development outlined above does not mean that the disputed statutory regulation should be deemed to have lost its justification.

Even if a liberal interpretation is given to the autonomous term "possessions" within the meaning of

Article 1 Protocol 1 ECHR, it is difficult to see, at the present time, how the plaintiffs in the cassation proceedings could be deemed to possess a right that can be regarded as an asset within the meaning of this provision (cf. e.g. European Court of Human Rights 23 February 1995, Series A, no. 306-B, p. 46, §53, and European Court of Human Rights 20 November 1995, Series A, no. 332, p. 21, §31; *Bulletin* 1995/3 [ECH-1995-3-019]).

Pursuant to Article 120 of the Constitution, the district court was not permitted to review the constitutionality of the disputed statutory provision.

#### *Languages:*

Dutch.



#### *Identification:* NED-1999-3-001

**a)** The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 15.01.1999 / **e)** 16.734 / **f)** / **g)** / **h)** Nederlandse Jurisprudentie, 1999/665.

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**  
 3.19 General Principles – **Margin of appreciation.**  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

#### *Keywords of the alphabetical index:*

Competition, economic, protection / Advertisement, misleading / Burden of proof / Consumer protection.

#### *Headnotes:*

In principle, the protection afforded by Article 10 ECHR extends to advertisements, but in determining whether it is necessary to restrict this protection States Parties must be allowed a certain margin of discretion that is essential in the realm of commerce, especially in a field as complex and volatile as unfair competition (see European Court of Human Rights, *Markt intern Verlag and Beermann*, 20.11.1989, Series A, no. 165;

Nederlandse Jurisprudentie 1991, 738; Jacobowski 23.06.1994, Series A, no. 29; Nederlandse Jurisprudentie 1995, 365, *Bulletin* 1994/2 [ECH-1994-2-009] and *Hertel v. Switzerland*, 25.08.1998, *Reports of Judgments and Decisions* 1998, § 47). In this context parliament must be assumed to have concluded that the restrictions on the freedom of advertising ensuing from the regulations on misleading advertisements, as set forth in Article 6.194 *et seq.* of the Civil Code, especially the apportionment of the burden of proof in Article 6.194, are necessary in Dutch society to protect the rights and interests of consumers and competitors.

#### *Languages:*

Dutch.



#### *Identification:* NED-1999-3-002

**a)** The Netherlands / **b)** Supreme Court / **c)** First Division / **d)** 26.02.1999 / **e)** R97/140 / **f)** / **g)** / **h)** Nederlandse Jurisprudentie, 1999/716.

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**  
 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**  
 5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

#### *Keywords of the alphabetical index:*

Telephone communication, freedom of expression, applicability / *Lex specialis.*

#### *Headnotes:*

In respect of telephone calls, Article 8 ECHR is not a *lex specialis* in relation to Article 10 ECHR, in the sense that Article 10 ECHR is wholly inapplicable to telephone communications.

### **Summary:**

Neither the wording of Articles 8 and 10 nor the case-law of the European Court of Human Rights (European Court of Human Rights, *Klass et al.*, 06.09.1978, Series A, no. 28; *Special Bulletin – Leading cases ECHR* [ECH-1978-S-004], *Silver et al.*, 25.03.1983, Series A, no. 61; *Special Bulletin – Leading cases ECHR* [ECH-1983-S-002]) provide any grounds on which to argue that in respect of telephone communications Article 8 is a *lex specialis* in relation to Article 10, in the sense that Article 10 is wholly inapplicable to telephone communications. It would be at odds with the technological advances of the past few decades to withhold the protection afforded by Article 10 from users of the telephone network. In the case at hand, the Court of Appeal's ruling that the measures (deliberately tampering with call-back lines) constituted an interference within the meaning of Article 10.1 ECHR did not display an incorrect conception of law.

The argument that without restrictions loss of income would have occurred to such an extent as to render the maintenance and renewal of the infrastructure impossible indicates grounds that would justify the view that this interference was a restriction necessary in a democratic society in the interests of the prevention of disorder or the protection of the rights of others.

### **Languages:**

Dutch.



### **Identification:** NED-2008-2-006

**a)** The Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 04.06.2008 / **e)** 200703206/1 / **f)** S. v. Minister of Transport, Public Works and Water Management / **g)** *Administratiefrechtelijke Beslissingen* (AB) 2008, 229; *Jurisprudentie Bestuursrecht* (JB) 2008, 146 / **h)** CODICES (Dutch).

### **Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.3 Sources – **Techniques of review.**

### **4.7.9 Institutions – Judicial bodies – **Administrative courts.****

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

### **Keywords of the alphabetical index:**

Damages, immaterial / Interpretation, in the light of the Convention.

### **Headnotes:**

In case of breach of the 'reasonable time'-criterion in Article 6 ECHR by an administrative court, material and immaterial damages can be obtained in administrative court proceedings

### **Summary:**

I. The Minister of Transport, Public Works and Water Management rejected the applicant's application for damages under the Betuwe Freight Railway (Compensation) Regulations. The applicant objected to the decision but the Minister dismissed his objections. The District Court upheld the decision. On appeal to the Administrative Jurisdiction Division of the Council of State, the applicant, *inter alia*, complained about the length of the proceedings. He stated that the protracted proceedings had imposed an emotional burden on him and his family.

II. The Administrative Jurisdiction Division of the Council of State supplemented the legal basis of this ground of appeal on its own initiative treating the complaint as claiming that the right to a fair hearing within a reasonable time laid down in Article 6.1 ECHR had been breached. The complaint was treated as an application for compensation for damages caused by this alleged breach (emotional distress).

The question whether the 'reasonable time'-criterion in Article 6.1 ECHR had been breached, was considered in the light of the circumstances of the case, taking into account the case-law of the European Court of Human Rights. The proceedings had taken five years and eight months, the count starting immediately after the reception of the notion of objections by the Minister. It had taken the District Court more than three years and five months to pronounce judgment. Therefore, the Administrative Jurisdiction Division of the Council of State deemed it arguable that the Court of First Instance had acted in breach of Article 6.1 ECHR. In this view of Article 13 ECHR the Administrative

Jurisdiction Division of the Council of State decided to re-open the examination of the case to deal with the issue of damages, thereby interpreting provisions of national law concerning administrative procedure in the light of Article 13 ECHR.

*Supplementary information:*

This is the first case in the Netherlands where it has been held that compensation of (immaterial) damages for breach of the 'reasonable time'-criterion in Article 6.1 ECHR by a court can be obtained in administrative court proceedings.

*Cross-references:*

European Court of Human Rights:

- *Frydlender v. France*, no. 30979/96, 27.06.2000, *Reports of Judgments and Decisions* 2000-VII; *Bulletin* 2000/2 [ECH-2000-2-007];
- *Pizzati v. Italy*, no. 622361/00, 29.03.2006.

*Languages:*

Dutch.



## Norway Supreme Court

### Important decisions

*Identification:* NOR-1984-S-001

**a)** Norway / **b)** Supreme Court / **c)** **d)** 23.10.1984 / **e)** Inr 141/1984 / **f)** / **g)** Norsk Retstidende (Official Gazette), 1984, 1175 / **h)**.

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

*Keywords of the alphabetical index:*

Privacy, invasion / Hospital, detention, compulsory / Detention, preventative.

*Headnotes:*

A person sentenced to detention in a mental hospital pursuant to Section 39.1 of the Penal Code may invoke the rule of Section 9.a of the Mental Health Act, and on that ground demand judicial review of the enforcement decision, under Chapter 33 of the Civil Procedure Act.

*Summary:*

A woman appeared persistently outside the home of a childhood friend and refused to leave, leading to her removal by the police. She was charged with invasion of privacy under Section 390.a of the Penal Code, and proceedings were instituted for preventative detention. In connection with these proceedings, she was placed

under psychiatric observation. The two appointed experts found her insane, and agreed that there was a risk of repetition of the acts with which she had been charged.

She was sentenced to detention and placed in a mental hospital. While temporarily released in April and May 1983, she paid a further Series of visits to her childhood friend. Renewed proceedings were instituted for preventative detention. When the first detention period expired without any decision having been made in the new detention case, the police requested her compulsorily detention in hospital under the Mental Health Act, and she was subsequently hospitalised. On 24 September 1983, she initiated a suit in the City Court under Section 9 of the Act. The detention case was decided on 12 September 1983, the prosecuting authority being authorised to apply detention under Section 39.1.a, b, d and e of the Penal Code for a period of three years.

She appealed the detention judgment, but the appeal was denied. Thereupon it was decided that she was to be placed in a mental hospital pursuant to the judgment.

The government moved for termination of the civil suit before the City Court pursuant to Section 9 of the Mental Health Act. The government maintained that the enforcement decision that had been adopted pursuant to Section 5 of the Act was no longer relevant after the decision that had been made pursuant to the detention sentence.

Both the City Court and the Court of Appeal upheld the government's views. The woman appealed the decision to the Appeal Selection Committee of the Supreme Court. The Committee allowed the appeal to pass to the Supreme Court. The Supreme Court held that neither the wording nor the history of the Act furnished any direct guidance as to whether the right to have a judicial review pertained also to those who were forcibly placed in a mental hospital pursuant to a detention sentence. The decision would have to be made in accordance with the applicable considerations, including the consideration that Norwegian law should wherever possible be presumed to accord with treaties by which Norway was bound – in this case the European Convention on Human Rights of 4 December 1950.

As for the material conditions for compulsory detention in hospital under the Mental Health Act, these would also have to apply to anybody placed in a mental hospital pursuant to a detention sentence.

The Supreme Court held that important guarantees of individual legal safeguards called for the right to obtain a judicial review of detention orders, pursuant to the

rules of Chapter 33 of the Civil Procedure Act – in line with the right of review provided for other persons forcibly detained. This solution accords with the views applied in the interpretation of Article 5 ECHR. The Supreme Court referred to several Decisions by the Court and the Commission, including the Judgment of 24 October 1979 (*Winterwerp*), the Judgment of 5 November 1981 (*X v. United Kingdom*), and the Decision of the Commission of 22 April 1983 (*B v. United Kingdom*).

#### Cross-references:

- *Winterwerp v. the Netherlands*, 24.10.1979, Vol. 33, Series A, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-004].

#### Languages:

Norwegian.



#### Identification: NOR-2000-1-001

- a) Norway / b) Supreme Court / c) / d) 25.02.2000 / e) Inr 12B/2000 / f) / g) Norsk Retstidende (Official Gazette ), 2000, 279 / h) CODICES (Norwegian).**

#### Keywords of the systematic thesaurus:

- 3.18 General Principles – **General interest**.  
5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.  
5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

#### Keywords of the alphabetical index:

Decision, administrative / Defamation / Media, newspaper, article, declaration as 'null and void'.

#### Headnotes:

The right to declare a newspaper article on an administrative decision null and void depends on an interpretation of the provisions on freedom of expression in Article 100 of the Constitution and in international instruments, especially Article 10 ECHR and Article 19 of the International Covenant on Civil and Political Rights.

### **Summary:**

The newspaper *Bergens Tidende* had printed an article on an administrative decision concerning the suspension of two driving instructors' official licences.

The instructors (A and B) sued the journalist, the editor and the newspaper, seeking compensation and requesting that 8 statements in the article be declared null and void, including the statement that A was unqualified and had committed 26 violations of the applicable rules.

The City Court found in favour of the defendants, and the driving instructors' appeal to the Court of Appeal was dismissed.

The instructors appealed to the Supreme Court.

The Supreme Court found no reason to declare the article null and void nor to award damages.

The newspaper did not deny that the article might include defamatory statements and that evidence proving the truth of the allegations had not been adduced.

However, the Supreme Court did not consider the statements to be unlawful.

The Court held that, in determining the limits within which statements can lawfully be put forward, one must consider the provisions in Article 100 of the Constitution, Article 10 ECHR and Article 19 of the International Covenant on Civil and Political Rights.

These limits can be altered in accordance with developments both nationally and internationally.

Regarding the right to declare a newspaper article on administrative decisions null and void, the Court referred to Judgments delivered by the European Court of Human Rights concerning Article 10 ECHR – the *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999 and the *Nilsen and Johnsen v. Norway*, 25 November 1999.

In this specific case the Court attached considerable weight to the fact that the case concerned an essentially correct article on an administrative decision made after the usual adversarial procedure, to which the journalist had gained access in accordance with the provisions of the Freedom of Information Act. Furthermore, essential parts of the article were also based on a lawsuit about an earlier decision of suspension concerning A. The newspaper had already reported on the main hearing and the judgment in that case.

For other reasons, this subject matter also had to be considered of public interest in the district.

The appeal was accordingly dismissed.

### **Supplementary information:**

Under Norwegian defamation law, three kinds of remedies exist for unlawful defamation, namely the imposition of a penalty under the provisions of the Criminal Code, an order under Article 235 of this Code declaring the defamatory allegation null and void and an order under the Damage Compensation Act 1969 to pay compensation to the aggrieved party.

### **Languages:**

Norwegian.



### **Identification:** NOR-2001-1-002

**a)** Norway / **b)** Supreme Court / **c)** 23.03.2001 / **d)** 2000/793 / **f)** / **g)** Norsk Retstidende (Official Gazette), 2001, 428 / **h)** CODICES (Norwegian).

### **Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

4.6.9.1 Institutions – Executive bodies – The civil service – **Conditions of access**.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State**.

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

### **Keywords of the alphabetical index:**

Criminal record, access / Remedy, effective / Compensation, requirement.

### Headnotes:

The unauthorised gathering of information from the Register of Criminal Records constituted a breach of Article 8 ECHR. The establishment of the fact of breach was sufficient to satisfy the right to an effective remedy in Article 13 ECHR. There was no requirement in Article 13 ECHR for the court had to make an award of compensation.

### Summary:

In 1997, A. applied for the post of head of the execution and enforcement department of a District Court. After an interview with A., the chief judge suspected that A. had a criminal record. He asked A. whether this was the case, but A. refused to answer. The chief judge then contacted the Court Department of the Ministry of Justice. He spoke with a civil servant who was under the impression that the Ministry had the necessary authority to obtain information from the Register of Criminal Records. The civil servant then contacted KRIPOS, the National Criminal Investigation Service, and was given information over the telephone of the details registered against A's name. She passed the information on to the chief judge over the telephone, who in turn passed the information on to the appointments committee. A. was not given the job.

In the summer of 1997, A. took the matter up with the Ministry of Justice. In its reply, the Ministry acknowledged that it did not have the requisite authority to obtain information from the Register of Criminal Records, and apologised for what had happened. In the autumn of 1998, A. filed a civil suit against the chief judge and the Ministry of Justice on behalf of the State, claiming damages for economic and non-economic loss. In a Decision of 15 March 2000, the Court of Appeal found in favour of the chief judge and the State. The chief judge died just seven days later. A. appealed against the decision of the Court of Appeal, directing the appeal against both the State and the chief judge's estate. The Appeals Selection Committee granted leave to appeal only in so far as the appeal was directed against the State, and only in respect of the claim for damages for non-economic loss. In the Supreme Court, the claim for damages for non-economic loss was based on Sections 3.5 and 3.6 of the Damages Act and Articles 8 and 13 ECHR. In the Supreme Court, the State argued that the authority that the civil servant at the Ministry of Justice believed she had to obtain information from the Register of Criminal Records was not tenable, but that the Ministry had an alternative tenable authority.

The Supreme Court found that the Register of Criminal Records contains sensitive information and that the gathering and transmission of information from the

Register must be deemed to be an interference in the right to respect for private life protected by Article 8 ECHR. Reference was made to the Decision of the European Court of Human Rights 26 March 1987 in *Leander v. Sweden* (Series A, no. 116, *Special Bulletin – Leading cases ECHR* [ECH-1987-S-002]) paragraph 48. The pertinent issue was therefore whether the interference was justified in accordance with Article 8.2 ECHR.

The Supreme Court found that the Ministry did not have the necessary authority to obtain information from the Register of Criminal Records, and that the Ministry's action therefore constituted a breach of Article 8 ECHR. However, the Court was of the opinion that the transmission of the information did not constitute an unlawful defamation, since the purpose of the action was to provide the appointments committee with the best possible basis upon which to determine whether A. was a suitable candidate for the post, and the Ministry had proceeded as cautiously and carefully as possible. On these grounds, the Court found that the State was not liable to pay damages for non-economic loss pursuant to Section 3.6 of the Damages Act. Nor was it proven on a balance of probabilities that there was causation between the Ministry's unauthorised action and damage to A's person, and the Court therefore also found in favour of the State in the claim for non-economic loss pursuant to Section 3.5 of the Damages Act. In view of the Court's finding, it was unnecessary to consider the scope of the State's enterprise liability pursuant to these provisions.

With regard to the claim for compensation pursuant to Article 13 ECHR, the Supreme Court found that in order to satisfy A's right to an effective remedy, it was sufficient that the Supreme Court had made a finding that there had been a breach of the Convention. There was therefore no cause to award damages pursuant to this article.

Although the appeal was unsuccessful, the Supreme Court awarded A. costs for that part of the case concerning the Ministry's authority to obtain information from the Register of Criminal Records, and whether as a consequence of this had been a breach of the European Convention on Human Rights. The Court found that this was necessary in order to give A. an effective remedy in respect of the question of whether there had been a breach of the Convention.

### Cross-references:

European Court of Human Rights:

- *Leander v. Sweden*, 26.03.1987, *Special Bulletin – Leading cases ECHR* [ECH-1987-S-002].

**Languages:**

Norwegian.

**Identification:** NOR-2001-2-005

**a)** Norway / **b)** Supreme Court / **c)** / **d)** 22.08.2001 / **e)** 2000/1533 / **f)** / **g)** Norsk Retstidende (Official Gazette), 2001, 1006 / **h)** CODICES (Norwegian).

**Keywords of the systematic thesaurus:**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.19 General Principles – **Margin of appreciation.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**

**Keywords of the alphabetical index:**

Education, religious, ethical / Education, religious, dispensation.

**Headnotes:**

The Supreme Court found that neither Section 2.4 of the Education Act nor the national curriculum for the primary school subject "Christian Knowledge and Religious and Ethical Education" (hereinafter, "KRL") were in breach of Norway's obligations in international law. The appellants had failed to prove on a balance of probabilities that the instruction that their children had received had been devised and implemented in such a manner that they could claim full dispensation from KRL pursuant to European Convention on Human Rights and the International Covenant on Civil and Political Rights (hereinafter, "ICCPR").

**Summary:**

Article 2 of the Constitution provides that all inhabitants of Norway shall have the right to free exercise of their religion. The Evangelical-Lutheran religion is the official religion of the Norwegian state.

Christian Knowledge and Religious and Ethical Education was introduced gradually into the national curriculum as a primary school subject from autumn 1997 to replace the subjects Christianity and Ethical Education.

In 1998, the Norwegian Humanist Association and 16 parents whose applications for full dispensation from KRL had been turned down, filed a civil action against the state, claiming that junior-high-school children over the age of 15 years who were members of the Norwegian Humanist Association, and younger school children of members of the Association were entitled to full dispensation from KRL. The plaintiffs claimed that, in any event, parents were entitled to full dispensation from KRL education for their children. The state contended that the Norwegian Humanist Association's claim should be dismissed on the grounds of lack of *locus standi*, and that the state should be dismissed in the claim brought by the parents.

The City Court allowed the action from both plaintiffs, but decided in favour of the state. The Norwegian Humanist Association and the parents appealed to the Court of Appeal against the findings of the City Court, and asserted in addition that the administrative decisions whereby full dispensation was refused were null and void. The state maintained that the Norwegian Humanist Association's action should be dismissed for lack of *locus standi*. The Court of Appeal found that the Association had the requisite *locus standi* to file an action, but the claim was dismissed on the merits.

The Norwegian Humanist Association and 14 of the 16 parents appealed the decision of the Court of Appeal to the Supreme Court, where the appeal proceedings were limited to the issue of validity of the administrative decision to refuse full dispensation from KRL. The appellants alleged that refusal of full dispensation was null and void on the grounds that, by introducing KRL with only a limited right to dispensation, the Norwegian state was in breach of its obligations in international law. The appellants referred in particular to Article 2 Protocol 1 ECHR and Article 18.4 ICCPR (concerning protection of the rights of parents to secure their children education and teaching in conformity with their own religious and philosophical convictions) viewed in light of Article 9 ECHR and Article 18.1 ICCPR on freedom of thought, conscience and religion.

The Supreme Court dismissed the Norwegian Humanist Association's appeal on the grounds of lack of legal interest in the issue of validity.

The Court stated that the consistent practice of the European Court of Human Rights provided that the Convention states shall themselves determine the

content and composition of an educational subject, and referred to the Decisions in *Kjeldsen et. al. v. Denmark* (Series A, no. 23, paragraph 53, *Special Bulletin – Leading cases ECHR* [ECH-1976-S-002]) and *Valsamis v. Greece* (RJD 1996 at page 2312 ff. paragraph 28). The Court found that Article 9 ECHR and Article 2 Protocol 1 ECHR did not prevent obligatory instruction in the content of different world religions and philosophies of life, and in religious history and ethics, provided that such instruction is carried out in an objective, critical and pluralistic manner. The obligatory instruction must cover different world religions and philosophies of life. In the opinion of the Court, the emphasis in Section 2.4 of the Education Act on knowledge of Christianity as opposed to other religions and philosophies of life fell within the scope of the discretion conferred upon the member states. The requirement that the instruction should be objective, critical and pluralistic could not be interpreted in such a way that emphasis on the different world religions and philosophies of life must be distributed proportionally. It was acceptable that certain religions and philosophies were given a more dominant position than others, in the light of the history, culture and tradition of the individual member states.

The Court referred to the fact that the Education Act provides that the subject shall be an ordinary primary school subject, that the *travaux préparatoires* to the Act provide that the subject shall just provide pupils with the relevant facts, and that the Act provides that the teaching shall be neutral and non-proselytising.

For these reasons, the Court found that Section 2.4 of the Education Act concerning KRL and the national curriculum for the subject were not in breach of the European Convention on Human Rights or the International Covenant on Civil and Political Rights.

The Court did not find it necessary to come to a decision or make a ruling with regard to other Conventions that the parties had pleaded.

When presenting their case, the appellants had not gone into detail concerning the validity of the individual administrative decisions. There was no basis for determining whether the instruction that the appellants' children had received had been given in a manner that was in breach of the international conventions in question. The appellants had failed to prove on a balance of probabilities that the instruction that their children had received had been devised and implemented in such a manner that it gave grounds for dispensation from all of KRL.

An alternative contention, that the system of limited dispensation was discriminatory pursuant to Article 26 ICCPR and Article 14 ECHR, did not succeed.

The Supreme Court found that common instruction in KRL and the requirement of a written application for dispensation pursued a legitimate purpose, and that it was not a disproportionate interference to require those parents who wanted dispensation from parts of the subject to follow the instruction and apply for dispensation when required. In their pleadings, the parties had not discussed in detail what grounds had to be satisfied to substantiate an application for dispensation, nor which grounds had actually been given in the individual applications for dispensation. The Supreme Court therefore restricted itself to stating that there was no reason to believe that a breach of the prohibition against discrimination in this particular case could lead to the conclusion that the administrative decision to deny full dispensation from instruction in KRL was null and void.

#### Cross-references:

European Court of Human Rights:

- *Kjeldsen et. al. v. Denmark*, Series A, no. 23, paragraph 53, *Special Bulletin – Leading cases ECHR* [ECH-1976-S-002];
- *Valsamis v. Greece*, 18.12.1996, *Reports of Judgments and Decisions* 1996-IV, p 2312 ff. paragraph 28).

#### Languages:

Norwegian.



#### Identification: NOR-2001-3-006

- a)** Norway / **b)** Supreme Court / **c)** / **d)** 19.09.2001 / **e)** 2000/1406 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2001, 1123 / **h)** CODICES (Norwegian).

#### Keywords of the systematic thesaurus:

- 1.4.9.1 Constitutional Justice – Procedure – Parties – ***Locus standi***.
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 3.16 General Principles – **Proportionality**.
- 5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

*Keywords of the alphabetical index:*

Detention, psychiatric hospital / Hearing, Control Commission, adjournment.

*Headnotes:*

The complaints procedure before the Control Commission in a case concerning enforced hospitalisation satisfies the person's right to a hearing by an independent and impartial tribunal as requested by Article 6.1 ECHR.

Dismissal of a legal action pursuant to Chapter 30 of the Civil Procedure Act concerning the legality of an administrative decision on the grounds of lack of legal interest (*locus standi*), is not incompatible with the right to judicial review laid down in Article 6.1 ECHR.

*Summary:*

On the 22 October 1997, A. was hospitalised against his will pursuant to Section 3 of the former Mental Health Act of 29 April 1961 no. 2. His complaint against the hospitalisation was dealt with by the Control Commission, which dismissed the complaint. In accordance with an application from A., the Control Commission's proceedings were postponed and first dealt with after A. had been discharged from hospital.

The Control Commission was established in accordance with Section 8 of the Mental Health Act. Section 8 contained detailed provisions *inter alia* on appointment of the Commission's members and provided that the Commission should be chaired by a lawyer, preferably with experience from the judiciary, and otherwise comprise a doctor and two other members. More detailed procedural rules were laid down in Section 9 of the Act.

A. applied for the decision of the Control Commission to be annulled pursuant to the special provisions of Chapter 33 of the Civil Procedure Act concerning judicial review of an administrative decision concerning deprivation of liberty and other compulsory intervention. The application was dismissed on the grounds that the administrative decision no longer had any legal relevance (see *Norsk Retsidende*, 2000, page 121). A. then brought a legal action in the courts against the state (the Ministry of Health and Social Affairs) pursuant to the provisions of Chapter 30 of the Civil Procedure Act concerning the legality of administrative decisions. The district court dismissed the legal action on the

grounds that A. lacked the necessary legal interest to pursue the case. The Court of Appeal dismissed A.'s appeal against the decision of the district court.

A. appealed to the Appeals Selection Committee of the Supreme Court against the decision of the Court of Appeal. The Appeals Selection Committee referred the matter to the Supreme Court to be dealt with pursuant to the same rules as ordinary appeals.

A. submitted, *inter alia*, that the first sentence of Article 6.1 ECHR gave him an automatic right to have the hospitalisation decision reviewed by an independent and impartial tribunal. The state submitted, on the other hand, that Article 6.1 ECHR had no application whatsoever to the action that A. had brought.

The Supreme Court unanimously dismissed A.'s appeal and confirmed the decision of the Court of Appeal. The Court found that A. lacked the necessary legal interest to bring a legal action (see the Civil Procedure Act Section 54). The Court accepted that A. both during and afterwards had experienced the circumstances surrounding the hospitalisation as a serious personal strain. However, it was established in Supreme Court practice that the moral satisfaction that a judgment in A.'s favour would have given him was not alone sufficient to give him legal interest in an action. A. had failed to show on a balance of probabilities that a judgment in his favour would have any other significance for him of relevance to the assessment that the Court was required to make pursuant to Section 54.

The Supreme Court also stated that it was not disputed that the hearing by the Control Commission of the hospitalisation decision satisfied the requirements of Article 13 ECHR concerning the right to an effective remedy before a national authority.

With regard to the state's submission that Article 6.1 ECHR had no application whatsoever to the action that A. had brought, the Supreme Court referred to the Decision of the European Court of Human Rights in *Neves e Silva v. Portugal*, 1989 (Series A, no. 153-A, paragraph 37), and stated that protection pursuant to Article 6.1 ECHR presumes the existence of at least a minimum number of tenable arguments. Since the Supreme Court had found that, in any event, there was no breach of Article 6.1 ECHR, it found it unnecessary to discuss the case on its merits.

The Supreme Court found that the Control Commission's hearing of the hospitalisation decision adequately satisfied A.'s right to a hearing by an independent and impartial tribunal as required by Article 6.1 ECHR. This applied notwithstanding that the Control Commission's decision had been only partly

publicised. The Court referred in this connection to the Judgment of the European Court of Human Rights of 24 April 2001 in *B and P v. The United Kingdom*.

The state had further submitted that dismissal by the court on the grounds of lack of legal interest could not under any circumstances be contrary to the right of access to courts guaranteed by Article 6.1 ECHR. The state referred to the European Court's Judgment of 22 October 1996 in *Stubbings and others v. The United Kingdom* (*Bulletin* 1996/3 [ECH-1996-3-014]), where the Court found that "the very essence of the applicants' right of access to courts was not impaired". In this connection, the Supreme Court stated that the requirement of legal interest in Section 54 of the Civil Procedure Act served a legitimate purpose. Furthermore, this purpose was proportionate to the limitations thereby imposed. Dismissal of the case due to lack of legal interest was thus not incompatible with the right of access to courts laid down in Article 6.1 ECHR.

#### Cross-references:

European Court of Human Rights:

- *Neves e Silva v. Portugal*, 27.04.1989, Series A, no. 153-A, paragraph 37;
- *B and P v. The United Kingdom*, 24.04.2001;
- *Stubbings and others v. The United Kingdom*, 22.10.1996, *Reports of Judgments and Decisions* 1996-IV; *Bulletin* 1996/3 [ECH-1996-3-014].

#### Languages:

Norwegian.



**Identification:** NOR-2002-2-002

a) Norway / b) Supreme Court / c) Plenary / d) 03.05.2002 / e) 2001/890 / f) / g) Norsk Retstidende (Official Gazette), 2002, 509 / h) CODICES (Norwegian).

#### Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

4.10.7 Institutions – Public finances – **Taxation**.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

#### Keywords of the alphabetical index:

Charge, criminal, notion.

#### Headnotes:

The imposition of ordinary (30%) surtax pursuant to Section 10-2 of the Tax Assessment Act (cf. the first sentence of Section 10-4.1 of the Act), constitutes a "criminal charge" in the terms of Article 6.1 ECHR.

#### Summary:

The application to the Supreme Court concerned the submission of evidence in a case of judicial review of a tax assessment decision. The tax authorities amended a taxpayer's tax assessment, having found that his dealings with two ships were not undertaken in the course of business as he had claimed, and he was imposed a surtax of 30%. The taxpayer filed an action with the District Court. In his points of claim, he cited three witnesses who would be called to give testimony and submitted five documents as evidence. The State objected to the submission of this evidence on the grounds that it constituted fresh information which the taxpayer had had both reason and opportunity to submit earlier. The District Court found some of the evidence inadmissible, and the Court of Appeal upheld the District Court's decision. The decision of the Court of Appeal was appealed to the Supreme Court, which decided that the case in its entirety should be determined by the Supreme Court sitting in plenary session.

The main issue in the case was whether the imposition of ordinary – 30% – surtax in accordance with Section 10-2 of the Tax Assessment Act (cf. the first sentence of Section 10-4.1 of the Act) constitutes a "criminal charge" against the taxpayer in the terms of Article 6 ECHR. The parties agreed that the evidence in question could not be precluded if the case fell within the scope of Article 6.1 ECHR.

A majority of the Supreme Court – nine of 13 justices – found that the imposition of ordinary surtax fell within the scope of Article 6.1 ECHR. The Court recalled that tax cases did not ordinarily fall within the ambit of Article 6.1 ECHR. However, following the Decision of the Supreme Court of 23 June 2000, (*Bulletin* 2000/2 [NOR-2000-2-002]) Norwegian additional surtax was deemed to fall within Article 6.1 ECHR. In that decision, however, the Supreme Court had reserved judgment as

to how ordinary surtax must be viewed in relation to Article 6.1 ECHR.

Ordinary surtax is imposed almost automatically where a taxpayer has provided incorrect or incomplete information to the tax authorities. According to Section 10-3.a and 10-3.b of the Tax Assessment Act, exemption from ordinary surtax may be granted only where the error in the tax assessment form is obviously an arithmetical error or misprint, or where the circumstances of the taxpayer must be deemed to be pardonable due to illness, old age, inexperience or another reason for which he cannot be blamed.

The Court referred to a number of decisions of the European Court of Human Rights, in which three criteria are cited in order to determine whether a penalty imposed by an administrative authority is to be deemed to constitute a criminal charge: the classification of the penalty in domestic law, the nature of the offence and the content and seriousness of the penalty. In particular, the Supreme Court referred to the European Court of Human Rights' Judgments of 8 June 1976 in *Engel v. Netherlands*, 21 February 1984 in *Öztürk v. Germany*, 24 February 1994 in *Bendenoun v. France* and 24 September 1997 in *Garyfallou AE BE v. Greece*.

The Supreme Court recalled that ordinary surtax is not a criminal sanction in Norwegian law. However, the question had to be determined on the basis of a full assessment of the second and third criteria as these had been developed by the European Court. The nature of the offence indicated quite strongly that ordinary surtax constitutes a criminal charge. A particularly important consideration was the close connection between additional surtax and criminal sanctions based on the same conduct. The Court also attached weight to the fact that additional surtax could amount to an extremely large amount of money. The fact that a prison sentence could not be imposed, whether instead of or in the case of a failure to pay ordinary surtax, was not decisive.

#### Cross-references:

- no. Inr 30B/2000, 23.06.2000, *Bulletin 2000/2* [NOR-2000-2-002].

#### European Court of Human Rights:

- *Engel v. Netherlands*, no. 5100/71, 08.06.1976, *Special Bulletin – Leading cases ECHR* [ECH-1976-S-001];
- *Öztürk v. Germany*, no. 08544/79, 21.02.1984, *Special Bulletin – Leading cases ECHR* [ECH-1984-S-001];

- *Bendenoun v. France*, no. 12547/86, 24.02.1994, *Special Bulletin – Leading cases ECHR* [ECH-1994-1-004];
- *Garyfallou AE BE v. Greece*, no. 18996/91, 24.09.1997.

#### Languages:

Norwegian.



#### Identification: NOR-2002-3-004

- a) Norway / b) Supreme Court / c) / d) 11.10.2002 / e) 2001/1588 / f) / g) Norsk Retstidende (Official Gazette), 2002, 1216 / h) CODICES (Norwegian).**

#### Keywords of the systematic thesaurus:

- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.  
5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem**.

#### Keywords of the alphabetical index:

Driving licence, confiscation, qualification / Sanction, imposition by different authorities / Punishment, definition.

#### Headnotes:

An administrative decision concerning the confiscation of a driving licence following a criminal conviction for breach of the Road Traffic Act Section 22.2 was deemed to be punishment within the terms of Article 4.1 Protocol 7 ECHR. The conviction did not, however, bar a subsequent administrative confiscation order.

#### Summary:

A. was convicted by the Court of Summary Jurisdiction and sentenced to 21 days' imprisonment and a fine of NOK 20,000 for breach of Section 22.2 of the Road Traffic Act. This provision provides that it is an offence to have consumed alcohol within six hours before driving a motor vehicle in circumstances where the driver believes or ought to believe that the driving might

lead to a police investigation. The sentence was suspended with a probation period of two years.

The judgement was served on A. personally in court the same day. He accepted the conviction, which became enforceable against him immediately. Before the prosecution's time-limit for appeal had expired, the police warned A. that there was a possibility that an administrative order would be made to confiscate his driving licence for a period of two years. Two months after the judgement became final, the police issued an order for the confiscation of the licence for a period of 12 months, pursuant to Section 33.2 of the Road Traffic Act. A. brought an appeal against the order to the Ministry of Justice, which allowed the appeal in part and reduced the confiscation period to eight months.

A. subsequently filed a civil action against the State, represented by the Ministry of Justice, and claimed that the order was unlawful and in breach of the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR. The District Court found in favour of the State, but the Court of Appeal found the order to be unlawful.

The case before the Supreme Court raised two main questions. Firstly, whether the confiscation of the driving licence was deemed to be "punishment" in the terms of the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR. This question had to be resolved on the basis of consideration of all of the circumstances, taking as a starting point the criteria to be applied when determining whether a measure is a "penalty" in Article 7 ECHR, as laid down in the case of *Welch v. United Kingdom* (European Court of Human Rights, case 17440/90). The main criterion for defining a measure as a "penalty" in this connection is whether it is imposed following conviction for a "criminal offence". The other criteria are the nature and purpose of the measure, its characterisation under national law, the procedures involved in the making and implementation of the measure and the severity of the measure.

The Supreme Court found that the confiscation of the driving licence in the present case must be deemed to be "punishment" within the terms of Article 4.1 Protocol 7 ECHR. The Court placed emphasis, *inter alia*, on the fact that the measure in question was infringing, that it was directly related to a criminal conviction, and that the Norwegian system of mandatory confiscation of a driving licence for the consumption of alcohol subsequent to the event must be said to have a distinct penal motive. The Court left unanswered the question whether the situation would be different for the confiscation of a driving licence following a conviction for drunk-driving pursuant to Section 22.1 of the Road Traffic Act, or for confiscation following breaches of other provisions of the Act.

The second question in the case before the Supreme Court was whether A. had been "tried again in criminal proceedings" within the terms of the Convention. The issue here was whether the enforceable criminal conviction barred the administrative confiscation order. The Court stated that its plenary decisions concerning the surtax did not resolve the questions raised in the present case. As opposed to the confiscation of driving licences, the imposition of the surtax pursuant to the Tax Assessment Act takes place in accordance with a dual-track system, whereby both authorities conduct proceedings with separate and independent submission and assessment of evidence. In cases concerning the confiscation of a driving licence following a criminal conviction, however, there is only one set of proceedings where the law attaches two measures to the same act, and where the confiscation takes place subsequent to and fully based on the conviction. In resolving this question, the Court stated that the appropriate starting point was the wording of Article 4.1 Protocol 7 ECHR, which provides that no one shall be liable to be tried or punished "again" for an offence for which he has already been "finally" acquitted or convicted.

According to the practice of the European Court of Human Rights, the purpose of the provision is to prevent "the repetition of criminal proceedings that have been concluded by a final decision". The Supreme Court referred in particular to the admissibility Decision of 30 May 2000 in *R.T. v. Switzerland* (case 31982/96) and emphasised that the fact that two different public authorities imposed qualitatively different sanctions pursuant to a system of divided competence according to law, did not itself constitute a violation of the Convention. The Court discussed the importance of the statement in the *R.T.* case to the effect that the sanctions were "issued at the same time", and suggested that there were two alternative approaches to the question. Firstly, it could be argued that the system in the Norwegian Road Traffic Act with the obligatory confiscation of a driving licence when a person is found guilty of breach of the provisions of the Act, will never amount to a repetition of criminal proceedings, and that Article 4.1 Protocol 7 ECHR will therefore never be applicable. In that event, any protection that a convicted person has against confiscation after criminal proceedings are completed must be sought in Article 6.1 ECHR.

The other approach was related to the fact that the decision is made by two different authorities. The system could therefore be conceived as two sets of proceedings and thus in breach of Article 4.1 Protocol 7 ECHR, unless the sanctions are imposed "at the same time", cf. the *R.T.* case. The Court stated that the requirement of "at the same time" must in that event be more clearly substantiated in light of the purpose of Article 4.1 Protocol 7 ECHR, which is to protect the

offender's legitimate interest in wishing to put the case behind him. This required a concrete assessment, where a relevant factor is that the confiscation of the driving licence in alcohol-related driving offences is well known among motorists.

The Supreme Court concluded that the two approaches would hardly lead to different results, and that the decisive issue was whether the different sanctions were imposed reasonably close to each other in time, without unnecessary delay. Irrespective of which approach was applied, the Court found in favour of the State. The Court noted that A. had been forewarned of the possibility that a confiscation order would be made, even before the prosecution's time-limit for appeal had expired, but stated that the result would have been the same even if the warning had been given after the time-limit had expired.

#### Cross-references:

- no. 2001/1527, 03.05.2002, *Bulletin* 2002/2 [NOR-2002-2-003];
- no. 2000/770 of 03.05.2002, *Bulletin* 2002/2 [NOR-2002-2-001].

#### European Court of Human Rights:

- *Welch v. United Kingdom*, Vol. 307-A, Series A; *Bulletin* 1995/1 [ECH-1995-1-002];
- *R.T. v. Switzerland*, no. 31982/96, 30.05.2000.

#### Languages:

Norwegian.



#### Identification: NOR-2003-3-008

**a)** Norway / **b)** Supreme Court / **c)** / **d)** 23.09.2003 / **e)** 2002/1389 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2003, 1221 / **h)** CODICES (Norwegian).

#### Keywords of the systematic thesaurus:

5.3.14 Fundamental Rights – Civil and political rights – ***Ne bis in idem***.

#### Keywords of the alphabetical index:

Bankruptcy / Sanction, disqualification from business.

#### Headnotes:

An order imposing disqualification from business upon a bankrupt is not a bar to subsequent criminal proceedings pursuant to the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR. This principle only applies where a person is "finally acquitted or convicted" of an offence.

#### Summary:

A. ran a cafe and restaurant business. The business was declared bankrupt, and he was disqualified from business pursuant to the Bankruptcy Act Section 142.1.1 and 142.1.2. Subsection 1.1 provides that disqualification may be imposed where there are justifiable grounds for suspecting that one or more criminal offences have been committed during the course of business leading to the bankruptcy. Subsection 1.2 provides that disqualification may be imposed in the case of reprehensible business conduct rendering the bankrupt unfit to found a new company or hold office as board member. Almost two years after the disqualification order was made, A. was convicted of and given a custodial sentence for the criminal offences upon which the disqualification order was based. He appealed to the Court of Appeal and thereafter to the Supreme Court and pleaded that the criminal conviction subsequent to the disqualification from business was a violation of the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR.

The Supreme Court found that there was no repetition of criminal proceedings.

With regard to the disqualification imposed pursuant to Section 142.1.2, the Supreme Court referred to the admissibility Decision of the European Court of Human Rights of 14 September 1999 in the case of *DC, HS and AD v. the United Kingdom* (no. 39031/97). The English rules concerning the disqualification of directors had clear similarities with the disqualification provisions in subsection 1.2, but the sanction under the English rules was more far-reaching. The European Court of Human Rights had stated that neither the domestic classification of the offence, nor the nature of the offence, nor the nature and degree of severity of the sanction indicated that there was a criminal charge within the meaning of Article 6.1 ECHR.

The Supreme Court found that disqualification pursuant to subsection 1.2 of the Bankruptcy Act had to be viewed the same way, and that the prohibition against repeated criminal proceedings therefore did not apply.

With regard to disqualification imposed pursuant to Section 142.1.1 of the Bankruptcy Act, the Supreme Court pointed out the fact that the *ne bis in idem* principle only applies if a person is "finally acquitted or convicted" of an offence. A disqualification order could not be said to satisfy that condition. The kind of guilt required, the purpose of the sanction and the procedure to be followed when imposing disqualification from business suggest that it cannot be deemed to be a final conviction for the criminal offences upon which the order was based. Moreover, the Supreme Court found that the case against the United Kingdom is also applicable where disqualification is imposed pursuant to subsection 1.1. Neither the purpose of the sanction nor its nature nor its degree of severity indicates that disqualification from business is a criminal charge.

#### *Languages:*

Norwegian.



*Identification:* NOR-2004-3-004

- a) Norway / b) Supreme Court / c) / d) 12.11.2004 / e) 2004/686 / f) / g) Norsk retstidende (Official Gazette) / h) CODICES (Norwegian).

#### *Keywords of the systematic thesaurus:*

- 3.18 General Principles – **General interest.**
- 3.19 General Principles – **Margin of appreciation.**
- 4.5.2 Institutions – Legislative bodies – **Powers.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

#### *Keywords of the alphabetical index:*

Advertising, political, television, prohibition.

#### *Headnotes:*

Legislation that prohibits political advertising on television does not represent a violation of Article 100 of the Constitution or Article 10 ECHR (see Section 3 of the Human Rights Act).

It is essential that the prohibition's purpose was to regulate political debate and not to prohibit freedom of political expression. Failing a common European opinion as to what the law regulating political advertising should be, the political authorities must have a wide margin of appreciation when determining what measures there should be in this area.

#### *Summary:*

Section 3-1.3 of the Broadcasting Act prohibits the broadcasting of denominational and political advertisements on television. Prior to the local and county elections in 2003, a local television station – TV Vest – broadcast an advertisement for the Rogaland Pensioners' Party. The National Mass Media Authority imposed a fine on TV Vest AS for breach of the prohibition.

TV Vest brought a civil action against the State and submitted that the fine was invalid on the grounds that the prohibition in Section 3-1.3 of the Broadcasting Act constituted a violation of both Article 100 of the Constitution and Article 10 ECHR. The Oslo City Court found in favour of the State and dismissed the proceedings. TV Vest appealed and the Appeals Selection Committee of the Supreme Court granted leave to bring the appeal directly to the Supreme Court.

The majority of the Supreme Court upheld the judgment of the City Court. With regard to Article 100 of the Constitution, the Supreme Court emphasised in particular that Section 3-1 of the Broadcasting Act did not prohibit political expression itself, but only the use of television for paid political statements. The Norwegian parliament had viewed the Act as regulating the way in which political debate could best take place. This is an area where the views of the parliament as to the constitutionality of the measure must be accorded particular weight. Furthermore, the courts should in general be bound by the purposes that the parliament had for the adoption of legislation. The majority held that there was no breach of Article 100 of the Constitution.

On 30 September 2004, the Norwegian parliament passed an amendment to Article 100 of the Constitution following the recommendations of the Government Commission on Freedom of Speech (*Norwegian Official Reports* 1999:27). The amendment was not directly applicable to the case, since the relevant provision was the provision as it was worded at the time the political advertising took place. Furthermore, it was to be assumed that parliament intended Section 3-1 of the Broadcasting Act to be enforceable after the amendment of the Constitution.

Further, the majority of the Supreme Court held that there had been no violation of Article 10 ECHR, on the ground that the prohibition in Section 3-1 of the Broadcasting Act fell within the exception in Article 10.2 ECHR. The prohibition was "provided by law" and had a purpose as provided in Article 10.2 ECHR. Consequently, the only remaining question was whether the prohibition was "necessary in a democratic society". The majority of the Supreme Court held that that requirement was fulfilled. The fact that a majority of the parliament during the debate on the constitutional amendment in September 2004, had found that the prohibition against political advertising was awkward from a freedom of expression point of view did not mean that the prohibition was unconstitutional. That would imply that the legislator had renounced its margin of appreciation despite clear statements to the effect that parliament did not wish to bind future developments in one direction or the other.

One justice found that the prohibition in Section 3-1 of the Broadcasting Act constituted a violation of Article 10 ECHR. In matters concerning political expression, the State has a narrow margin of appreciation. In light of the Judgment of the European Court of Human Rights in *Vgt v. Switzerland* (no. 24699/94, Judgment of 28 June 2001), a minority of the Supreme Court found that an unqualified prohibition against political television advertising is in breach of Article 10 ECHR. In view of the fact that the parliament had changed its views on political advertising, there was little credibility in the argument that there is such an absolute necessity for an unqualified prohibition that it can be considered to be consistent with Article 10.2 ECHR.

#### *Languages:*

Norwegian.



*Identification:* NOR-2012-3-003

a) Norway / b) Supreme Court / c) Plenary / d) 21.12.2012 / e) 2012-02398-P / f) / g) Norsk retstidende (Official Gazette), 2012, 1985 / h) CODICES (Norwegian, English).

#### *Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests**.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

#### *Keywords of the alphabetical index:*

Asylum, procedure / Child, best interests.

#### *Headnotes:*

The review of administrative decisions should in general be based on the facts at the time the decision was made. Norway's human rights obligations T the obligation to ensure the right to an effective remedy under Article 13 ECHR 3 give no grounds for any other solution. This includes immigration cases.

#### *Summary:*

Questions had arisen over the validity of a refusal by the Immigration Board of Appeal of the application for asylum and residence in Norway of an Iranian family with children who, at the time of the decision, had lived there for a long time. A majority of the Supreme Court concluded, after an extensive review of theory, preparatory works of acts and case-law that the review of administrative decisions should in general be based on the facts at the time the decision was made. Norway's human rights obligations give no grounds for any other solution. This includes immigration cases. The obligation to ensure the right to an effective remedy under Article 13 ECHR is safeguarded through the system in force in Norway today. The Immigration Board of Appeals, which should be regarded as a court of law according to the European Convention on Human Rights system, is required to hear requests for reversals based on new circumstances. Refusals to grant reversals may also be heard by the courts.

Section 38.3 of the Immigration Act provides that the best interests of the child is to be a fundamental consideration in cases relating to the granting of a residence permit on the grounds of strong humanitarian considerations or a special connection to Norway and should be interpreted to mean that consideration for the child's best interests will carry significant weight. This is in conformity with Article 3 of the Convention on the Rights of the Child. Importance is to be attached to a connection that has developed while the child has been an illegal immigrant in the country. However, so much weight may be attached to immigration-regulating considerations, cf. Section 38.4 of the Immigration Act, including derived consequences of a decision and regard for the other rules of the Act, that they must prevail over consideration of the best interests of the child. In certain circumstances, consideration for the child's best interests may be so weighty that it takes

precedence regardless of any other counter-considerations. Section 38.1 of the Immigration Act does not allow for a right of judicial review of the administrations application of the conditions "strong humanitarian considerations" or "special connection to Norway". In cases under Section 38.3 of the Immigration Act it must be clear from the decision that the regard for the child's best interests has been properly evaluated and measured against conflicting considerations and carries weight as a fundamental consideration. The courts may examine whether the decision has complied with these requirements. The concrete weighing of interests cannot be examined. A concrete review of the Immigration Board of Appeals decisions showed that consideration for the child had been duly evaluated and that there were no errors which would lead to invalidation.

Decision in plenary. Dissenting votes 14-5.

#### *Languages:*

Norwegian, English (translation by the Court).



#### *Identification:* NOR-2012-3-004

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 21.12.2012 / **e)** 2012-02399-P / **f)** / **g)** Norsk retstidende (Official Gazette), 2012, 2039 / **h)** CODICES (Norwegian, English).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

#### *Keywords of the alphabetical index:*

Asylum, procedure / Child, best interests.

#### *Headnotes:*

A court has a procedural right to deliver a declaratory judgment to the effect that a deportation violates Article 8 ECHR relating to the right to respect for private and family life.

#### *Summary:*

Having reviewed the validity of the refusal by the Immigration Board of Appeal of an application for a residence permit for a family from Bosnia and Herzegovina who had children in Norway, the Supreme Courts majority held that the Immigration Board had relied on a correct understanding of Section 38 of the Immigration Act in its assessment as to whether a residence permit should be granted. The decision satisfied the requirements as to reason in Section 38.3 of the Immigration Act as these are specified in another plenary Judgment of the same date in case HR-2012-2398-P. A court has a procedural right to deliver a declaratory judgment to the effect that a deportation violates Article 8 ECHR relating to the right to respect for private and family life. Having reviewed the European Court of Human Rights Judgment of 4 December 2012 in *Butt v. Norway*, the majority concluded that there were no such "exceptional circumstances" that could constitute grounds for a violation of the Convention when the duty to leave the country had been breached over several years. Unlike the European Convention on Human Rights and the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child does not contain any requirement for an effective remedy in law at national level. It is accordingly not possible to deliver a declaratory judgment for a breach of this Convention.

Plenary decision.

Dissenting votes 11-8 as to the feasibility of delivering a declaratory judgment for breach of the Convention on the Rights of the Child, 14-5 regarding the other issues.

#### *Languages:*

Norwegian, English (translation by the Court).



# Poland

## Constitutional Tribunal

### Important decisions

*Identification:* POL-2000-1-005

a) Poland / b) Constitutional Tribunal / c) / d) 12.01.2000 / e) P 11/98 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2000, no. 3, item 46; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3 / h) CODICES (Polish).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 3.17 General Principles – **Weighing of interests**.  
 5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons**.  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.  
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

*Keywords of the alphabetical index:*

Municipality, rent control / Lease, termination.

*Headnotes:*

Provisions introducing a controlled rent, determined by the local municipality, for leases of flats or houses owned by natural persons is discordant with a constitutional right to property and the rule of democracy. Whilst drafting the limitations introduced in such provisions, terms introduced by the Constitution were breached.

*Summary:*

The case was examined by the Tribunal as a result of a legal query introduced by the Supreme Court. In the Tribunal's opinion, there was a conflict of two interests – rights of the owner and of the lessee, where both are protected on the constitutional level (although not equally). The Tribunal did not deny the need for the protection of lessees and the introduction of provisions limiting the freedom of the owner in determining the

amount of the rent. The Tribunal emphasised, however, that each particular provision which interferes with the right to property must be appraised with reference to all existing limitations on that right. Provisions in force significantly limit the right to use and dispose of premises by the owner. In particular, the right to terminate a lease relationship is possible only in situations where the lessee has clearly breached his duties. As a result of the foregoing, the provisions providing for the possibility of determination of the rent by local municipalities, and fixing the rates below the costs of maintaining the building, constitutes an excessive interference in property rights. Fixing rents at a figure which fell short of the amount needed to cover the owner's expenses of maintaining the building (and lack of any compensation for this loss) would result in a disproportionate burden on the owner, in order to ensure the lessee's protection and would be discordant with the rule of proportionality.

The Tribunal also emphasised that the Constitution provides for conditions of admissibility of any limitations of rights and liberties of individuals. These limitations may be introduced only in the form of a Law. It is not possible to adopt norms which would give executive and local authorities total freedom to decide upon the final condition of such limitations and in particular, to decide upon the scope of the limitations. The provisions examined in this case introduced only a maximal amount of the controlled rent, giving the local municipalities freedom to fix the actual rents. Such a solution, in the Tribunal's opinion, gave rise to great doubts as to whether the constitutional requirement of enacting the limitation of rights and liberties only by a way of a Law is met.

*Supplementary information:*

One judge delivered a dissenting opinion (Biruta Lewaszkiewicz-Petrykowska).

*Cross-references:*

- no. K 11/94, 26.04.1995;
- no. K 34/98, 02.06.1999, *Bulletin* 1999/2 [POL-1999-2-019];
- no. P 2/98, 12.01.1999, *Bulletin* 1999/1 [POL-1999-1-002];
- Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Resolution of Supreme Court of 27.02.1996 (III CZP 190/95);
- Resolution of Supreme Court of 01.12.1998 (III CZP 47/98);
- Decision of Highest Administrative Court of 11.12.1997 (II SA/Gd 1703-1708/96);
- Resolution of Highest Administrative Court of 20.04.1998 (FPS 4/98);

- Resolution of Highest Administrative Court of 23.09.1997 (I S.A./Ka 391/96);

European Court of Human Rights:

- *Spadea and Scalabrino v. Italy*, 28.09.1994;
- *Sporrong and Lönnroth v. Sweden*, 23.09.1982, *Special Bulletin – Leading cases ECHR* [ECH-1982-S-002];
- *Scollo v. Italy*, 28.09.1995, *Bulletin* 1995/3 [ECH-1995-3-018];
- *Velosa Baretto v. Portugal*, 21.11.1995, *Bulletin* 1995/3 [ECH-1995-3-020];
- *Mellacher and others v. Austria*, 23.11.1989.

*Languages:*

Polish.



*Identification:* POL-2004-1-003

- a) Poland / b) Constitutional Tribunal / c) / d)** 25.11.2003 / **e) K 37/02 / f) / g)** *Dziennik Urzędowy Rzeczypospolitej Polskiej "Monitor Polski"* (Official Gazette), 2003, no. 56, item 877; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9/A, item 96 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

*Keywords of the alphabetical index:*

Inheritance, right / Inheritance, testator, will, respect / Defence, national.

*Headnotes:*

The right to inheritance, like other protected constitutional property rights, is not an absolute right. In previous judicial decisions certain significant requirements were laid down which the legislator should respect when drafting rules governing disposals in the event of death. One of these is the need to respect the true will of the testator, expressed in the form of a testament or otherwise.

Article 15.2 of the Act on recognizing part of the Hel Peninsula as an area of particular importance for national defence which provides that testamentary heirs must obtain a permit to inherit an estate comprising real property located on the Hel Peninsula cannot be regarded as necessary or in reasonable proportion to the intended purpose of the legislator. There are also no grounds for refusing appropriate compensation to an heir who was precluded from acquiring real property.

#### *Summary:*

The precedence of testamentary inheritance in relation to statutory inheritance undoubtedly follows the constitutional guarantees of the right to property and the right to inheritance, a component of which is the freedom to make a will.

The basic measure of the permissibility of the introduction of specific mechanisms limiting the use of constitutional substantive rights is the constitutional principle of proportionality, which makes it possible to examine whether the same effect may be achieved through less detrimental methods, i.e. interfering less with the constitutionally protected rights and freedoms. All limitations of rights and freedoms should satisfy the conditions of statutory form and must be necessary for the realization of specific goals.

The contested provisions are contrary to the right to property (Article 64.1 and 64.2) in connection with Articles 21.1 and 31.3 of the Constitution.

#### *Cross-references:*

Constitutional Tribunal:

- Decision K 3/01 of 03.07.2001;
- Decision SK 11/98 of 16.02.1999, *Bulletin* 1999/1 [POL-1999-1-003];
- Decision P 4/99 of 31.01.2001, *Bulletin* 2001/1 [POL-2001-1-006];
- Decision K 30/01 of 21.05.2002;
- Decision K 33/99 of 03.10.2000, *Bulletin* 2000/3 [POL-2000-3-020];
- Decision K 11/94 of 26.04.1994;
- Decision K 5/96 of 30.10.1996;
- Decision K 34/98 of 02.06.1999, *Bulletin* 1999/2 [POL-1999-2-019];
- Decision K 21/01 of 09.04.2002;
- Decision K 28/02 of 24.02.2003;
- Decision P 5/99 of 14.03.2000, *Bulletin* 2000/1 [POL-2000-1-009];
- Decision K 1/90 of 08.05.1990;
- Decision P 11/98 of 12.01.2000, *Bulletin* 2000/1 [POL-2000-1-005];
- Decision K 8/98 of 12.04.2000;

European Court of Human Rights:

- *Sporrong and Lönnroth v. Sweden*, 23.09.1982, Vol. 52, Series A, *Special Bulletin – Leading cases ECHR* [ECH-1982-S-002].

*Languages:*

Polish.



*Identification:* POL-2006-1-001

- a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.12.2005 / **e)** K 32/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 250, item 2116; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11A, item 132 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, [www.trybunal.gov.pl/eng/summaries/wstepgb.htm](http://www.trybunal.gov.pl/eng/summaries/wstepgb.htm)); CODICES (Polish).

*Keywords of the systematic thesaurus:*

3.12 General Principles – **Clarity and precision of legal provisions.**

3.16 General Principles – **Proportionality.**

3.19 General Principles – **Margin of appreciation.**

3.22 General Principles – **Prohibition of arbitrariness.**

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications.**

*Keywords of the alphabetical index:*

Police, surveillance, limits.

*Headnotes:*

Police surveillance activities are by their very nature secretive, carried out without the subject's knowledge and under conditions that provide the police with a wide margin of discretion. There is limited external control and limited guarantees of the rights of those who are the subject of the surveillance. These activities would be ineffective if they had to be made transparent. Such activity by the police is indispensable in a modern State, which is responsible for ensuring the safety of its citizens against terrorism and crime. Nevertheless, it should be accompanied by appropriate substantial guarantees, with clearly defined limits on interference with privacy as well as procedural guarantees such as the obligation to report the surveillance undertaken and to legitimise it by reference to an external agency; the obligation to notify the subject about the surveillance and what was found in a very limited way and from a certain point in time. Control mechanisms should also be in place in case of abuse on the part of the organisation controlling the surveillance.

Under Article 31.3 of the Constitution, regulations must answer the test of proportionality. They must be capable of bringing about the results intended, they must be indispensable for the protection of the public interest with which they are connected; and the results must be in proportion to the burdens they place on the citizen.

All constitutional rights and freedoms of individuals stem from human dignity (Article 30 of the Constitution). In the case of privacy, this relationship is of a specific nature. The protection of dignity requires the respect of purely private life; so that individuals are not forced into the company of others and do not have to share with others their experiences or intimate details.

Different areas of privacy exist, with differing levels of necessity for interference. For example, the respect for the privacy of the home places greater limits on the interference of the authority using wiretapping than the protection of the privacy of correspondence.

Provisions limiting rights and freedoms should be formulated clearly and precisely, in order to avoid excessive discretion when determining, in practice, the *ratione personae* and *ratione materiae* of such limits.

**Summary:**

I. Under the Police Act 1990 (hereinafter, the "Act"), police surveillance is conducted secretly and is based on the use of means such as wiretapping or control of correspondence and mail. Surveillance may be carried out for the purpose of the detection or prevention of the commitment of certain criminal offences, the identification of perpetrators, as well as the obtaining and preservation of evidence. The basis for surveillance is, in principle, the issue of a decision by an appropriate regional court.

The Commissioner for Citizens' Rights alleged before the Constitutional Tribunal that certain provisions of the Act (see below) infringe numerous constitutional provisions relating to citizens' informational autonomy.

The Tribunal ruled that: Article 19.4 of the Act provides for the possibility of abandoning the destruction of materials collected in the process of surveillance conducted without the consent of a court. This does not comply with Articles 31.3 and 51.4 of the Constitution, which respectively provide for proportionality and the right to demand correction or deletion of incorrect or incomplete information acquired by illegal means. It is not inconsistent with Article 7 of the Constitution (functioning of public authority organs on the basis and within the limits of the law).

Article 19.16 of the Act prevents the subject from being informed about the surveillance while it is taking place. Insofar as this envisages the suspect and their defence counsel being informed about the surveillance once it has come to an end, this conforms to Articles 31.3 and 45.1 of the Constitution (right to a fair trial), Article 49 of the Constitution (privacy of communication) and Article 77.2 of the Constitution (recourse to the courts to vindicate infringed rights and freedoms cannot be barred).

There is no requirement within Article 19.18 of the Act to obtain the consent of a court to conduct surveillance when the sender or recipient has expressed consent for the transfer of this information. This does not conform to Articles 31.3 and 49 of the Constitution.

Article 20.2 of the Act allows the police to collect a very wide variety of information about those they suspect may have committed criminal offences. This does not conform to Articles 31.3 and 51.2 of the Constitution (prohibition on collecting unnecessary information about citizens) since it does not precisely specify the circumstances under which information may legitimately be collected about the suspected perpetrator of an offence neither does it specify an exhaustive list of the type of information which may be collected.

Article 20.17 of the Act deals with information collected for the purpose of investigating a criminal offence after a suspect has been acquitted or charges against him have been dropped. This is in line with Articles 31.3 and 51.2 of the Constitution.

Materials collected without the consent of a court represent a legal resource, directly the court does give its consent (pursuant to Article 19.4 of the Act). This can be used in the proceedings and the accusation cannot be made that advantage has been taken of "fruits of a poisonous tree". Nonetheless, subsequent consent may not be sufficient to justify the infringement of Article 51.4 of the Constitution. A statute may not influence the scope of a constitutional notion, especially when this has a negative impact on an individual's rights.

Article 19.16 of the Act does not exclude the possibility of divulging information about the surveillance when it has come to an end and no indictment has been lodged. The applicant here is challenging an interpretation which can be made of the challenged norm and arguably an unconstitutional conjecture. However, it has not been proved that this interpretation is carried out in general practice.

External control of surveillance activities can only be a safeguard of individual rights and freedoms if the controlling organ is independent and impartial. The difficulty is that in the situation described in Article 19.18 of the Act, consent to conduct these activities is granted by somebody with a personal interest in the surveillance activities (the recipient or sender of the information transfer). The consent in question represents a justification of encroachment upon the personal sphere of the person expressing it (*volenti non fit iniuria*). Using it to justify encroaching upon the private sphere of a third party constitutes a misunderstanding.

If somebody is acquitted or charges against him are dropped, data collected about him may contain data which could be of use to the police in their investigation of other people. Article 20.17 of the Act refers to information collected legally, with the consent of the court. The possibility of retaining this information does not include so-called sensitive information – disclosing race, ethnicity, political views, religious or philosophical beliefs, religious allegiance, political or union membership, or information related to health, addictions, or sexual practices.

A distinction has to be drawn between the absence of obstacles to making materials available upon the subject's request – which is ensured by the legislation presently in force – and the obligation to inform a person subject to surveillance about such a control.

The existence of the latter duty is desirable but it is not up to the Constitutional Tribunal to fill a legislative lacuna.

#### Cross-references:

##### Constitutional Tribunal:

- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, no. I, item 12;
- Judgment K 9/95 of 31.01.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 1, item 2; *Bulletin* 1996/1 [POL-1996-1-002];
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 188, *Bulletin* 2000/3 [POL-2000-3-020];
- Judgment K 22/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 216;
- Judgment K 41/01 of 30.09.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5A, item 61; *Bulletin* 2002/3 [POL-2002-3-030];
- Judgment P 6/02 of 10.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 91; *Bulletin* 2003/1 [POL-2003-1-009];
- Judgment SK 17/02 of 11.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 98;
- Judgment SK 12/03 of 09.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 51; *Bulletin* 2003/3 [POL-2003-3-024];
- Judgment P 3/03 of 28.10.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 8A, item 82;
- Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 4A, item 30;
- Judgment K 4/04 of 20.06.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 6A, item 64;
- Judgment K 31/04 of 26.10.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 9A, item 103; *Bulletin* 2005/3 [POL-2005-3-010];
- Procedural Decision K 32/04 of 23.11.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 10A, item 126;
- Procedural Decision S 2/06 of 25.01.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 1A, item 13.

##### European Court of Human Rights:

- *Klass and Others v. Germany*, no. 5029/71, 06.09.1978, Series A, no. 28;
- *Malone v. the United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82; *Special Bulletin – Leading cases ECHR* [ECH-1984-S-007];
- *Kruslin v. France*, no. 11801/85, 24.04.1990, Series A, no. 176-A; *Special Bulletin – Leading cases ECHR* [ECH-1990-S-001];
- *Huvig v. France*, no. 11105/85, 24.04.1990, Series A, no. 175-B;
- *A v. France*, no. 14838/89, 23.11.1993, Series A, no. 277-B;
- *Friedl v. Austria*, no. 15225/89, 31.01.1995, Series A, no. 305-B;
- *Rotaru v. Romania*, no. 28341/95, 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *Doerga v. the Netherlands*, no. 50210/99, 27.04.2004.

##### Languages:

Polish, English (summary).



##### Identification: POL-2006-1-003

- a) Poland / b) Constitutional Tribunal / c) / d) 18.01.2006 / e) K 21/05 / f) / g) Dziennik Ustaw Rzeczypospolitej Polskiej (Official Gazette), 2006, no. 17, item 141; Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy (Official Digest), 2006, no. 1A, item 4 / h) Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, [www.trybunal.gov.pl/eng/summaries/wstepgb.htm](http://www.trybunal.gov.pl/eng/summaries/wstepgb.htm)); CODICES (Polish).**

##### Keywords of the systematic thesaurus:

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law**.

3.3.3 General Principles – Democracy – **Pluralist democracy**.

3.17 General Principles – **Weighing of interests**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

**5.3.28 Fundamental Rights – Civil and political rights – Freedom of assembly.**

*Keywords of the alphabetical index:*

Assembly, function, democratic / Assembly, approval / Public morals / Fundamental right, essence, regulation.

*Headnotes:*

The goal of freedom of assembly, as guaranteed in Article 57 of the Constitution, is not only to ensure individual autonomy and self-realisation, but also to protect social communication processes, essential for the functioning of a democratic society. Freedom of assembly is a precondition for democracy and a necessary component thereof, as well as a prerequisite for enjoying other human rights and freedoms connected with public life. Assemblies are the principal element of democratic public opinion, as they allow the influence of political process through criticism and protest. By protecting minority groups, freedom of assembly increases legitimacy and acceptance for decisions taken by representative bodies and the administrative/executive structure subordinate to them. The stabilising function of assemblies for the political and social order is particularly important for the representation mechanism. It consists of a public presentation of the sources, causes and essence of dissatisfaction, submitting them for analysis, as well as an expression of criticism, or negation, of the operative legal or social order. As an early warning mechanism, indicating to representative bodies and public opinion potential and already existing sources of tension, as well as limitations of the integration mechanisms and effects, assemblies allow for timely adjustments in policy.

Public authorities are under an obligation to guarantee the enjoyment of freedom of assembly, irrespective of the political views of those in power. Freedom of assembly is a constitutional value and not one which is defined by the democratically legitimised political majority in power at a certain point in time.

The moral views of those in power are not synonymous with “public morals” as a justification for limiting freedom of assembly within the meaning of Article 31.3 of the Constitution (conditions permitting the imposition of limitations on constitutional rights and freedoms).

Public authorities must ensure the protection of groups organising demonstrations and taking part in them, regardless of the degree of controversy of the views and opinions which might be expressed at the demonstration, provided that no laws have been broken.

The risk of a violent counter-demonstration, or the potential for aggressive extremists joining the assembly, may not lead to the withdrawal of the right to organise a peaceful demonstration, even where there may be a genuine threat to the public order by events remaining beyond control of the organisers of the demonstration, and public authorities fail to undertake effective action aimed at guaranteeing the enjoyment of freedom with respect to the planned demonstration.

The legislator does not have the discretion to regulate the essence of a particular constitutional value, depending on circumstances that are not of fundamental significance from the constitutional point of view (an example might be rules for the use of public roads).

*Summary:*

The Constitutional tribunal was asked to rule on certain provisions of the Road Traffic Act 1997 (hereinafter, the “1997 Act”). They dealt with the organisation of a demonstration which could cause delays or changes in road traffic. Article 65 provides that “Athletic competitions, rallies, races, assemblies and other events hindering traffic or requiring the use of a road in a particular manner, are allowed to take place, subject to the condition that safety and order have been ensured during the event, and permission for the organisation thereof has been obtained”). The granting of such permission is conditional upon the organiser carrying out the obligations specified in detail in Article 65a.2 and 65.3 (in particular, preparing a project on traffic organisation in consultation with the Police).

The present proceedings were launched by the Commissioner for Citizens’ Rights who argued that the above provisions infringed the freedom of assembly. He drew particular attention to the fact that there is no requirement to obtain permission for processions, pilgrimages and other events of a religious nature (Article 65h.1).

The Tribunal ruled that that part of Article 65 of the 1997 Act encompassing the term “assemblies” did not conform to Article 57 of the Constitution (freedom of assembly).

The practical application of the 1997 Act transforms the essence of freedom of assembly into the right to assemble, regulated by decisions by a public administration body acting on the basis of provisions allowing for excessive discretion in such decisions. This is at odds with the Constitution.

The Assemblies Act 1990 requires prior notification of an organ of the commune (in other words the basic unit of local self-government) as the sole precondition for holding a lawful public demonstration. This corresponds with the model of implementing the constitutional freedom of assembly in a democratic State governed by the rule of law. This type of regulation carries with it the need to consider different values, as well as the need to weigh various arguments, and constitutes the essence and the scope of interference by public authorities in the mechanism of the enjoyment of the right to assembly.

Article 65 of the 1997 Act places different types of events on the same level, even though they are not of the same constitutional nature, for instance political demonstrations and athletic competitions, rallies, races and similar events. These are politically neutral by nature.

In Article 65h of the 1997 Act the legislator excluded the application of Articles 65-65g with respect to processions, pilgrimages and other events of a religious nature, as well as funeral processions taking place on roads in accordance with local customs. This indicates that the legislator correctly noticed the difference between such situations and, for example, sporting events. However, it is unjustified to treat demonstrations differently, when the significant common feature they share with events of a religious nature is their constitutional rank. No grounds were found for differentiating between the statutory regulation of enjoyment of the constitutional freedom of conscience and religion (Article 53.1 and 53.2) and the enjoyment of the constitutional freedom to organise peaceful assemblies (Article 57).

#### *Supplementary information:*

According to Article 1.2 of the Assemblies Act 1990 an assembly consists of at least 15 persons convened for the purpose of joint debates or for the purpose of jointly expressing a position.

The constitutional challenge in the present case was submitted at a time when local authorities sometimes refused to grant permission to hold assemblies due to failure to fulfil the requirements derived from the challenged regulation (a notable example being the "Equality Parade" in Warsaw – a demonstration regarding the situation of homosexuals).

#### *Cross-references:*

##### *Constitutional Tribunal:*

- Judgment K 34/99 of 28.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 142; *Bulletin* 2000/2 [POL-2000-2-018].

##### *European Court of Human Rights:*

- *Rassemblement Jurassien and Unité Jurassienne v. Switzerland*, no. 8191/78, 10.10.1979, *D.R.* 17, p. 108;
- *G. v. Germany*, no. 13079/87, 06.03.1987;
- *Ärzte für das Leben v. Austria*, no. 10126/82, 21.06.1988, Series A, no. 139;
- *United Communist Party of Turkey and Others v. Turkey*, 30.01.1998, *Reports of Judgments and Decisions* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Yesilgoz v. Turkey*, no. 45454/99, 20.09.2005;
- *United Macedonia Organisation Ilinden – PIRIN and Others v. Bulgaria*, no. 59489/00, 20.10.2005;
- *Ivanov and Others v. Bulgaria*, no. 46336/99, 24.11.2005.

#### *Languages:*

Polish, English (summary).



#### *Identification:* POL-2006-3-011

- a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.03.2006 / **e)** K 17/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 49, item 358; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3A, item 30 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of Poland (summary in English, [www.trybunal.gov.pl/eng/summaries/wstepgb.htm](http://www.trybunal.gov.pl/eng/summaries/wstepgb.htm)); CODICES (Polish).

#### *Keywords of the systematic thesaurus:*

- 3.16 General Principles – Proportionality.
- 3.17 General Principles – Weighing of interests.
- 3.18 General Principles – General interest.
- 5.1.4 Fundamental Rights – General questions – Limits and restrictions.

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

*Keywords of the alphabetical index:*

Public office, holder, private life, right, restriction.

*Headnotes:*

Conflict between constitutional rights should be dealt with as follows. Neither right can be eliminated altogether, so it is necessary to strike a balance and to determine the scope of application of each right. The values deemed directional or principal also require analysis, in the light of the Constitution's general principles.

Citizens are entitled under the Constitution to public information. The exercise of the right to information may have an indirect effect not only on the public activities of persons discharging public functions but also on the borderline area between their public and private lives. It will not always be possible, in practice, to draw a clear distinction between the spheres of public activity and private life in the cases of persons discharging public functions. A variety of factors may be involved here – the nature of public activities, contact with other bodies in the course of these activities, and the need or desire to undertake certain private activities whilst performing public ones.

European courts and parliamentary draftsmen usually strive to secure the broadest possible access to public information, as this constitutes a significant guarantee of transparency in the public life of a democratic state. It is acknowledged that there may be limitations on the privacy of persons discharging public functions, justified by such values as openness and the availability of information on the functioning of public institutions in a democratic state. The need for transparency in public life should not, however, lead to the total rejection and negation of protection of the private lives of persons discharging public functions. These remain under the protection of rights enshrined in Conventions, such as Article 8 ECHR. Nonetheless, those undertaking such functions must accept more interference with their privacy than is the case for other persons.

Under the Constitution, the protection of private life encompasses autonomy as regards information. This is interpreted as an individual's right to decide whether to disclose personal information, as well as the right to review such information when it comes into the possession of other entities. Limitations upon the

exercise of the right to privacy are permissible when conditions such as proportionality are met.

Analysis of the constitutional provisions leads to several conclusions as to the scope of the right to information on the activities of public authorities and persons discharging public functions. Firstly, the information whose nature and character may violate the interests and rights of other persons may not go beyond what is indispensable in terms of the need for transparency in public life, as evaluated in line with the standards of a democratic state. Secondly, the information must always be significant in any evaluation of the functioning of institutions and persons discharging public functions. Thirdly, the information may not be of such a nature and scope as to undermine the essence of the protection of the right to privacy, if disclosed.

There is only ever justification for interference in the private lives of persons discharging public functions undertaken in connection with citizens' right of access to public information where the events disclosed from private life are relevant to the public life of the person in question. The impassable limit on such interference is the obligation to respect that person's dignity.

*Summary:*

I. Under Article 61.1 of the Constitution, citizens can obtain information on the activities of public authorities, and about persons discharging public functions. There are limits to this right, particularly under Article 61.3 of the Constitution (the protection of freedoms and rights of others).

The manner in which citizens may exercise the above right, and the duties of public authorities in this regard, are set out in the Access to Public Information Act 2001 (hereinafter, the "2001 Act"). Article 5.2 of the Act provides that the right to public information is subject to limitation by virtue of the privacy of a natural person or a trade secret. However, the second sentence of this section is under challenge in the present case by the President of the Supreme Administrative Court. It states that the limitation specified in the first sentence "does not apply to information about persons discharging public functions, being connected with the discharge of such functions, including information on the conditions under which such functions may be conferred and discharged".

The applicant contended that the constitutional right to privacy (under Article 47 of the Constitution) was of a greater value than the right to public information. The President of the Supreme Administrative Court suggested that limitations on the right to privacy for persons discharging public functions may be

necessary, but those introduced in the challenged provision cannot be justified by reference to any of the premises enumerated in Article 31.3 of the Constitution (proportionality).

II. The Tribunal ruled that the challenged regulation does not infringe Article 31.3 of the Constitution (proportionality), Article 47 of the Constitution (right to privacy), Article 61.3 of the Constitution (permissible limitations on citizens' access to public information) and Article 61.4 of the Constitution (exclusivity of statutes in relation to the manner of accessing public information).

The challenged provision has to be assessed in the light of a balance between the principal values of the common good (Article 1 of the Constitution) and the dignity of the person (Article 30 of the Constitution). The notion of "person discharging public functions", used in Article 61.1 of the Constitution and in the challenged provision of the 2001 Act, is not the same as the notion of "public person". "Public person" covers those holding prominent positions with influence over public attitudes and opinions, encouraging widespread interest in achievements in the arts, sport and science. "Persons discharging public functions" implies links of a more formal nature to public institutions. It covers people within public institutions with certain decision-making powers which have a direct impact on the legal position of others.

#### Cross-references:

#### Constitutional Tribunal:

- Judgment K 24/98 of 21.10.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 97; CODICES [POL-1998-X-003];
- Judgment P 2/98 of 12.01.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 1, item 2; *Bulletin* 1999/1 [POL-1999-1-002];
- Judgment SK 11/98 of 16.02.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 2, item 22; *Bulletin* 1999/1 [POL-1999-1-003];
- Judgment U 3/01 of 19.02.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 1A, item 3; *Bulletin* 2002/2 [POL-2002-2-014];
- Judgment K 11/02 of 19.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4A, item 43; *Bulletin* 2003/2 [POL-2003-2-014];

- Judgment K 38/01 of 16.09.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5A, item 59;
- Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006]; [POL-2002-H-002];
- Judgment K 7/01 of 05.03.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 3A, item 19; *Bulletin* 2003/2 [POL-2003-2-017];
- Judgment K 20/03 of 13.07.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 7A, item 63.

#### European Court of Human Rights:

- *Lingens v. Austria*, no. 9815/82, 08.07.1986, Series A, no. 103; *Special Bulletin – Leading cases ECHR* [ECH-1986-S-003];
- *Leander v. Sweden*, 26.03.1987, Series A, no. 116; *Special Bulletin – Leading cases ECHR* [ECH-1987-S-002];
- *Guerra and Others v. Italy*, 19.02.1998, *Reports of Judgments and Decisions* 1998-I;
- *McGinley and Egan v. United Kingdom*, 09.06.1998, *Reports of Judgments and Decisions* 1998-III;
- *Rotaru v. Romania*, no. 28341/95, 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *Editions Plon v. France*, no. 58148/00, 18.05.2004, *Reports of Judgments and Decisions* 2004-IV;
- *Von Hannover v. Germany*, no. 59320/00, 24.06.2004, *Reports of Judgments and Decisions* 2004-VI; *Bulletin* 2004/2 [ECH-2004-2-005].

#### Court of First Instance:

- T-92-98, 07.12.1999, "*Interporc II*", *European Court Reports* 1999, p. II-3521.

#### Languages:

Polish, English, German (summary).



*Identification:* POL-2007-1-002

a) Poland / b) Constitutional Tribunal / c) / d) 19.12.2006 / e) P 37/05 (procedural decision) / f) / g) *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 11A, item 177 / h) CODICES (English, Polish).

*Keywords of the systematic thesaurus:*

- 1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**
- 1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
- 2.1.1.3 Sources – Categories – Written rules – **Community law.**
- 2.1.1.4 Sources – Categories – Written rules – **International instruments.**
- 2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities.**
- 2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**
- 2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Community law and domestic law.**
- 2.2.1.6.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and domestic non-constitutional instruments.**
- 3.26.2 General Principles – Principles of EU law – **Direct effect.**
- 3.26.3 General Principles – Principles of EU law – **Genuine co-operation between the institutions and the member states.**
- 4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction.**
- 4.17.1.4 Institutions – European Union – Institutional structure – **Court of Justice of the EU.**

*Keywords of the alphabetical index:*

Court of Justice of the European Communities, preliminary ruling / European Communities, loyalty.

*Headnotes:*

When applying the law, judges are subject to the Constitution and statutes. This rule is derived from the Constitution, under which courts must decline to apply Acts of Parliament in the event of a conflict with an international agreement ratified by statute. The analogical principle of precedence applies to secondary Community law, under the Constitution. If there are no questions as to the interpretation of a Community norm,

the court should refuse to apply the conflicting statutory provision and directly apply the Community provision. If the latter cannot be directly applied, the Court should seek such interpretation of the domestic provision that conforms to Community law. If questions of interpretation of Community law have arisen, the national court should refer a question to the Court of Justice of the European Communities (hereinafter, the "ECJ") for a preliminary ruling, within the procedure laid down in the EC Treaty.

The very fact that, under the principle of precedence, a domestic provision will not be applied in a particular case does not prejudge the necessity to repeal such a provision, even though sometimes legislative amendment may be desirable. In each case it depends on the nature of the provision, its scope of application, and the nature of its conflict with Community law. Expectation that the Constitutional Tribunal will eliminate such domestic provisions would result in the Tribunal shouldering the task of ensuring the effectiveness of Community law. This particular field of application of law falls outside the Tribunal's scope of competence.

Under the Constitution, international agreements are superior to statutes. The Constitutional Tribunal does have competence to review the conformity of statutory provisions with ratified international agreements, where there is no other way of eliminating the conflict, where an international norm is not directly applicable or where the scope of application of an international norm fully overlaps with the scope of application of a statutory norm.

The procedure of the preliminary ruling under the EC Treaty is a very important mechanism of legal cooperation between national courts and the ECJ. That mechanism, which is based on recognition of the difference between the interpretation and the application of law, vests the interpretation of law in the ECJ, and the application in the national courts, which are bound by the ECJ's jurisprudence. The ECJ contributes to the ruling on a case, but does not actually rule on it. The above procedure is a form of "judicial cooperation" by means of which the national court and the ECJ directly and mutually contribute to reaching a particular decision. Pursuant to the principle of loyalty under the Treaty, the preliminary ruling is binding on the referring court, which must take the ruling into account when considering the case. Failure to do so constitutes infringement of Community law.

The Republic of Poland is required under the Constitution to respect international law. That principle applies *mutatis mutandis* to the Community law. As required by the Treaty, Member States shall take all appropriate measures to ensure fulfilment of their

Treaty obligations or those resulting from actions taken by Community institutions. The judiciary's role is also spelt out in the Polish Constitution. Specifically, national courts are not only authorised, but also obliged to refuse to apply a domestic norm, which is in conflict with Community law. A national court does not, in such case, repeal a domestic norm; it simply refuses to apply it to the extent that is required to give precedence to the Community norm. The domestic norm in question is not deemed invalid and remains in force to the extent that is not encompassed by the Community norm. Where any doubts arise as to the relationship between domestic and Community law, it is necessary to invoke the preliminary ruling procedure.

#### **Summary:**

Under Article 193 of the Constitution any court may refer a question of law to the Constitutional Tribunal as to the conformity of a norm with the Constitution, ratified international agreements or statutes, if the answer to such question will determine an issue currently before the court. This means that the question of law may be examined on the merits only where the judgment the Constitutional Tribunal might hand down (on the question of the constitutionality or legality of a legal provision) might have an influence over the ruling of a case pending before the referring court.

Article 91 of the Constitution provides that a ratified international agreement will take precedence over statutes if this agreement cannot be reconciled with the provisions of such statutes. Where an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall have direct effect and will take precedence in the event of a conflict of laws.

In the current case, the Regional Administrative Court in Olsztyn referred a question of law. It suggested that Article 80 of the Excise Duty Act 2004 (which stipulates that passenger cars not registered on Polish territory are subject to excise duty) contravened Article 90 of the EC Treaty (the prohibition for EU Member States to impose on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products).

In the event of a conflict between a domestic law norm and a Community norm the court is authorised and obliged to give precedence to the latter. For that reason, the prerequisite for admissibility of a question of law, set forth in Article 193 of the Constitution, is not fulfilled. The court should decide upon the solution to such a conflict on its own. In case of doubt as to the interpretation of Community law, the court should seek assistance from the ECJ, by means of

the preliminary ruling procedure. Therefore, there is no need to refer to the Constitutional Tribunal questions of law regarding the conformity of domestic law with Community law – even in situations where the referring court intends to refuse to apply a domestic statute. The issue of solving conflicts in relation to domestic statutes falls outside the scope of jurisdiction of the Constitutional Tribunal, since deciding whether a statute remains in conflict with Community law is within the competence of the Supreme Court, administrative courts and common courts. The interpretation of Community law norms is provided by the ECJ by way of preliminary rulings.

The Constitutional Tribunal refused to issue a decision on the merits and discontinued the proceedings. According to the Tribunal, the conflict between Article 80 of the 2004 Act and Article 90 of the EC Treaty may be resolved by the referring court itself. For that reason, the adjudication by the Constitutional Tribunal on the merits of the case is superfluous, since the answer to the question of law would not determine an issue pending before the referring court. Accordingly, in the light of Article 193 of the Constitution, the question of law is inadmissible.

#### **Cross-references:**

##### **Constitutional Tribunal:**

- Judgment P 8/00 of 04.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2000, no. 6, item 189; *Bulletin* 2000/3 [POL-2000-3-021];
- Judgment P 4/99 of 31.01.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2001, no. 1A, item 5; *Bulletin* 2001/1 [POL-2001-1-006];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) 2005, no. 5A, item 49; *Bulletin* 2005/1 [POL-2005-1-006].

##### **Court of Justice of the European Communities:**

- *Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment 16/65 of 01.12.1965, *ERC* 1965, p. 1081;
- *The Queen v. Secretary of State for Transport, ex parte Factortame*, Judgment C-213/89 of 19.06.1990, *ERC* 1990, p. I-2433;
- *Köbler*, Judgment C-224/01 of 30.09.2003, *ERC* 2003, p. I-10239, *Bulletin* 2005/2 [ECJ-2005-2-022];
- *Maciej Brzezinski v. Dyrektor Izby Celnej w Warszawie*, Judgment C-313/05 of 18.01.2007.

Other Constitutional Courts:

- Judgment of German Federal Constitutional Court 2 BvL 12, 13/88, 2 BvR 1436/87 of 31.05.1990;
- Judgment of Italian Constitutional Court 170/1984 of 05.06.1984.

*Languages:*

Polish, English, German (summary).



*Identification:* POL-2008-1-001

a) Poland / b) Constitutional Tribunal / c) / d) 13.03.2007 / e) K 8/07 / f) / g) *Dziennik Ustaw* (Official Gazette), 2007, no. 48, item 327; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 3A, item 26 / h) CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.6.5 Constitutional Justice – Effects – **Temporal effect.**

1.6.5.1 Constitutional Justice – Effects – Temporal effect – **Entry into force of decision.**

1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc).**

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases.**

3.10 General Principles – **Certainty of the law.**

3.12 General Principles – **Clarity and precision of legal provisions.**

3.16 General Principles – **Proportionality.**

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

*Keywords of the alphabetical index:*

Municipality, municipal council, member, property statement, absence, consequence / Constitutionality, presumption.

*Headnotes:*

The right to vote is a constitutional right, under Article 62 of the Polish Constitution. It relates to all forms of elections, irrespective of the level or hierarchy of organs or representatives chosen in such elections. The right stems from the principle of the sovereignty of the Nation, under Article 4 of the Constitution.

The right to be elected is derived from the principle according to which nations are to exercise power directly or through their representatives (Article 4.2 of the Constitution). This right not only encompasses the right to stand as a candidate in elections, but also involves the right to exercise a mandate obtained by way of elections conducted in a non-defective manner. As a result, the right is not exhausted in the act of voting, and the forfeiture of a mandate constitutes an infringement thereof. Regulations concerning the forfeiture of a mandate should, therefore, meet the constitutional criteria of proportionality (see Article 31.3 of the Constitution).

Allegations of lack of proportionality of a legal regulation may be based on Article 31.3 of the Constitution (prerequisites for the admissibility of limitations upon constitutional freedoms or rights) or Article 2 of the Constitution (the principle of a democratic state ruled by law). This will depend on whether this is the encroachment of the legislator into a constitutional right that is subject to review or the allegation concerns an inexplicable intensity of activity on the part of the legislator, the latter, however, bearing no connection to the limitations upon freedoms or rights.

The assessment of proportionality of a regulation requires that the following issues be addressed: first, the usefulness of the norm (i.e. whether the norm is capable of producing effects intended by the legislator); second, the legislator's necessity to act (i.e. whether the challenged norm is indispensable for the protection of the public interest, with which the norm is associated); third, the proportionality *stricto sensu* (i.e. whether the effects of the norm are proportionate to the burdens or limitations it places upon a citizen).

The existence of the possibility of various interpretations of a given provision does not, in itself, determine the unconstitutionality thereof. However, where the provision imposes obligations, especially ones that are connected with the sanction operating *ex lege*, shattering the outcome of an election, then the prerequisites behind the obligations should be defined in an unambiguous manner.

### **Summary:**

Polish law envisages that each newly elected commune councillor or head of a commune (mayor, president of a city) shall submit, to appropriate organs, a set of statements – in particular, a statement of their personal property as well as a statement concerning economic activity conducted by their closest relatives, where the economic activity is being conducted in the same commune.

The initiator (a group of Deputies) challenged regulations that specify sanctions of instantaneous forfeiture of a mandate of a councillor or a head of a commune resulting from a failure to submit given statements and provisions that define the moment from which the 30-day period envisaged for submission of the aforementioned statements begins to run.

The right to vote manifests itself in both the very act of voting and in the effectiveness of the choice made. In consequence, the challenged regulation tilts the balance between the rights of voters and the necessity of attainment of the goal set by the legislator, as the sanction consisting in the automatic forfeiture of a mandate torpedoes the decision made by voters on the grounds of a trivial and temporary circumstance.

Failure to submit a property statement within a specified period, unlike other prerequisites for the expiration of a mandate (e.g. death, deprivation of the right to be elected, violation of the prohibition against accumulation of public functions), may result from temporary and removable obstacles. Hence, the imposition of sanctions appropriate for irreversible conditions, in situations where a removable obstacle exists, does not fulfil the prerequisite of necessity, and is, therefore, disproportionate.

The allegation concerning lack of horizontal conformity between provisions of the same rank is beyond the scope of control undertaken by the Tribunal. In such circumstances, those organs applying the law are obliged to rectify any such nonconformity by way of appropriate interpretation of law.

Amending provisions may be subject to review by the Tribunal only in case where there is a challenge regarding the procedure under which they were adopted or the way they came into force.

According to the principle *falsa demonstratio non nocet*, of decisive importance is the essence of the case, as opposed to a faulty designation thereof in a procedural letter. In proceedings before the Constitutional Tribunal the content expressed both in the *petitum* of an application and in the reasoning thereof, make up the essence of the application.

Where the Constitutional Tribunal declares the content of a legal act unconstitutional, in principle, the judgment waives the binding force of a norm as of the date of official publication of the decision in an appropriate promulgation organ (Article 190.3 of the Constitution). Finding of unconstitutionality of a regulation on the grounds of a faulty procedure for the adoption thereof or its entry into force would mean, however, that the temporal effects of the decision would have to be linked not with the date of promulgation of the judgment, but rather with the moment of the adoption of the regulation found unconstitutional.

The presumption of constitutionality of a provision is rebutted at the date of public delivery of a judgment by the Tribunal declaring the provision unconstitutional (i.e. prior to the promulgation of the Tribunal's decision in the Official Gazette). Hence, organs applying provisions declared unconstitutional should take into account the fact that they deal with provisions that lost their presumption of constitutionality, even though other principles argue in favour of the application thereof or in cases where the Tribunal decided to postpone the entry into force of the judgment. In case of a decision regarding unconstitutionality, it is the intertemporal norm of a constitutional nature that should be applied. Such norm has precedence over general inter temporal norms that bring about changes to the legal environment in consequence of the legislator's activity.

### **Cross-references:**

#### **Constitutional Tribunal:**

- Judgment K 28/97 of 09.06.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 50; *Bulletin* 1998/2 [POL-1998-2-013];
- Judgment K 39/97 of 10.11.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 99; *Bulletin* 1998/3 [POL-1998-3-018];
- Judgment P 2/98 of 12.01.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 1, item 2; *Bulletin* 1999/1 [POL-1999-1-002];
- Judgment P 10/98 of 24.05.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 4, item 77; *Bulletin* 1999/2 [POL-1999-2-016];
- Judgment SK 14/98 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 163;
- Judgment P 11/98 of 12.01.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3; *Bulletin* 2000/1 [POL-2000-1-005];

- Judgment SK 18/01 of 08.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no.de, item 16; *Bulletin 2002/3* [POL-2002-3-024];
- Judgment K 26/00 of 10.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 2, item 18; *Bulletin 2002/3* [POL-2002-3-025];
- Judgment SK 5/02 of 11.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4, item 41; *Bulletin 2002/2* [POL-2002-2-018];
- Judgment P 19/01 of 29.10.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5, item 67;
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- Judgment SK 1/04 of 27.10.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 9, item 96;
- Procedural Decision SK 8/04 of 06.04.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 4, item 44;
- Judgment K 41/04 of 28.06.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 6, item 68;
- Judgment Kp 1/05 of 22.09.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 8, item 93;
- Judgment SK 7/05 of 06.12.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11, item 129;
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- *Pronina v. Ukraine*, no. 63566/00, 18.07.2006;
- *Yumak and Sadak v. Turkey*, no. 10226/03, 30.01.2007.

Court of Justice of the European Communities:

- *Skanavi and Chryssanthakopoulos*, Judgment C-193/94 of 29.02.1996.

Languages:

Polish.



*Identification: POL-2008-1-002*

**a) Poland / b) Constitutional Tribunal / c) / d) 17.04.2007 / e) SK 20/05 / f) / g) Dziennik Ustaw Rzeczypospolitej Polskiej (Official Gazette), 2007, no. 71, item 481; Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy (Official Digest), 2007, no. 4A, item 38 / h) CODICES (Polish).**

*Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

*Keywords of the alphabetical index:*

Paternity, acknowledgement, rescission / Child, best interest / Child, paternity, biological truth.

*Headnotes:*

The obligation to protect a child's best interests is the fundamental and supreme principle of Polish family law. All provisions regulating relations between parents and children are subject to it. This also encompasses the manner of determination of a child's parentage (affiliation mechanisms).

The principle of the protection of a child's best interests finds its fullest realisation in the possibility of bringing up the child in a family, and, above all, a biological one. However, biological bonds do not always constitute the basis for the shaping of family relations, since the interests of children and the provision of an adequate environment for their upbringing and development are of utmost importance. Accordingly, closeness, stability of family relationships, child safety and decent conditions for the child's upbringing and development are among the protected values.

#### **Summary:**

The subject of constitutional review in the present case, initiated by a constitutional complaint, was a legislative omission consisting in the determination of a too limited a circle of subjects entitled to demand a rescission of the acknowledgement of paternity.

The complainant challenged the conformity with the Constitution of a regulation that deprived a biological father of the right to demand rescission of the acknowledgement of paternity of his child where this has been filed, with the mother's consent, by a man not related to the child. The complainant alleges that this regulation contradicts the principle of protection of the rights of the child (Article 72.1 of the Constitution), on the grounds of the impossibility of determination of the child's civil status in accordance with the so-called biological truth, which in turn limits the rights of the biological father.

Provisions are not unconstitutional, just because they allow for a situation where inconsistency exists between the official parentage of a child with their real parentage (material truth). The Constitution does not stipulate the forms and mechanisms as regards the determination of a child's parentage. This matter rests with the legislator. Moreover, there has been no rating of the mechanisms. International law, which is binding upon the Republic of Poland, as well as the interpretation thereof (including, particularly, The European Convention of Human Rights and the jurisprudence of the European Court of Human Rights) confirm that attempts to ensure consistency of civil status with the so-called biological truth is limited by the child's interests.

In its jurisprudence, the Tribunal has already confirmed the right of a biological father to determine his paternity before a court. One cannot, however, infer from this right a further right for the biological father to request the rescission of the acknowledgement of his natural child filed by another man. Following the acknowledgement of paternity of a minor by a man who is not their biological father, the civil status of the child has been shaped. Taking into account the child's interest the status should not be subject to change. Accordingly, vesting in the

alleged biological father the right to demand the rescission of the acknowledgement of paternity filed by another man would undermine the child's civil status as well as the family bonds that have arisen. The admittance of such a request would not oblige anyone (not even the alleged father) to initiate proceedings to establish a new civil status of the child (i.e. acknowledgement of paternity of the child by the alleged biological father).

The Tribunal ruled that Article 81 of the Family and Guardianship Code, insofar as it excludes the right of a man who is convinced of his biological paternity to demand rescission of the acknowledgement of paternity filed by another man, conforms to Articles 45.1 and 77.2 of the Constitution, as well as to sentence 1 of Article 72.1 of the Constitution, read in conjunction with Article 31.3 of the Constitution.

The competence of the Constitutional Tribunal to review a normative act in force also includes the determination of whether the act lacks regulations, the absence of which might cast doubt upon its constitutionality. The assessment always encompasses the normative content of the provision, i.e. of what has been expressed, and what has not been included therein.

#### **Cross-references:**

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- Judgment SK 7/00 of 24.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 256;
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- Judgment K 18/02 of 28.04.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 4, item 32; *Bulletin* 2003/2 [POL-2003-2-020];
- Judgment SK 4/05 of 14.03.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3, item 29.

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- *Marckx v. Belgium*, no. 6833/74, 13.06.1979; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002];

- *J.R.M. v. the Netherlands*, no. 16944/90, 08.02.1993;
- *Hokkanen v. Finland*, no. 19823/92, 23.09.1994; *Bulletin* 1994/3 [ECH-1994-3-015];
- *X., Y. and Z. v. the United Kingdom*, no. 21830/93, 22.04.1997; *Bulletin* 1997/2 [ECH-1997-2-010];
- *Nylund v. Finland*, no. 29121/95, 29.06.1999, *Reports of Judgments and Decisions* 1999-VI.

*Languages:*

Polish.



*Identification:* POL-2008-1-004

- a) Poland / b) Constitutional Tribunal / c) / d) 24.10.2007 / e) SK 7/06 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2007, no. 204, item 1482; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 9A, item 108 / h) CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**

3.4 General Principles – **Separation of powers.**

3.9 General Principles – **Rule of law.**

4.7.4 Institutions – Judicial bodies – **Organisation.**

4.7.4.1 Institutions – Judicial bodies – Organisation – **Members.**

4.7.4.1.1 Institutions – Judicial bodies – Organisation – Members – **Qualifications.**

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

*Keywords of the alphabetical index:*

Judge, impartiality, conditions / Right to court, scope / Court, independence, perception by public / Rule of law, essential elements.

*Headnotes:*

The three most frequently indicated elements of the right to court are the right to initiate court proceedings, the right to have court procedures framed in an appropriate manner, and the right to obtain a binding court decision. The right to court also includes the right to an appropriately shaped organisation and position of organs considering cases.

All cases (except for those that fall under the jurisdiction of tribunals) shall be considered before competent, impartial and independent courts specified in the Constitution. Independence of courts, above all, means the organisational and functional separateness of the judiciary from other organs of public authority in order to guarantee its full autonomy in terms of consideration of cases and adjudication. In turn, independence of judges means that the judge shall act solely on the basis on the law, in accordance with his or her conscience and personal convictions.

An independent court is composed of persons, in which the law vests the attribute of independence, not only in the form of a declaration, but also by shaping the system that determines the activity of judges, which amounts to a guarantee that is real and effective.

Impartiality is an inherent feature of the judicial power and, simultaneously, an attribute of the judge. Loss of it results in the judge being unable to carry out his or her job. Impartiality consists in the objective assessment of parties to proceedings, both in the course of a pending case and while adjudicating. Lack of impartiality of a judge while adjudicating constitutes a particularly gross violation of the principle of judicial independence.

Three types of competence characteristic of courts are listed below:

1. competencies connected with their fundamental task, that is, implementing the administration of justice;
2. other competencies conferred by the Constitution;
3. non-constitutional competencies conferred by statute.

The constitutional legislator vests certain competencies in courts, taking into account the necessity of fulfilment by the organs of certain requirements regarding their organisation and procedure, stemming from provisions of the Constitution. Accordingly, one has to acknowledge that the guarantees specified in Article 45 of the Constitution are applicable to all competencies reserved in the Constitution to courts, but not to the remaining “non-constitutional” competencies of the organs. With regard to the non-constitutional competencies, these are the general guarantees of procedural justice, constituting the essential element of the principle of a state ruled by law.

If courts are to be perceived by the public as truly independent institutions, it is vital for the administration of justice to be performed in such a way as to remove any potential reservations by parties to proceedings about the independence and impartiality of the Court.

An exception to the rule about the administration of justice by judges is the participation therein of the citizenry on the principles specified by statute. Further departure from the indicated rule is admissible if two requirements are met:

1. derogations from the rule must be justified by a constitutionally legitimate objective and be encompassed within the limits of the realisation of the objective;
2. all the essential “material” requirements as to the impartiality and independence of the court must be fulfilled.

#### **Summary:**

Two constitutional complaints were filed, challenging regulations on the basis of which assistant judges had adjudicated upon the complainants’ rights and freedoms. The complainants claimed that the regulations were out of line with the Constitution. They gave assistant judges and judges equal powers to adjudicate, but at the same time deprived assistant judges of the constitutional guarantee of independence.

The institution of an assistant judge is not to be associated with the principle envisaging participation of citizenry in the administration of justice (Article 182 of the Constitution). An assistant judge is not a representative of the society and discharges his or her function within the scope of employment, as opposed to a duty of a citizen.

A statutory regulation, pursuant to which the assistant judge, while adjudicating, shall be independent and subject only to the Constitution and statutes, constitutes

merely a declaration, which does not provide for an actual and effective independence required by the Constitution. Such a regulation needs to be accompanied by specific legal provisions with regard to the practical assurance of the observance of the individual elements making up the notion of independence.

A regulation envisaging the existence of the institution of the assistant judge or the possibility of adjudicating by persons other than judges (within the constitutional meaning) should guarantee the actual separation of the judicial power from other powers (see Article 10 of the Constitution). It should also weaken bonds between assistant judges and the Minister of Justice and ensure the influence of the National Council of the Judiciary on the professional career of the judge.

The Constitutional Tribunal declared the provision in question, Article 135.1 of the Law on the Organisation of Common Courts, to be out of line with Article 45.1 of the Constitution.

A prerequisite for the admissibility of a review of constitutionality within the procedure of a constitutional complaint is the existence of a relation between the norm under review and a legal basis of a final decision. It is possible to indicate four situations where the relation in question exists:

1. where the allegation of unconstitutionality concerns a normative act directly referred to in the sentencing part of a final decision;
2. where the allegation concerns a norm that is used for the reconstruction of content of a decision, which has not, however, been expressly indicated in the sentencing part of an individual act of applying the law;
3. where the challenged norm has found its application in a decision concerning a secondary or incidental issue, not referred to *expressis verbis* in the content of the final decision;
4. where the allegation concerns institutional provisions that constitute the basis for a final decision.

When adjudicating upon the constitutionality of a normative act the Constitutional Tribunal should recognise that the legal order emerging after the pronouncement of its judgment might not infringe the Constitution or, in consequence, lead to such infringement. In order to prevent such situations from occurring, the Tribunal may specify the effects of its decision in the prospective aspect by way of delaying the entry into force of the judgment (Article 190.3 of the Constitution). In each case, the Tribunal undertakes assessment of whether it is necessary or at least appropriate to delay the entry into force of a judgment.

Prerequisites for delay might include: actual effects triggered by an instantaneous elimination of an unconstitutional provision, the protection of constitutional norms, principles or values as well as the need to undertake extensive and broader legislative activity in order to make the legislation compatible with the Constitution.

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- Judgment K 3/98 of 24.06.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 52; *Bulletin* 1998/2 [POL-1998-2-014];
- Judgment K 1/98 of 27.01.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 1, item 3; [POL-1999-X-001];
- Judgment K 8/99 of 14.04.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 3, item 41; *Bulletin* 1999/1 [POL-1999-1-009];
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- Judgment P 1/99 of 16.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 111;
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- Judgment SK 10/00 of 02.04.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 52; *Bulletin* 2001/2 [POL-2001-2-013];
- Judgment SK 8/00 of 09.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 211;
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- Judgment SK 53/03 of 02.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 3, item 16;
- Judgment SK 43/03 of 14.06.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 6, item 58;
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- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 3, item 26;
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- *Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, 28.06.1984; *Special Bulletin – Leading cases ECHR* [ECH-1984-S-005];
- *Sramek v. Austria*, no. 8790/79, 22.10.1984;
- *Bentham v. the Netherlands*, no. 8848/80, 23.10.1985; *Special Bulletin – Leading cases ECHR* [ECH-1985-S-003];
- *Ettl and others v. Austria*, no. 9273/81, 23.04.1987.

##### Languages:

Polish.



## *Identification: POL-2008-1-005*

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.11.2007 / **e)** K 39/07 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2007, no. 230, item 1698; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2007, no. 10A, item 129 / **h)** CODICES (Polish).

### *Keywords of the systematic thesaurus:*

1.2.1 Constitutional Justice – Types of claim – **Claim by a public body.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.6 Constitutional Justice – **Effects.**

4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline.**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.13 Institutions – Judicial bodies – **Other courts.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**

### *Keywords of the alphabetical index:*

Judge, immunity, purpose / Legislative proceedings, advisory competence.

### *Headnotes:*

The formal immunity of judges serves to ensure the proper and stable functioning of the administration of justice, protecting courts and judges against influences. There is also a subjective aspect to immunity, in that it protects a given person. However, this effect is of secondary nature when set beside the primary aim of immunity, which is, ensuring the independence of courts and judges. The mechanism constitutes a guarantee of the separateness of the judiciary from other powers.

The significance of judicial immunity is particularly profound in countries where democracy and mechanisms for the separation of powers have not yet been

consolidated. Independence of judges and courts may exist without the need for the institution of immunity in countries of mature democracy, where the understanding of the separation of powers is already entrenched, and where there is a high degree of legal and political culture. These factors minimise the political risk of abusing the possibility of a judge's removal from office owing to the content of judgments delivered by them.

If derogations from immunity are excessively available, this leads to a "chilling effect", whereby the very fact of filing a motion requesting the derogation of immunity of a judge results in the lowering of the judge's reputation. Even where the groundlessness of such a motion has been proven in the course of follow-up proceedings and the judge has regained his or her power to adjudicate; there has been an effect upon their good reputation and readiness to exhibit independence and firmness.

Article 42 of the Constitution, whereby criminal responsibility is paralleled with the right to defence "at all stages of proceedings", is applicable to all repressive proceedings, whether these are penal or "quasi-penal", (examples would be disciplinary or preparatory proceedings). The right to defence before criminal proceedings, within the constitutional meaning, is enjoyed in "all proceedings", including incidental and preparatory ones, provided that they are connected with the encroachment into the sphere of constitutional freedoms and rights.

The realisation of the advisory competence in the course of legislative proceedings is not unlimited. The role of subjects in which the right to express an opinion has been vested is limited to taking a stance that will inform the legislator of their point of view. The expression of an opinion on a given matter by authorised organs does not mean that it will be possible to impose any solutions on Parliament; neither will it result in the right to veto any decisions of the Parliament.

### *Summary:*

The First President of the Supreme Court presented allegations that were both substantive and procedural in nature. Within the substantive allegation, the applicant challenged, *inter alia*, the introduction of summary and simplified procedures for derogation of judicial immunity and limitation upon a judge's access to records of proceedings. In turn, allegations of procedural nature embraced reservations as regards the failure to seek the opinion of the Supreme Court on the amendments.

A regulation that makes it possible for a public prosecutor to restrict – in a manner binding upon the disciplinary court – the accessibility of records of proceedings and their availability for the person subject to derogation of immunity, transforms court proceedings

into inquisitorial proceedings, with the public prosecutor playing the leading role. In such an instance, the disciplinary court becomes merely the enforcer of the public prosecutor's decision. This is incompatible with the idea of the independence of the court, being one of the powers, and contradicts the guarantee and the legitimising function of courts.

The 24-hour period for the consideration of a case within an extraordinary procedure in immunity proceedings, stemming from the regulation under dispute, is too short for substantive reasons. In the course of such proceedings, the court is supposed to determine whether "there exists a sufficiently justified suspicion of a crime having been committed". In order to do so, it is necessary to assess materials and the stance of the public prosecutor presented in the motion and determine whether the motion should be considered within a summary procedure. The adopted solution may result either in a superficiality of the guarantee function of the court deciding upon the immunity or in a "wary" dismissal of motions, which – from the perspective of the reliability of utilising immunity proceedings in order to purge the judiciary – is highly inadvisable.

There is no necessity to again seek an opinion of appropriate subjects, where the amendments to a draft have been based on the same assumptions as the original version. In particular, there is no need to seek an opinion where the amendments concern the same object of a regulation, and where the advisory organ had the chance to present its stance in its first opinion. However, where amendments to a bill encompass issues that had not been included in the original draft, then such a normative novelty has to receive an opinion of authorised subjects.

Both the nature of the matter regulated by way of a statute and the nature of the advisory authority of authorised bodies (statutory or constitutional) are of significance in the determination of whether, in a given instance, the obligation to seek an opinion in the course of legislative work has been violated.

The fact that, under the Constitution, the National Council of the Judiciary, the Ombudsman and the National Council of Radio Broadcasting and Television safeguard particular values does not mean that the organs possess advisory competence within the legislative procedure. However, the National Council of the Judiciary, unlike the Ombudsman or the National Council of Radio Broadcasting and Television, has the capacity to initiate abstract reviews of constitutionality (Article 186.2 of the Constitution). Since the National Council of the Judiciary has the right to initiate proceedings concerning the review of the constitutionality, it is all the more important that it should provide its opinion on appropriate statutes.

When undertaking a review of constitutionality, the Tribunal examines both the content of the challenged regulation (substantive criterion of review), competencies (competency criterion of review) as well as observance of an appropriate procedure, as envisaged by legal provisions, for the adoption or ratification thereof (procedural criterion of review). In case of a substantive review, the adjudication upon the constitutionality of a statute consists in a comparison of the challenged statutory norm with the content of a norm indicated as the basis of review. In turn, in case of a review regarding procedure, a review of constitutionality consists in the assessment of conformity of a procedure for the adoption of the challenged provisions against the requirements laid down in provisions regulating the legislative procedure.

Where there is a judgment finding unconstitutionality, irrespective of whether the review of constitutionality was undertaken based on a substantive or a procedural criterion, this will result in the elimination of the challenged regulation from the legal order. A finding of unconstitutionality on the grounds of a faulty procedure for the adoption of a statute will result in the failure of the statute to enter into force. A finding of unconstitutionality of a statute on the grounds of its content results in the repeal of the statute as of the day of promulgation of the Tribunal's judgment in the appropriate Official Gazette.

Six judges of the Tribunal presented dissenting opinions.

#### Cross-references:

#### Constitutional Tribunal:

- Judgment K 13/91 of 28.01.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 3;
- Judgment K 19/95 of 22.11.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, no. 3, item 16; *Bulletin* 1995/3 [POL-1995-3-017];
- Judgment K 7/95 of 19.11.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 6, item 49;
- Judgment K 25/97 of 22.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 3-4, item 35; *Bulletin* 1997/3 [POL-1997-3-017]; Judgment K 3/98 of 24.06.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 52; *Bulletin* 1998/2 [POL-1998-2-014];
- Judgment K 25/98 of 23.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 23; *Bulletin* 1999/1 [POL-1999-1-004];
- Judgment K 11/02 of 19.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4, item 43; *Bulletin* 2003/2 [POL-2003-2-014];

- Judgment SK 22/02 of 26.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9, item 97; *Bulletin* 2004/1 [POL-2004-1-004];
- Judgment K 18/03 of 03.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 10, item 103;
- Procedural Decision S 2/06 of 25.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1, item 13;
- Judgment K 25/07 of 18.07.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 7, item 80.

European Court of Human Rights:

- *Airey v. Ireland*, no. 6289/73, 09.10.1979;
- *Langborger v. Sweden*, no. 11179/84, 22.06.1989;
- *Bryan v. the United Kingdom*, no. 19178/91, 22.11.1995; *Bulletin* 1995/3 [ECH-1995-3-022];
- *Stafford v. the United Kingdom*, no. 46295/99, 28.05.2002;
- *Salov v. Ukraine*, no. 65518/01, 06.09.2005;
- *Sacilor-Lormines v. France*, no. 65411/01, 09.11.2006;
- *Lombardo and others v. Malta*, no. 7333/06, 24.04.2007;
- *Baczkowski v. Poland*, no. 1543/06 03.05.2007;
- *Dyuldin and Kislov v. Russia*, no. 25968/02, 31.07.2007.

*Languages:*

Polish.



*Identification:* POL-2008-3-006

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.04.2008 / **e)** SK 16/07 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2008, no. 38, item 342; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2008, no. 3A, item 45 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

3.16 General Principles – **Proportionality.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

Health, right / Norm, legal, interpretation, application / Expression, freedom.

*Headnotes:*

Freedom of expression, under Article 54.1 of the Constitution, is not necessarily limited to information and opinions that are regarded as favourable or perceived to be harmless or neutral; it encompasses the expression of opinions in all forms and in all circumstances. An “opinion” is understood not only as the expression of personal assessment as regards facts and occurrences of various spheres of life, but also as a presentation of opinions, conjectures, predictions and judgments regarding controversial matters, and the communication of information concerning both ascertained and conjectured facts. The broadest scope of freedom of expression and the right to voice criticism exists in the sphere of politics. Yet, freedom of expression also encompasses other areas of public and private life. Freedom of expression has particular significance in the shaping of attitudes and opinions on matters that attract public interest or cause concern.

Petitions, proposals and complaints, as referred to in Article 63 of the Constitution (right to petition), concern the broadly understood activity of public authority, which is characterised by its political nature.

*Summary:*

The subject of review in the present case were provisions of the Act on Chambers of Physicians, under which physicians must abide by the principles of professional ethics and are subject to sanctions for failure to do so. The provisions also authorise medical courts to adjudicate on penalties such as warning, reprimand, suspension or deprivation of the right to practice a profession. The challenged provision of Article 52 of the Code of Medical Ethics expresses the so-called principle of loyalty, prescribing an obligation to express opinions on the activity of another physician with particular caution, as well as a prohibition on discrediting the person in public.

Medical courts interpret the prohibition on public discredit as a prohibition on any public criticism, irrespective of the motives underlying its expression or the veracity of allegations. The complainant alleged an

infringement of freedom of expression by the adopted interpretation of the Code of Medical Ethics, and pointed out that the imposed limitation of the right is not justified in view of the principle of proportionality.

The Constitutional Tribunal examined Article 52.2 of the Code of Medical Ethics, in conjunction with Articles 15.1, 41 and 42.1 of the Act of 17 May 1989 on Chambers of Physicians. It held that to the extent that it prohibits the expression of public statements on professional activities of another physician, where the statements are veracious and justified by the protection of the public interest, the provision runs counter to Article 54.1, read in conjunction with Articles 31.3 and 17.1 of the Constitution, and is inconsistent with Article 63 of the Constitution.

It is necessary to compare two values: the freedom to make public statements that are truthful and justified by the protection of the public interest with the appropriateness of the protection of the public interest connected with the public image of health service and its employees. Any limitations upon the freedom of expression on the grounds of the protection of the public interest have to be weighed against patients' rights to proper health care and to information. Furthermore, the limitations must satisfy the formal criteria for the admissibility of limitations upon constitutional freedoms and rights, and pass a test of proportionality, which is composed of three elements:

1. the prerequisite of usefulness of a norm;
2. the prerequisite of the legislator's necessity to act;
3. the prerequisite of proportionality in the strict sense.

The Tribunal acknowledges the need for certain limitations upon the freedom of expression and the right to voice criticism in relations existing between physicians, on account of the necessity to protect patients' confidence in the health care system, which is indispensable for the proper functioning of the medical profession as a whole, the specific nature of relations between a physician and a patient, based on the trust the patient places in his or her physician, and, finally, the specific character of diagnostic and therapeutic decisions, which are very often taken in circumstances of incomplete understanding of the conditions related to a given case. However, it may be necessary to voice public criticism of another physician, within the limits of the veracity of the statements expressed, and the need to protect the patient's health and life. The Code of Medical Ethics should not be interpreted in such a way as to impose an outright ban on voicing public criticism by another physician.

A complex statutory norm is a norm of universally binding law (e.g. of a statute) specified in detail by the content of a particular decision, e.g. an act adopted by an organ of a professional self-regulating body, belonging to a separate deontological normative order. Provisions of the Code of Medical Ethics acquire legal value solely in conjunction with another act of universally binding law, as can be seen from the relevant provisions of the Act on Chambers of Physicians.

The subject of review within the procedure of a constitutional complaint is a normative act in its substantive meaning. Of decisive significance in the assessment of a particular act is whether its content is general (i.e. the provision is addressed to a particular category of persons non-identifiable by name) and abstract in its nature (i.e. the content of the provision does not exhaust itself in a one-off obligation to behave in a particular manner). The assessment is undertaken for each and every act separately, applying the presumption of normative nature of legal acts.

#### Cross-references:

##### Constitutional Tribunal:

- Judgment U 15/88 of 07.06.1989, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1989, item 10;
- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, no. I, item 13;
- Procedural Decision U 1/92 of 07.10.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, no. II, item 38;
- Procedural Decision U 5/94 of 06.12.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, no. II, item 41; *Bulletin* 1994/3 [POL-1994-3-021];
- Procedural Decision U 7/99 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 170;
- Judgment P 6/99 of 15.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 164; *Bulletin* 2000/1 [POL-2000-1-002];
- Procedural Decision P 13/99 of 29.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 68;
- Judgment K 21/00 of 13.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 49;
- Judgment SK 1/01 of 12.07.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 5, item 127;

- Judgment SK 10/03 of 13.01.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 1A, item 2; *Bulletin* 2004/1 [POL-2004-1-009];
- Judgment P 21/02 of 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 9; *Bulletin* 2004/2 [POL-2004-2-012];
- Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 39; *Bulletin* 2004/2 [POL-2004-2-015];
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment U 4/06 of 22.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
- Judgment P 3/06 of 11.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 121;
- Judgment P 10/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128; *Bulletin* 2007/2 [POL-2007-2-003];
- Judgment P 1/06 of 20.02.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 2A, item 11;
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26;
- Procedural Decision SK 13/07 of 16.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 115.

#### European Court of Human Rights:

- *Lingens v. Austria*, no. 9815/82, 08.07.1986; *Special Bulletin – Leading cases ECHR* [ECH-1986-S-003];
- *Castells v. Spain*, no. 11798/85, 23.04.1992; *Special Bulletin – Leading cases ECHR* [ECH-1992-S-003];
- *Incal v. Turkey*, no. 22678/93, 09.06.1998, *Reports of Judgments and Decisions* 1998-IV;
- *Hertel v. Switzerland*, no. 25181/94, 25.08.1998, *Reports of Judgments and Decisions* 1998-VI;
- *Bergens Tidende v. Norway*, no. 26132/95, 02.05.2000, *Reports of Judgments and Decisions* 2000-IV;
- *Stambuk v. Germany*, no. 37928/97, 17.10.2002;
- *Selistö v. Finland*, no. 56767/00, 16.11.2004.

#### Languages:

Polish.



#### *Identification: POL-2009-2-001*

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.09.2008 / **e)** K 44/07 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2008, no. 177, item 1095; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2008, no. 7A, item 126 / **h)** CODICES (Polish).

#### *Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law**.
- 3.11 General Principles – **Vested and/or acquired rights**.
- 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
- 5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights**.
- 5.1.5 Fundamental Rights – General questions – **Emergency situations**.
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

#### *Keywords of the alphabetical index:*

Terrorism, fight / Organised crime, fight / Aircraft, renegade, shooting down.

#### *Headnotes:*

When undertaking a “vertical” assessment of the compatibility between the elements of the legal system in critical areas such as the weight accorded to public security issues and the right to legal protection of the lives of particular individuals, including those on board a renegade aircraft, the Constitutional Tribunal unequivocally gives priority to values such as human life and dignity. These values constitute the foundation of European civilisation and outline the semantic content of humanism, a notion that is central to our culture (including legal culture).

The values are inalienable in the sense that they do not allow for any “suspension” or “forfeiture” in a particular context. Humanism is not an attitude to be followed solely in times of peace and prosperity, but rather a value best measured during critical and sometimes extremely difficult situations. Any other conclusion is completely unacceptable from the perspective of the most rudimentary assumptions of our legal system.

The Tribunal noted that organised crime can be combated and regular wars conducted without the need for a total suspension or negation of fundamental human rights and freedoms. It is therefore also possible to fight terrorism without extensive intrusion into the fundamental rights of uninvolved parties, in particular their right to life.

#### **Summary:**

I. The abstract review, initiated by the First President of the Supreme Court, challenged the conformity of Article 122a of the Act of 3 July 2002 (the Aviation Law) with Articles 38, 31.3, 26 and 30 of the Constitution.

Questions arose over the conformity of the challenged provisions with the constitutional protection of life; human dignity, the constitutional principle of a democratic state ruled by law; and the goals and tasks of the Armed Forces of the Republic.

The applicant emphasised that the concept of a terrorist attack provides information about the specificity of the threat, but does not prejudge the nature of the legal values under threat. Human life may not be evaluated according to the criterion of chance of survival. If the Minister of National Defence ordered a renegade to be shot down, the passengers and crew would be unfairly used without their consent and knowledge.

In a written statement submitted to the Tribunal, the President of the Civil Aviation Authority stressed that the risk of endangering the life of civilians due to a terrorist attack is more or less equal to an analogous risk due to random technical failures, which, he suggested, undermines the necessity for the regulation of Article 122a of the Aviation Law.

II. The Tribunal decided that, from a purely pragmatic perspective, it could simply pronounce the disputed provision to be inconsistent with the principle of diligent legislation. It would then lose its binding force. However, taking this course of action would entail bypassing several constitutional issues of high significance which had arisen in this case.

The Tribunal found that there was no need for a reinterpretation of human rights protection standards in order to protect public safety from terrorist attacks. This opinion is shared by other Constitutional Courts, including the House of Lords, the Federal Constitutional Court of Germany and the Supreme Court of the USA.

#### **1. Protection of human life.**

Although the legal protection of life is not unlimited, any limitations in this field must be interpreted particularly restrictively, in convergence with the criterion of "absolute necessity" developed in the case-law of the European Court of Human Rights. It is necessary to determine whether the violation of the protection of life is to be legalised by the legislator by a constitutional value, whether the violation may be justified on the grounds of constitutional values and whether the legislator respected the constitutional criteria for resolving such conflicts, such as the requirement of proportionality.

In view of the unusually general content of Article 122a of the Aviation Law as well as the unclear system of references and the delegation to a sub-statutory regulation of essential elements of an assessment undertaken while taking a decision on the destruction of the aircraft, it can be concluded that the statutory form of a regulation, required in such circumstances, has not been fully observed. The challenged regulation is not indispensable for the protection of a constitutionally protected legal value that does not stand lower in the constitutional hierarchy than the value sacrificed. Human life is not subject to evaluation on account of age, state of health of the individual, the expected life span or any other criteria. The mechanism prescribed in Article 122a has to be regarded, in most cases, as inadequate for the intended goal, exposing to certain death passengers and crew members, who are not aggressors, but victims.

#### **2. Protection of human dignity.**

Human dignity should be recognised as a constitutional value, which is of fundamental significance to the axiological basis of current constitutional solutions. A democratic state ruled by law is a state founded on the respect for the individual and on the respect for, and the protection of life and human dignity. The recognition of both the inalienable dignity of a person as a constitutional principle and the right of every human being – irrespective of their qualification or psychophysical condition, constitutes the basis for regarding individuals as the holders of rights.

The application of the challenged legal provisions results in a "depersonification" and "reification" of those on board of a renegade aircraft who are not aggressors. The argument that they have found themselves in such a situation solely as a result of the unlawful activity of the perpetrators must be considered false; it is indirectly indicative of a failure by the state to fulfil its positive obligation to protect.

The legal provisions in question would not have resulted in such serious constitutional doubts if they had simply envisaged the shooting down of an aircraft with only perpetrators on board, since they decided of their own free will to die, simultaneously threatening the lives of innocent people.

### 3. Diligent legislation, democratic state ruled by law.

Finally, the legislator may not endow organs applying the law with excessive freedom to determine the subjective and objective scope of a legal norm. For a legal provision to conform to the constitutional principle of diligent legislation (and consequently with the principle of the democratic state ruled by law), it must be sufficiently precise to enable its uniform interpretation and application.

Among the prerequisites justifying the decision to destroy a civil aircraft with passengers on board are such ambiguous phrases as "state security considerations" or the necessity to ascertain that a civil aircraft has been used for "unlawful acts". Furthermore, it is doubtful, whether a sub-statutory act may regulate a decision-making mechanism, with the potential consequence of the loss of several hundreds of human lives.

### 4. Goals of the Armed Forces of the Republic.

The Tribunal decided not to adjudicate upon the conformity of the contested legal provisions with the constitutional goals of the Armed Forces of the Republic.

### Cross-references:

#### Constitutional Tribunal:

- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 13; CODICES [POL-1992-X-002];
- Judgment W 16/92 of 17.03.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, item 16;
- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 12;
- Judgment K 26/96 of 28.05.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 2, item 19; *Special Bulletin Leading Cases* [POL-1997-S-001];
- Judgment K 2/98 of 23.03.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 3, item 38; CODICES [POL-1999-X-004];
- Judgment K 34/99 of 28.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 142; *Bulletin* 2000/2 [POL-2000-2-018];

- Judgment SK 5/99 of 17.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 7, item 254; *Bulletin* 2000/3 [POL-2000-3-023];
- Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 217; *Bulletin* 2002/1 [POL-2002-1-005];
- Judgment K 36/00 of 08.10.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 5A, item 63; *Bulletin* 2002/3 [POL-2002-3-032];
- Judgment K 28/02 of 24.02.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 2A, item 13;
- Judgment K 7/01 of 05.03.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 3A, item 19; *Bulletin* 2003/2 [POL-2003-2-017];
- Judgment P 14/01 of 24.03.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 3A, item 22;
- Judgment K 53/02 of 29.10.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 8A, item 83; *Bulletin* 2003/3 [POL-2003-3-032];
- Judgment K 14/03 of 07.01.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 1A, item 1;
- Judgment SK 56/04 of 28.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 67;
- Judgment SK 41/05 of 24.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 126;
- Judgment SK 54/06 of 06.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 23;
- Judgment K 42/07 of 03.06.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 5A, item 77; *Bulletin* 2008/3 [POL-2008-3-007].

#### European Court of Human Rights:

- *Tyrrer v. the United Kingdom*, no. 5856/72, 25.04.1978; *Special Bulletin – Leading cases ECHR* [ECH-1978-S-002];
- *Marckx v. Belgium*, no. 6833/74, 13.06.1979; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002];
- *Young, James and Webster v. the United Kingdom*, nos. 7601/76 and 7806/77, 13.08.1981; *Special Bulletin – Leading cases ECHR* [ECH-1981-S-002];
- *Platform “Ärzte für das Leben” v. Austria*, no. 10126/82, 21.06.1988;
- *McCann et al. v. the United Kingdom*, no. 18984/91, 27.09.1995;
- *Aksoy v. Turkey*, no. 21987/93, 18.12.1996; *Bulletin* 1996/3 [ECH-1996-3-017];
- *Ergi v. Turkey*, no. 23818/94, 28.07.1998;
- *Osman v. the United Kingdom*, no. 23452/94, 28.10.1998;
- *Velikova v. Bulgaria*, no. 41488/98 18.05.2000;

- *Kelly et al. v. the United Kingdom*, no. 30054/96, 04.05.2001.

**Other Constitutional Courts:**

- Federal Constitutional Court of Germany, no. 1 BvR 357/05 of 15.02.2006, *Bulletin* 2006/1 [GER-2006-1-004];
- House of Lords Judgments, *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 65;
- House of Lords Judgments, *A (FC) and others (FC) v. Secretary of State for the Home Department* [2005] UKHL 71;
- US Supreme Court, *Rasul v. Bush*, no. 03-334, 542 US 466 (2004) 321 F. 3d 1134;
- Israeli Supreme Court, Judgment HCJ 5100/94 of 15.07.1999 (*Public Committee against Torture on Israel v. The State of Israel et al.*); CODICES [ISR-1999-X-001];
- Israeli Supreme Court, Judgment HCJ 3278/02 of 18.12.2002 (*The Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. The Commander of IDF Forces in the West Bank*;
- Israeli Supreme Court, Judgment HCJ 3239/02 of 05.02.2003 (*Marab v. The Commander of IDF Forces in the West Bank*).

**Languages:**

Polish.



**Identification:** POL-2009-2-002

- a) Poland / b) Constitutional Tribunal / c) / d) 18.02.2009 / e) Kp 3/08 / f) / g) Monitor Polski (Official Gazette), 2009, no. 13, item 170; Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy (Official Digest), 2009, no. 2A, item 9 / h) CODICES (Polish).

**Keywords of the systematic thesaurus:**

- 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.  
 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

**Keywords of the alphabetical index:**

European Union, European Court of Justice, preliminary question, excessive length of proceedings / Court, ordinary, verification of the constitutionality of laws.

**Headnotes:**

The right to trial consists of the right to access to court, the right to adequate court procedure, the right to a court decision and the right to an adequate régime and standing of organs issuing court decisions.

Excessive length of legal proceedings occurs only if the inactivity of a legal organ is unjustified. In addition to the length of the proceedings, several other factors should be taken into account, such as the complexity of the case, its importance for the claimant, or his or her behaviour.

The removal of any potential for doubt as to the interpretation or scope of the binding force of EU law at an early stage of the proceedings could lend additional strength to the legal standing of the accused or of the victim.

**Summary:**

I. An abstract review, initiated by the President of the Republic, challenged the conformity of Article 1 of the Act of 10 July 2008 (the Act on authorisation of the President of the Republic of Poland to accept the jurisdiction of the Court of Justice of the European Communities under Article 35.2 of the Treaty on the European Union, Journal of Laws 2009, no. 33, item 253 (hereinafter, the “Act”)), with Article 45.1 of the Constitution.

The President did not question the constitutionality of himself having the right to declare the acceptance of the jurisdiction of the Court. Rather, he challenged the constitutionality of every common court having the possibility to address preliminary questions to the Court. In his opinion, this might lead to an infringement of Article 45.1 of the Constitution, because of a “widespread practice” of addressing preliminary questions under Article 234 of the Treaty Establishing the European Community; because of the strict formal requirements of lodging a prejudicial question, and because of a long average time of processing a preliminary question by the Court.

A member state acquires the competence to accept the jurisdiction of the Court, ratifying the Treaty. Until the date of issue of the judgment, 17 member states of the European Union have accepted the facultative jurisdiction of the Court under Article 35.2 of the Treaty.

In the Polish legal system, there is a possibility for the common courts to address preliminary questions to the Supreme Court, to the Supreme Administrative Court, and to the Constitutional Tribunal.

On 1 March 2008 the Court adopted urgent preliminary proceedings, with a view to significant reductions in the amount of time needed to issue a preliminary judgment in certain fields of law.

II. The Court cited several judgments of the European Court of Human Rights, with respect to the right to trial within a reasonable time in the context of preliminary proceedings before the Court of Justice of the European Communities. On the one hand, the excessive length of legal proceedings may occur only if the inactivity of a judicial organ is unjustified. Several factors should be taken into account in addition to the duration of proceedings, such as the complexity of the case, the importance of the case to the claimant, and his or her behaviour. On the other hand, extra time due to the preliminary proceedings before the Court may not be qualified as excessive length of proceedings, and that time may not result in states facing charges for having infringed the right to trial within reasonable time. Legal organs should above all try to strike a balance between proceeding at a reasonable pace and the general rule of the administration of justice.

The analogous preliminary proceedings under Polish law have never been subjected to constitutional review.

Allowing ordinary courts the possibility to address a preliminary question to the Court under Article 35.2 of the Treaty could remove the potential for doubts over the interpretation or the scope of the binding force of EU law at an early stage of the proceedings. It could also strengthen the legal standing of the accused or of the victim.

The practice of addressing preliminary questions by administrative courts under Article 234 of the Treaty Establishing the European Community is not widespread. Ordinary courts issuing judgments in criminal proceedings make their own decisions as to the legal and factual basis of their rulings.

Between the entry into force of the Treaty of Amsterdam and the issue of this decision, there were only sixteen judgments of the Court under Article 35 of the Treaty. Concerning Article 234 of the Treaty Establishing the European Community, from the point

of Poland's accession to the EU to the issue of this judgment, one motion has been lodged by the Supreme Court, eleven by administrative courts and only four by the ordinary courts.

There are no particular formal requirements for preliminary questions addressed to the Court. The motion simply needs to be formulated in a simple, clear and precise way, and should include the legal and factual tenor of the proceedings in the member state.

The urgent preliminary procedure, adopted on 1 March 2008 has significantly reduced the average length of preliminary proceedings before the Court from an average of 20 months to between one and three months.

The Tribunal found Article 1 of the Act to be in line with the chosen standard of constitutional control. The judgment was issued by the Tribunal sitting in a plenary session (i.e. 15 judges). No dissenting opinions were put forward.

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- *König v. Germany*, no. 6232/73, 28.06.1978; *Special Bulletin – Leading cases ECHR* [ECH-1978-S-003];
- *Boddaert v. Belgium*, no. 12919/87, 12.10.1992;
- *Abdoella v. the Netherlands*, no. 12728/87, 25.11.1992;
- *Dobbertin v. France*, no. 13089/87, 25.02.1993;
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- *Pafitis v. Greece*, no. 20323/92, 26.02.1998;
- *Humen v. Poland*, no. 26614/95, 15.10.1999;
- *Dewicka v. Poland*, no. 38670/97 04.04.2000;
- *Koua Poirezz v. France*, no. 40892/98, 30.09.2003.

#### Court of Justice of the European Communities:

- Judgment no. 6/64 *Flamino Costa* of 15.07.1964;
- Judgment C-99/00 *Lyckeskog* of 04.06.2002;
- Judgment in the joint cases C-187/01 *Hüseyin Gözütok* and C-385/01 *Klaus Brügge* of 11.02.2003;
- Judgment C-555/03 *Warbecq* of 10.06.2004;
- Judgment C-469/03 *Filomeno Miraglia* of 10.03.2005;
- Judgment C-105/03 *Pupino* of 16.06.2005; *Bulletin* 2008/2 [ECJ-2008-2-016];
- Judgment C-150/05 *Jean van Straaten* of 29.09.2006;
- Judgment C-467/05 *Dell'Orto* of 28.06.2007;
- Judgment C-195/08 *PPU Rinau* of 11.07.2008;
- Judgment C-66/08 *Kozłowski* of 17.07.2008;
- Judgment C-296/08 *PPU Sansebastian Goicoechea* of 12.08.2008;
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#### Supreme Court:

- Judgment I KZP 21/06 of 20.07.2006, *Orzecznictwo Sadu Najwyższego, izba karna i wojskowa* (Official Digest), 2006, no. 9, item 77;
- Judgment I KZP 30/05 of 27.10.2005, *Orzecznictwo Sadu Najwyższego, izba karna i wojskowa* (Official Digest), 2005, no. 11, item 107;
- Judgment IV KKN 617/99 of 05.02.2003, *Orzecznictwo Sadu Najwyższego, izba karna i wojskowa* (Official Digest), 2003, item 284.

#### Languages:

Polish.



#### Identification: POL-2009-3-003

- a) Poland / b) Constitutional Tribunal / c) / d)** 23.06.2009 / **e) K 54/07 / f) / g)** *Dziennik Ustaw* (Official Gazette), 2009, no. 105, item 880; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2009, no. 6A, item 86 / **h)** CODICES (Polish).

#### Keywords of the systematic thesaurus:

2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms.**

3.6 General Principles – **Structure of the State**.

3.16 General Principles – **Proportionality**.

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services**.

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence**.

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.

5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications**.

**Keywords of the alphabetical index:**

Corruption prevention / Data, personal, protection / Data, personal, collecting, processing.

**Headnotes:**

The definition of corruption lacks the notion of “socially harmful reciprocity”. This could result in difficulties in establishing when corruption actually takes place.

When gathering personal data, the secret services should observe the criteria of necessity, subsidiarity and purposefulness. However, in the case of the Central Anti-corruption Bureau (hereinafter, the “CAB”), the process of gathering personal data does not even fulfil the criterion of necessity.

Inspections performed by the CAB are akin to a search under the Code of criminal procedure. However, there are no procedural guarantees covering inspections under the Act comparable to those included in the Code of criminal procedure relating to a search.

There is no statutory basis for establishing a special procedure for handing over information in a decree.

**Summary:**

I. A group of Members of Parliament initiated an abstract review, challenging the constitutional compliance of the Act of 9 June 2006 on the CAB (hereinafter, the “Act”), Journal of Laws 2006, no. 104, item 708, or alternatively, of Articles 1.3, 2.1, 5.2-3, 22.1-3, 22.4-7, 22.8-10, 31.3 and 40 of the Act, as well as that of Article 43.2 of the Personal Data Protection Act as amended by Article 178 of the Act, and of Paragraphs 3 and 6 of the Decree of the President of the Council of Ministers, issued under Article 22.9 of the Act.

The constitutional provisions at issue here were Article 2 of the Constitution (democratic state ruled by law), Article 7 of the Constitution (rule of law), Article 10 (separation of powers), Article 20 of the Constitution (social market economy), Article 22 of the Constitution (economic activity freedom limitations), Article 30 of the Constitution (human dignity), Article 31.3 of the Constitution (limitations of constitutional rights), Article 32.1 of the Constitution (equality before the law), Article 42.1 of the Constitution (*nullum crimen sine lege*), Article 47 of the Constitution (legal protection of private life), Article 50 of the Constitution (inviolability of the home), Article 51 of the Constitution (personal data protection), Article 92.1 of the Constitution (delegations to issue ministerial decrees) and Article 202.1 of the Constitution (Supreme Chamber of Control). Also at

issue were Articles 7.1, 8 and 18 ECHR, Article 20 of the Criminal Law Convention on Corruption, the preamble and Articles 5, 6 and 7 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

The Act gives the CAB competences which are reminiscent of the police and prosecution. It stipulates that the CAB is competent to act, in terms of certain crimes regulated in other criminal legislation, if there is a link between the crime and corruption.

The Act contains a legal definition of corruption. It differs from the definition contained in the Criminal Law Convention of Corruption in that it defines several types of corruption in the same redaction unit of the Act, using multiple subordinate clauses.

The competences of the CAB are shared in part by the Supreme Chamber of Control. The head of the CAB is subordinate to the President of the Council of Ministers.

The Act empowers the CAB to gather, process and store personal data, including sensitive personal data on for example ethnic and racial origins and sexual history. The Act also excludes certain competences of the General Inspector of Personal Data Protection relating to the activity of the CAB.

It also empowers the CAB to carry out controls and inspections.

The Act provides a delegation for the President of the Council of Ministers to issue a decree concerning the transfer of personal data and its surveillance by the CAB.

II. The provisions regulating tasks of the CAB, and the provisions on “links with corruption” do not expand the scope of criminal prosecution by comparison to the situation prior to the entry into force of the Act. The only goal of those provisions was a systematic distinction of the competence of the CAB within the pre-existing legal order.

The definition of corruption within the Act applies both to public and private law entities. It lacks a concept of “socially harmful reciprocity” of corruption, which might lead to difficulties in establishing when corruption actually takes place. This is especially difficult in the case of private law entities, where many actions, such as concluding agreements, are not socially harmful, but might be viewed as corruption, according to the definition. The Tribunal was of the view that the definition was too-long and grammatically inconsistent. It also contained vague notions such as “property, personal or other benefit”, as well as logical errors.

The mere fact that the competences of the CAB are shared in part with the Supreme Chamber of Control is not enough to render the provisions regulating the structure of the CAB unconstitutional. The subordination of the head of the CAB to the President of the Council of Ministers is a solution applied in several other countries and may enhance the effectiveness of the CAB by eliminating other channels of influence on the head.

According to the jurisprudence of the Tribunal, when gathering personal data, the secret service must observe the criteria of necessity, subsidiarity and purposefulness. However, in the case of the Act, the process of gathering personal data by the CAB does not even fulfil the criterion of necessity, and the obligatory verification of the data by the Bureau is much too long (ten years). The Act does not provide a mechanism to stop the data being used by unauthorised personnel or for purposes contrary to the law.

The differentiation of controlled entities into two groups (public finance sector and entrepreneurs) does not infringe the constitutional rule of equality before the law. All entities, whether public finance or entrepreneurial, share the same relevant characteristics.

The claimants had not proved sufficiently the infringement of the constitutional freedom of economic activity by the provisions of the Act concerning controls performed by the CAB.

It was noted that inspections performed by the CAB bear a resemblance to a search under the Code of criminal procedure (the limitation of constitutional freedoms and rights occurs in both cases to a similar extent). However, there are no procedural guarantees relating to an inspection in the Act comparable to those included in the Code of criminal procedure for searches. In particular, there is no statutory guarantee ensuring the appropriate use of data gathered during an inspection and to safeguard against access by unauthorised personnel.

The exclusion of certain competences of the General Inspector of Personal Data Protection is not unconstitutional. Similar exclusions exist in relation to other secret services, and the claimants did not provide proof of unconstitutionality of the exclusion with regard to the CAB only.

The decree of the President of the Council of Ministers issued under Article 22.9 of the Act provides a special procedure whereby state organs hand over information to the CAB, based upon an agreement between the organ and the CBA, without the necessity to file a relevant request in writing. The Tribunal declared Paragraphs 3 and 6 of the decree unconstitutional, due

to a lack of a statutory basis for establishing a special procedure of handing over information in a decree. Such a procedure might lead to unlimited access to the information by unauthorised personnel.

The Tribunal pronounced the provisions of Article 1.3 (definition of corruption), Article 22.4-7 (collection of personal data, including sensitive personal data), Article 22.8-10 (statutory delegation to issue decrees on personal data protection) and Article 40 (inspections carried out by the CAB) of the Act, as well as Paragraphs 3 and 6 of the respective ministerial decree unconstitutional. They will lose their legal effect 12 months from the publication of the judgment in the Journal of Laws. It pronounced the provisions of Article 2.1 (tasks of the CAB), Article 5.2-3 (organisation of the CAB), Article 22.1-3 (personal data collection in general), Article 31.3 (controls carried out by the CAB) of the Act, as well as Article 43.2 of the Personal Data Protection Act as amended by Article 178 of the Act (challenge to the General Inspector of Personal Data Protection over certain matters) to be constitutionally compliant. The judgment was issued by the Tribunal sitting in a panel of 5 judges. One dissenting opinion was made.

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- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 13; CODICES [POL-1992-X-002];
- Judgment S 1/94 of 13.06.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 28;
- Judgment K 12/94 of 12.01.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 2; *Bulletin* 1995/1 [POL-1995-1-003];
- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 12;
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- *Kopp v. Switzerland*, no. 23224/94, 25.03.1998; *Bulletin* 1998/1 [ECH-1998-1-005];
- *Amann v. Switzerland*, no. 27798/95, 16.02.2000;
- *Rotaru v. Romania*, no. 28341/95, 04.05.2000;
- *Segerstedt-Wilberg et al. v. Sweden*, no. 62332/00, 06.06.2006;
- *Leempoel & S.A. Ed. Ciné Revue v. Belgium*, no. 64772/01, 09.11.2006;
- *Ryabov v. Russia*, no. 3896/04, 31.01.2008;
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European Commission of Human Rights:

- *A.O. v. the Netherlands*, Decision of 04.03.1988.

*Languages:*

Polish.



*Identification:* POL-2010-1-003

- a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 02.12.2009 / **e)** U 10/07 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2009, no. 210, item 1629 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms.**

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**

4.15 Institutions – **Exercise of public functions by private bodies.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

*Keywords of the alphabetical index:*

Education, public, religion, encouragement by the State.

*Headnotes:*

Calculating the final classification of a candidate's grades average on the basis of the grade obtained in the subject "religion" along with grades obtained in ethics and in compulsory core subjects, is a consequence of the introduction of the subject "religion" to the curriculum and a consequence of putting grades obtained in the subject "religion" on school reports and matriculation certificates in public schools.

The neutral and impartial role of the State may not rely on ensuring a factual equality of all religions and beliefs, extending to the domain of teaching, but it should consist in providing every individual with the freedom to follow any religion or belief, and to grant protection of rights embedded in the freedom of religion and beliefs, including the sphere of education. The freedom of religion and beliefs granted to everyone is a limit on the existing institutional inequality between churches and confessional associations and to the particular standing of the Catholic Church in the Republic, regulated in Article 25.4 of the Constitution, as well as in an international agreement between the Republic and the Holy See (the Concordat).

The challenged provision of the regulation of the Minister of National Education does not infringe the constitutional model of a secular state and fits within contemporary democratic European standards. The lawmaker may of course lay down this provision in the future.

*Summary:*

I. A group of Members of Parliament lodged a motion seeking the constitutional review of a regulation by the Minister of National Education of 13 July 2007, amending the regulation covering the terms and methods of grading, classifying and promoting pupils and students and conducting tests and examinations in public schools (hereinafter, the "Regulation") with Articles 25.1 and 25.2, 32.1 and 32.2, 53.3, 48.1 and 92.1 of the Constitution, and with various provisions of the act on guarantees of freedom of conscience and confession (hereinafter, the "Act"). The Regulation provided that after its entry into force, the final classification of a candidate's grades average in public schools would be calculated on the basis of the grade obtained in the subject "religion" along with grades obtained in other elective subjects and compulsory core subjects.

Article 25.1 of the Constitution stipulates that churches and other religious organisations shall have equal rights. Article 25.2 of the Constitution further stipulates that public authorities of the Republic shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life. Finally, Article 25.4 of the Constitution stipulates that relations between the Republic and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.

Under Article 53.3 of the Constitution, parents are entitled to ensure their children a moral right and religious upbringing in accordance with their convictions. The provisions of Article 48.1 shall apply as appropriate.

II. The applicants contended in their motion that, in spite of its obligation to remain neutral in the domain of religious and philosophical beliefs, the State is supporting religious teaching, motivating pupils to an additional effort. This support consists of calculating the final classification grades average on the basis of grades obtained in the subject "religion". The Members of Parliament pointed out that this restricted pupils in their freedom to choose this extracurricular subject, as they are "under pressure of an expectation of getting good grades in religion or ethics".

They also argued that the State supports a theistic worldview, ascribing the subject "religion" the same importance as it assigns to subjects communicating objective scientific knowledge. The challenged provisions introduce an element of pressure upon pupils attending religion classes because of their parents' wishes, not their own. The balance between the rights of the parents and the freedom of conscience and beliefs of the child is thus infringed.

The Members of Parliament claimed too that, according to the Episcopal Commission of Education of the Catholic Church in Poland, the grading system of the subject "religion" is supposed to incline pupils towards extracurricular religious activity in the parish, attending services and retreats, manifesting religious beliefs and participating in religious formation groups. The infringement of the constitutional principle of equality, according to the applicants, consists in differentiating between pupils participating in the subject "religion", and those who do not, the former being graded on the basis of their internalisation of principles of faith, their engagement in religious practices and the degree of their piety. What is more, according to the applicants the *catechesis* programme basis of the Catholic Church in Poland set by the Conference of the Episcopate stipulates that one of the major goals of the *catechesis* is awakening the

interest in the divine message and the ability to read in the biblical teachings a divine call to one's life.

The applicants also raised arguments relating to the alleged incompatibility of the Regulation with various provisions of the Act. Article 6.2 of the Act prohibits the State from forcing citizens to participate or not to participate in religious rites. According to the Members of Parliament, *catechesis* at public schools constitutes a religious act. Furthermore, under Article 10.1 of the Act, Poland is a secular state, neutral in the field of religion and beliefs. According to the applicants, the intervention by the state in the grading system of the subject "religion" is not in accordance with Article 20.2 of the Act, since religion ceases to be a matter of confessional association and enters into the public education system. Finally, according to the Members of Parliament, the Regulation infringes Article 20.3 of the Act, which stipulates, that a separate act regulates the principles of teaching religion at schools and kindergartens, since the principles of grading should be regulated in an act of parliament, and not in a ministerial regulation.

In a supplementary motion lodged in June 2009, the applicants pointed out that only about 1% of schools organise ethics classes. The Members of Parliament also reiterated that several cases against Poland are pending before the European Court of Human Rights, relating to the lack of a real possibility of attending ethics classes and to discrimination against pupils not attending religion classes. The applicants also pointed out that the Regulation was handed down under the delegation of Article 22.2.4 of the act on the system of education, and its constitutionality has already been questioned by the Tribunal in the signalling Procedural Decision S 1/07.

The Tribunal noted that under Article 12.2-12.4 of the Concordat between the Republic and the Holy See, the programme of education of the Catholic religion and the respective manuals are elaborated upon by the ecclesiastical powers. The teachers of religion must have a *missio canonica*, granted by a diocesan bishop. In matters relating to teaching and religious education, teachers of religion are subject to church regulations, and in other matters to state regulations.

In the Tribunal's opinion, the constitutional principle of equality of rights of churches and other confessional associations excludes the possibility of establishing a state religion, and providing the State with a confessional character. In accordance with the Tribunal's jurisprudence, this principle admits the possibility of a different treatment of churches and confessional associations which do not have a common feature, significant from the point of view of the respective regulation. The principle of institutional

equality of rights may not be understood as a principle creating and expectative of obtaining factual equality.

Putting grades obtained in the subject "religion" on school reports and matriculation certificates has already been subject to constitutional review. In its Decision U 12/92, the Tribunal decided that putting grades obtained in the subject "religion" on school reports and matriculation certificates is a consequence of organising religion classes by public schools. In the present case, the Tribunal held that calculating final classification grades averages on the basis of grades obtained in the subject "religion" is a consequence of putting grades on school reports and matriculation certificates, which in turn is a consequence of organising religion classes by public schools. The Tribunal quoted jurisprudence of the European Court of Human Rights, according to which the teaching of religion and the teaching of other subjects is subordinated to the same principles and the same consequences, due to the inclusion of the subjects in the curriculum, under the condition of voluntariness of the teaching of religion, as well as confessional and viewpoint pluralism.

Recalling its more recent jurisprudence (Decision K 35/97), the Tribunal pointed out that grading in the subject "religion" is an element of the obligation of public schools to organise religion classes if the parents or the pupils and the parents so desire. The Minister of National Education is entrusted only with the determination of the methods and conditions of realisation of this task by the public schools.

According to the Tribunal, pupils or their parents have a choice between classes of a particular religion and ethics. The Constitution does not include separate guarantees of teaching of the atheist, pantheist or deist worldviews, as named by the applicant. The Tribunal also recalled the Decision of the European Court of Human rights in the case *Saniewski v. Poland*, where the Court decided that situations in which voluntary religious education is being organised in public schools and where there is a possibility of exemption from attending obligatory religion classes, and where grades obtained in the subject "religion" or alternatively "ethics" are displayed on school reports and matriculation certificates, do not constitute an infringement of Article 9 ECHR.

The applicants had argued that the system of religious education promotes majority religions and that pupils who do not wish to attend classes of the Catholic religion do not have the possibility of attending ethics classes (only about 1% of schools in Poland organise ethics classes). However, the Tribunal decided, that this

argument relates to the application of the law, which may not be subject to constitutional review.

Furthermore, the Tribunal ruled that the applicants had provided no proof that on average grades obtained in the subject "religion" are higher than grades obtained in obligatory core subjects.

The Tribunal decided that the arguments of the applicants relating to the catechetical goals, to the alleged pressure applied on pupils and to the internal character of religion teaching (and indirectly to the grades and their inclusion in the average) exceed the scope of the petition. Moreover, according to the Tribunal it is not for the State to impose the programme of religion teaching and to reduce it to a study of religions. On the other hand, the role of the State may not be passive, since the State is supposed to ensure a diversified structure of social conscience and religious beliefs. The State should react, in co-operation with proper ecclesiastic powers, in cases of intolerance or inadmissible pressure, being a reflection of dominance of one of the religions. Institutional inequality may not lead to a limitation of "minority" churches and confessional associations in the realisation of their functions and rights based on the freedom of religion.

According to the Tribunal, the principle of a secular state, regulated in the act on guarantees, is not an adequate pattern of constitutional review of the Regulation, although it has already been a pattern of constitutional review in the Decision U 12/92.

The challenged provision of the regulation of the Minister of National Education does not infringe the constitutional model of a secular state and fits within contemporary democratic European standards. The lawmaker may of course lay down this provision in the future.

The Tribunal has discontinued proceedings relating to the control of constitutionality of the Regulation against Article 92.1 of the Constitution and with Article 20.3 of the act on guarantees.

The Tribunal issued this decision in a plenary session (15 judges). One dissenting opinion was raised.

#### Cross-references:

#### Constitutional Tribunal:

- Judgment U 12/92 of 20.04.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 9; *Bulletin* 1993/2 [POL-1993-2-009];

- Judgment K 35/97 of 05.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 32; *Bulletin* 1998/2 [POL-1998-2-008];
- Judgment K 12/99 of 26.10.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 6, item 120; *Bulletin* 1999/3 [POL-1999-3-027];
- Judgment K 28/98 of 09.11.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 156; *Bulletin* 1999/3 [POL-1999-3-028];
- Judgment K 10/99 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 162;
- Judgment SK 12/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 143; *Special Bulletin – Inter-Court Relations* [POL-2000-C-001];
- Judgment K 21/00 of 13.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 49;
- Judgment K 16/01 of 13.11.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 8, item 250;
- Judgment P 9/01 of 12.03.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 14; *Bulletin* 2002/3 [POL-2002-3-022];
- Judgment K 13/02 of 02.04.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 4A, item 28;
- Judgment K 50/02 of 26.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 32;
- Judgment K 55/05 of 12.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 104;
- Judgment U 5/06 of 16.01.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 1A, item 3;
- See also Procedural Decision S 1/07 of 31.01.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 1A, item 8;
- Judgment U 8/05 of 06.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 121.

#### European Court of Human Rights:

- *Kokkinakis v. Greece*, no. 14307/88, 25.05.1993; *Special Bulletin – Leading cases ECHR* [ECH-1993-S-002];
- *Saniewski v. Poland*, no. 40319/98, 26.06.2001;
- *Leyla Sahin v. Turkey*, no. 44774/98, 10.11.2005; *Special Bulletin – Leading cases ECHR* [ECH-2005-3-005];
- *Folgerø and others v. Norway*, no. 15472/02, 29.06.2007.

#### Languages:

Polish.



#### Identification: POL-2010-2-004

- a) Poland / b) Constitutional Tribunal / c) / d) 24.02.2010 / e) K 6/09 / f) / g) Dziennik Ustaw (Official Gazette), 2010, no. 36, item 204; Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy (Official Digest), 2010, no. 2A, item 15 / h) CODICES (Polish, English).**

#### Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests**.
- 4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration**.
- 4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services**.
- 5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel**.
- 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
- 5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation ratione temporis**.
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
- 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.
- 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.
- 5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

#### Keywords of the alphabetical index:

Communist regime / Pension, reduction.

#### Headnotes:

Guarantees of impunity for systemic violations of human rights and freedoms set out in the Universal Declaration of Human Rights, negotiated by the representatives of bloodlessly falling dictatorships, are deprived of the guarantee of constitutional protection.

The social security system for professional soldiers and that pertaining to functionaries of uniformed services constitute a special kind of privilege. The privileged old age pension rights acquired by the addressees of the challenged provisions were acquired unjustly. The challenged provisions do not contain criminal sanctions or sanctions of a repressive character.

The lapse of time since the gaining of sovereignty by the Polish State in 1989 is significant but may not be a decisive criterion in the assessment of the constitutionality of the regulations adopted by the legislator in order to settle accounts with the former functionaries of the communist regime.

The Military Council in Poland had the attributes known in doctrinal literature as those of a military junta.

The essence of the communist regime was determined by the following features:

1. Monopolist power of the Communist Party over every domain of public life, including the political subordination of authorities of the legislative, executive and judicial power;
2. Nationalisation without compensation of all private property, or at least of all large and medium sized property in agriculture, industry and finance;
3. Replacement of market economy with central planning over all domains of economic life;
4. Economic dependence of citizens on the state;
5. Rigorously enforced prohibition of the existence of parties other than the communist party, or a possible admission of groupings intended to constitute the so-called political transmission of the power to certain milieus;
6. Lack of freedom of expression and other fundamental rights and freedoms;
7. In the case of a conflict with the regime, the lack of legal means to assert individual and political rights and freedoms.

#### **Summary:**

I. A group of Members of Parliament requested a constitutional review of the whole Act of 23 January 2009 amending the Act on Old Age Pensions of Professional Soldiers and their Families and the Act on Old Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the

Military Intelligence Service, the Central Anti-corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (*Journal of Laws – Dz. U. of 2009, no. 24, item 145; hereinafter, the “Act”*) in the light of Articles 2, 10, 18, 30, 31.3, 32, 45 and 67.1 of the Constitution.

The above legislative provisions brought about reductions in pension benefits for professional soldiers belonging to the Military Council of National Salvation and for functionaries of several uniformed formations, including the secret services of the People's Republic of Poland. The reduction consists of adopting a basis of assessment of the pension in the amount of 0.7% (instead of 2.6%) for every year of service in the entities described above between 1944 and 1990.

II. The applicants suggested that the Act infringed the principle of acquired rights, as well as the principles of citizens' trust in the state and that of social justice, enshrined in Article 2 of the Constitution. In their view, the Act was also at variance with Article 32, as the legislator treated all former functionaries of state security authorities equally, irrespective of whether or not they had undergone a verification process and whether they retired before or after 1990. The applicants also contended that the amendment did not have a general and abstract character, since it applied to persons who might be listed by name. Concepts such as “crime”, “responsibility” and “illegality” are derived from criminal law and suggest that the amendment has such a character.

According to the Tribunal, the axiological foundation of the legislation aimed at settling accounts with the communist regime in Poland from 1944 to 1990 (by democratic legislators and in accordance with the principles of a democratic state ruled by law) is in particular the preamble to the Constitution, where reference is made to “the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland”.

The rationale behind the verification proceedings was not the passing of moral judgment or the rendering of opinions equivalent to a court decision on the innocence of former functionaries of state security authorities of the People's Republic of Poland. Rather, their purpose was to attest the usefulness of former functionaries of the dissolved State Security Service for service in the new Office for State Protection. The State Protection Office was not a legal or ideological continuation of the communist State Security Service.

Contrary to the assertions of the applicants, the social security system of professional soldiers and that pertaining to functionaries of the uniformed services

constitute a special kind of privilege. These privileges had been acquired unfairly.

The coefficients applied to the basis of assessment of the pension (e.g. 0.7%, 1.3%, 2.6%, etc.) within the universal social insurance system and within the special systems of social insurance for the uniformed services are not comparable due to systemic differences of both systems.

There might have been an infringement of the essence of the right to social security had the legislator lowered the benefits below the social minimum or removed pension rights. The average reduced pension of a former functionary is still higher by 58% than an average pension under the universal social insurance system. Consequently, the challenged provisions are in line with Article 30 of the Constitution.

The challenged reduction in pension benefits does not infringe Article 32 of the Constitution, as the legislator treated officials of the security authorities of the People's Republic of Poland equally, with the sole exception of those able to prove that prior to 1990 they played an active role in the struggle for Poland's independence.

According to the Tribunal, the applicants had formed an inaccurate understanding of both the general and the abstract elements of the legal norms. They also contradicted themselves, in that having made the allegation of the lack of generality and abstractness of the norms; they claim that "giving the provisions of the statute a general and abstract character additionally prejudgets the establishment of collective responsibility".

The challenged provisions did not contain criminal sanctions, or even sanctions of repressive character; they do not determine the guilt of the addressees of the norms expressed in them. Consequently, Article 42 is not an adequate higher-level norm for review of the challenged provisions.

The Tribunal issued this decision in a plenary session. Five dissenting opinions were raised. The closed hearings were reopened and postponed indefinitely. Judgment was handed down on 10 March 2010.

#### Cross-references:

Constitutional Tribunal:

- Decision K 7/90 of 22.08.1990, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1990, item 5;

- Procedural Decision S 6/91 of 25.09.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 34;
- Decision K 14/91 of 11.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 7; *Special Bulletin – Leading Cases 1* [POL-1992-S-001];
- Decision K 3/91 of 25.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 1;
- Decision K 15/93 of 15.02.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 4; *Bulletin 1994/1* [POL-1994-1-002];
- Decision K 1/94 of 24.05.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 10; *Bulletin 1994/2* [POL-1994-2-008];
- Decision K 6/94 of 21.11.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 39; *Bulletin 1994/3* [POL-1994-3-019];
- Procedural decision U 5/94 of 06.12.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 41; *Bulletin 1994/3* [POL-1994-3-021];
- Decision K 13/94 of 14.03.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 6;
- Decision K 19/95 of 22.11.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 35; *Bulletin 1995/3* [POL-1995-3-017];
- Decision U 3/96 of 15.07.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 4, item 31; *Bulletin 1996/2* [POL-1996-2-012];
- Decision K 25/95 of 03.12.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 6, item 52; *Bulletin 1996/3* [POL-1996-3-018];
- Decision K 19/96 of 24.02.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 1, item 6; *Bulletin 1997/1* [POL-1997-1-005];
- Decision K 21/95 of 25.02.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 1, item 7; *Bulletin 1997/1* [POL-1997-1-006];
- Decision K 25/97 of 22.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 3-4, item 35; *Bulletin 1997/3* [POL-1997-3-017];
- Decision K 25/96 of 23.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 3-4, item 36; *Bulletin 1997/3* [POL-1997-3-018];
- Judgment K 12/98 of 03.11.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 6, item 98;
- Judgment SK 7/98 of 23.11.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 7, item 114; *Bulletin 1998/3* [POL-1998-3-020];
- Procedural Decision Ts 154/98 of 17.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 34;

- Judgment K 8/99 of 14.04.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 3, item 41; *Bulletin* 1999/1 [POL-1999-1-009];
- Judgment K 3/99 of 28.04.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 4, item 73; *Bulletin* 1999/2 [POL-1999-2-012];
- Judgment K 34/98 of 02.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 94; *Bulletin* 1999/2 [POL-1999-2-019];
- Judgment K 5/99 of 22.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 100;
- Judgment P 2/99 of 06.07.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 103; *Bulletin* 1999/2 [POL-1999-2-024];
- Judgment K 11/99 of 15.09.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 6, item 116;
- Procedural Decision U 7/99 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 170;
- Judgment K 4/99 of 20.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 165; *Bulletin* 2000/1 [POL-2000-1-003];
- Judgment K 22/99 of 21.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 166;
- Judgment SK 22/99 of 08.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 4, item 107;
- Judgment SK 21/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 144;
- Judgment K 9/00 of 04.12.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 8, item 294;
- Judgment K 8/98 of 12.04.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 3, item 87;
- Judgment K 27/00 of 07.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 29;
- Judgment SK 14/00 of 19.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 31;
- Judgment K 11/00 of 04.04.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 54;
- Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 217;
- Judgment SK 11/01 of 06.02.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 1A, item 2;
- Judgment SK 23/01 of 16.04.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 26; *Special Bulletin – Human Rights Limitation* [POL-2002-H-001];
- Judgment K 6/02 of 22.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 33; *Bulletin* 2002/3 [POL-2002-3-028];
- Judgment P 12/01 of 04.07.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 50;
- Judgment SK 41/01 of 08.07.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 51;
- Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006];
- Judgment SK 42/01 of 14.07.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 63;
- Judgment K 32/02 of 17.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 93;
- Judgment P 21/02 of 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 9; *Special Bulletin – Human Rights Limitation* [POL-2004-H-001]; *Bulletin* 2004/2 [POL-2004-2-012];
- Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 30;
- Judgment SK 26/02 of 31.03.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 3A, item 29;
- Judgment K 42/02 of 20.04.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 4A, item 38;
- Judgment K 6/04 of 17.10.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 9A, item 100;
- Judgment K 23/03 of 31.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 8;
- Judgment SK 45/04 of 07.02.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 2A, item 15;
- Judgment K 4/06 of 23.02.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment SK 30/04 of 10.04.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 4A, item 42;
- Judgment K 33/05 of 17.05.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 5A, item 57;
- Judgment U 4/06 of 22.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
- Judgment P 10/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128; *Bulletin* 2007/2 [POL-2007-2-003];

- Judgment SK 15/06 of 11.12.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 11A, item 170;
- Judgment SK 54/06 of 06.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 23;
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26; *Bulletin* 2008/1 [POL-2008-1-001];
- Judgment K 2/07 of 11.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 5A, item 48; *Bulletin* 2007/3 [POL-2007-3-005];
- Judgment K 20/07 of 08.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 102;
- Procedural Decision P 32/07 of 06.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 131;
- Judgment SK 82/06 of 12.02.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 1A, item 3;
- Judgment SK 96/06 of 01.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 40;
- Judgment P 38/06 of 29.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 46;
- Judgment K 35/06 of 02.09.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 7A, item 120;
- Judgment K 64/07 of 15.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 110;
- Judgment P 46/07 of 22.09.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 8A, item 126;
- Judgment U 10/07 of 02.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 163.

#### Federal Constitutional Court of Germany:

- Judgment 1 BvL 11/94, 1 BvL 33/95, 1 BvR 1560/97 of 28.04.1999; *BVerfGE* 100, 138;
- Judgment 1 BvL 22/95, 1 BvL 34/95 of 28.04.1999; *BVerfGE* 100, 59.

#### European Court of Human Rights:

- *Gillow v. the United Kingdom*, no. 9063/80, 24.11.1986;
- *Gaygusuz v. Austria*, no. 17371/90; 16.09.1996, *Bulletin* 1996/3 [ECH-1996-3-012];
- *Domalewski v. Poland*, no. 34610/97, 15.06.1999;
- *Sidabras and Dziautas v. Lithuania*, nos. 55480/00, and 59330/00, 27.07.2004;
- *Zickus v. Lithuania*, no. 26652/02, 07.04.2009;
- *Rasmussen v. Poland*, no. 38886/05, 28.04.2009.

#### European Commission of Human Rights:

- Decision in the case of *Styk v. Poland* of 16.04.1998, no. 28356/95;
- Decision in the case of *Szumilas v. Poland* of 01.07.1998, no. 35187/97;
- Decision in the case of *Bienkowski v. Poland* of 09.09.1998, no. 33889/96.

#### Languages:

Polish, English (translation by the Tribunal).



#### Identification: POL-2011-3-006

- a) Poland / b) Constitutional Tribunal / c) / d) 16.11.2011 / e) SK 45/09 / f) / g) Dziennik Ustaw (Official Gazette), 2011, no. 254, item 254; Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy (Official Digest), 2011, no. 9A, item 93 / h) CODICES (English, Polish).**

#### Keywords of the systematic thesaurus:

2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and constitutions**.

4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

#### Keywords of the alphabetical index:

Secondary EU legislation, constitutionality, conflict / Judgment, foreign country.

#### Headnotes:

EU regulations, as normative acts, may be subject to constitutional review in the course of review proceedings commenced by way of constitutional complaint.

The presumption of constitutionality of legal acts of EU institutions may only be ruled out after determining that the given legal act and the Constitution cannot be interpreted in such a way as to allow the conformity of the provisions of the legal act with the Constitution to be stated.

The scope of the powers of an international organisation to which the Republic of Poland belongs should be delineated in such a way as to guarantee the protection of human rights to an extent comparable with the Polish Constitution. Comparability concerns the catalogue of rights, on the one hand, and the scope of admissible interference with them on the other. The requirement of appropriate protection of human rights pertains to their general standard; it does not imply the necessity to guarantee identical protection of each of the rights analysed separately.

#### **Summary:**

I. The applicant challenged the constitutionality of Articles 36, 40, 41 and 42 of the Council Regulation (EC) no. 44/2001 (hereinafter, the "Regulation"). She claimed that these provisions did not apply in her case, as the foreign judgment had been issued in criminal proceedings and the enforceability of that judgment was manifestly contrary to the public policy of the Republic of Poland.

She argued that the challenged provisions of the Regulation did not conform to Article 45 of the Constitution, as the Regulation did not provide for any submissions to be made in first instance proceedings concerning the enforceability of the foreign judgment by the party against whom the judgment had been issued. She also contended that it encroached on Articles 78 and 176 of the Constitution, as the principle of two stages of court proceedings implies the right to actively participate in court proceedings before a court of any instance. Article 32 of the Constitution was, in her view also infringed, as only one of the parties was entitled to present arguments and statements to the court of first instance. Article 8 of the Constitution supposedly sets out the absolute primacy of the Constitution in the system of sources of law, and accordingly Article 91.3 of the Constitution only applies to a collision between ordinary statutes and secondary EU law.

II. The Tribunal first considered the question of whether an EU regulation is "another normative act" under Article 79.1 of the Constitution. Having answered this question in the affirmative, the Tribunal accepted the possibility of controlling the constitutionality of an EU regulation in proceedings initiated by the lodging of a constitutional complaint. Nevertheless, the fact that EU regulations are acts of EU law, also forming part of the Polish legal order, results in a special character of the

review conducted in such cases by the Constitutional Tribunal.

A degree of caution and restraint is needed when controlling the constitutionality of EU regulations; the principle of sincere cooperation is one of the systemic principles of EU law. A ruling on the inconsistency of the norms of an EU regulation with the Constitution might only result in suspending the unconstitutional norms on Polish territory but such a consequence would be difficult to reconcile with the obligations of a Member State and with the principle mentioned above.

Furthermore, as indicated in the reasoning, when indicating the nature of the infringement, an applicant should be required to show a probability that the challenged act of EU secondary legislation would cause a considerable decline in the standard of protection of rights and freedoms, by comparison with that offered by the Constitution.

Due to the withdrawal of the complaint with regard to Articles 36, 40 and 42 of the Regulation, and with regard to Articles 8, 32.2, 45.2 and 176.2 of the Constitution, the Tribunal decided to discontinue proceedings in that regard.

In the context of the present case, there were no grounds to conclude that the adopted model of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, with the existing restrictions imposed on a party against whom enforcement is sought in first instance proceedings, infringes the right to a fair trial, guaranteed by the Constitution. Also, since the creditor was not excessively and unjustly privileged by comparison with the applicant, the challenged norm did not infringe the constitutional principle of equality.

The Tribunal issued this judgment *en banc*.

#### **Cross-references:**

Constitutional Tribunal:

- Decision U 15/88 of 07.06.1989, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1989, item 10;
- Judgment SK 11/99 of 16.11.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 158, *Bulletin* 1999/3 [POL-1999-3-029];
- Judgment SK 12/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 143, *Special Bulletin – Inter Court Relations* [POL-2000-C-001];

- Procedural Decision Ts 139/00 of 06.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 40;
- Judgment SK 32/01 of 13.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 31;
- Judgment SK 5/02 of 11.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 41, *Bulletin* 2002/2 [POL-2002-2-018];
- Judgment SK 6/02 of 15.10.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 5A, item 65, *Bulletin* 2003/1 [POL-2003-1-003];
- Procedural Decision SK 42/02 of 06.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 97;
- Judgment K 18/04 of 11.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 49, *Bulletin* 2005/1 [POL-2005-1-006];
- Judgment SK 38/03 of 18.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 45;
- Judgment P 2/04 of 28.07.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 7A, item 72;
- Judgment P 1/05 of 27.04.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 4A, item 42, *Bulletin* 2005/1 [POL-2005-1-005];
- Judgment P 37/05 of 19.12.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 11A, item 177;
- Judgment SK 42/04 of 23.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 125;
- Judgment SK 7/06 of 24.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 108, *Bulletin* 2008/1 [POL-2008-1-004];
- Judgment SK 54/05 of 18.12.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 11A, item 158;
- Judgment SK 6/07 of 14.10.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 8A, item 137;
- Judgment Kp 3/08 of 18.02.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 2A, item 9, *Bulletin* 2009/2 [POL-2009-2-002];
- Judgment SK 19/08 of 31.03.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 3A, item 29;
- Procedural Decision SK 26/07 of 08.06.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 6A, item 92;
- Judgment SK 46/08 of 13.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 109;
- Procedural Decision SK 61/08 of 21.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 120;
- Procedural Decision U 6/08 of 17.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 178;
- Judgment SK 26/08 of 05.10.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 8A, item 73;
- Judgment K 19/06 of 04.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9A, item 96;
- Judgment K 32/09 of 24.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9A, item 108, *Bulletin* 2010/3 [POL-2010-3-006].

Federal Constitutional Court of Germany:

- Decision (*Beschluss*) 2 BvR 197/83 of 22.10.1986, *Solange II, Special Bulletin – Inter Court Relations* [GER-1986-C-001];
- Decision (*Beschluss*) 2 BvL 1/97 of 07.06.2000, *Bananenmarktordnung*;
- Decision (*Beschluss*) 2 BvR 2661/06 of 06.07.2010, *Honeywell*.

European Court of Human Rights:

- *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, *Reports of Judgments and Decisions* 2005-VI, *Bulletin* 2005/2 [ECH-2005-2-002];
- *Coopérative des Agriculteurs de la Mayenne*, no. 16931/04, 10.10.2006;
- *Société Etablissements Biret*, no. 13762/04, 09.12.2008;
- M.S.S, no. 30696/09, 21.01.2010.

European Court of Justice:

- C-34/73, 10.10.1973, *Variola*;
- C-9/73, 24.10.1973, *Schlüter*;
- C-101/76, 05.05.1977, *Koninklijke Scholten Honig*;
- C-242/81, 30.09.1982, *Roquette Frères*;
- C-222/84, 15.05.1986, *Johnston*;
- C-222/86, 15.10.1987, *Heylens*;
- C-314/85, 22.10.1987, *Foto-Frost, Special Bulletin – Inter Court Relations* [ECJ-1987-C-002];
- C-340/89, 07.05.1991, *Vlassopoulou*;
- C-97/91, 03.12.1992, *Borelli*;
- C-7/98, 28.03.2000, *Krombach*;
- C-38/98, 11.05.2000, *Régie Nationale des Usines Renault*;
- C-50/00, 25.07.2002, *Unión de Pequeños Agricultores*;
- C-253/00, 17.09.2002, *Munoz*;
- C-3/05, 16.02.2006, *Verdoliva*;
- C-432/05, 13.03.2007, *Unibet*, *Bulletin* 2009/2 [ECJ-2009-2-006];
- C-208/09, 22.12.2010, *Sayn-Wittgenstein*;
- C-391/09, 12.05.2011, *Runevic-Vardyn*.

*Languages:*

Polish, English (translation by the Tribunal).



## Portugal Constitutional Court

### **Important decisions**

*Identification:* POR-1997-1-002

**a) Portugal / b) Constitutional Court / c) First Chamber / d) 19.02.1997 / e) 121/97 / f) / g) Diário da República (Official Gazette), 100 (Series II), 30.04.1997, 5148-5154 / h).**

*Keywords of the systematic thesaurus:*

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**

*Keywords of the alphabetical index:*

Secret investigation / Criminal procedure, access to the file / Judicial protection / European Commission of Human Rights, case-law, interpretation in conformity.

*Headnotes:*

It is unconstitutional to interpret the provisions of the Code of Criminal Procedure in such a way as to deny accused persons and their defence counsel the right during the investigation to be informed of the contents of the file and therefore the right to appeal against the decision ordering or maintaining detention on remand. It is contrary to the guarantees of access to the law

and to the courts and to the guarantees provided by criminal procedure, and above all to the principles of adversarial hearings and equality of arms, contained in Articles 20.1, 32.1 and 32.5 of the Constitution.

#### *Summary:*

The applicant claimed, with reference to several principles of the Portuguese Constitution and the European Convention on Human Rights, that accused persons in criminal proceedings who are detained on remand, in addition to their right to be immediately and clearly informed of the reasons for their detention and their rights, also have the right – they themselves or their defence counsel – to be informed of the contents of the file. He thus questioned the constitutionality of the provisions under which (a) the rule that criminal proceedings must be conducted in public is not fully valid until the Public Prosecution Office has brought charges and (b) the file remains inaccessible to the defence during the first stage of the proceedings “*fase de inquerito*”.

As regards access to the file, Portuguese legislation was therefore more restrictive than many other national criminal procedures in western Europe.

In the case in point, the Court did not deem it essential to assess whether the provisions were unconstitutional on the grounds that they violated Articles 5.1, 5.2 and 6 ECHR, since these international legal principles have been incorporated into several articles of the Portuguese Constitution. Accordingly, international case-law on this matter, especially that of the European Commission of Human Rights and the European Court of Human Rights (see, for example, the Judgment of 30 March 1989 in the case of *Lamy v. Belgium*) was only taken into consideration as an element in interpreting the applicable constitutional provisions.

#### *Supplementary information:*

Three judges issued a dissenting opinion.

#### *Languages:*

Portuguese.



*Identification:* POR-2000-3-002

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 04.10.2000 / **e)** 412/00 / **f)** / **g)** *Diário da Repúblíca* (Official Gazette), 269 (Series II), 21.11.2000, 18871-18881 / **h)**.

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**

4.7.9 Institutions – Judicial bodies – **Administrative courts.**

5.3.13.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal.**

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

5.3.13.20 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Adversarial principle.**

#### *Keywords of the alphabetical index:*

Decision, administrative enforceable / Citizen, guaranteee / Judge, status / Appeal, to the courts / Judicial protection, effective / Decision, administrative, authoritative nature / Appeal, effect suspensive.

#### *Headnotes:*

The guarantee of access to the courts enshrined in Article 20.1 of the Constitution is intended to secure the defence of legally protected rights and interests. The effectiveness of this guarantee depends heavily on justice being administered within a reasonable time. After the Constitution was revised in 1997, it was agreed that the legislature must organise fast-track court proceedings so that citizens could have effective protection, in good time, against threats to, or violations of, personal rights, freedoms and guarantees.

Suspension of the effect of an administrative decision against which an appeal has been lodged is a preventive procedure that is dependent on the appeal to set aside the administrative decision and takes the form of emergency proceedings. Suspension of the effect of an administrative decision against which an appeal has been lodged is, in some circumstances, essential in order to anticipate the success of the

appeal, since in a system of executive administration such as the Portuguese system, an appeal against an administrative decision does not, as a rule, have suspensive effect. This is because the authoritative nature of an administrative decision means that, despite the appeal, the decision can, in principle, be enforced.

Article 268.4 of the Constitution shows clearly that the principle whereby effective court protection is guaranteed in all administrative matters includes an obligation on the legislature to make provision for procedural means which enable the citizen to require the authorities to take the administrative decisions they are supposed to take by law and, if necessary, to request appropriate preventive measures. The principle also provides for the traditional right of appeal against administrative decisions and the right of access to administrative justice for the purpose of upholding legally protected rights or interests. However, Article 268.4 of the Constitution does not prevent the law setting criteria that might limit the courts' scope to suspend the effect of an administrative decision, according, in particular, to whether enforcement of the decision is likely to cause damage that is difficult to redress.

It is the case-law of the European Convention on Human Rights (ECHR), in particular, which develops the concept of a "fair hearing". Indeed, the 1997 revision of the Portuguese Constitution was designed to transcribe, in an explicit way, the "right to a fair hearing" as recognised by Article 6 ECHR, by taking into account all the work of the European Court of Human Rights. With the Judgment in the case of *Lobo Machado v. Portugal* of 20 February 1996 (*Reports of Judgments and Decisions* 1996 – I, p. 195 et seq.; *Bulletin* 1996/1 [ECH-1996-1-003]), the European Court of Human Rights established case-law according to which the right to a fair hearing encompasses the right to an adversarial trial. This implies, in principle, that the parties involved in a trial, criminal or civil, have the right to inspect and discuss all the information or observations submitted to the judge, even by an independent magistrate, with a view to influencing the decision. This case-law was unvaryingly confirmed in subsequent judgments.

Respect for the principle of a fair trial presupposes conditions of objectivity. It is difficult to see how this could be the case where the external members of the judges' bench, whose task is to settle disputes, may take part in the discussion and attend confidential deliberations, at a stage in the proceedings when any intervention appears to have an especially decisive effect because it takes place immediately before the decision is taken.

### **Summary:**

The Court ruled on the constitutionality of two provisions of the Law on Proceedings in the Administrative Courts ("the Law"), and also of a provision of the Regulations on Court Judges (which lay down certain special rights for Court Judges).

Regarding the provisions of the Regulations on Court Judges, the Court concluded unanimously that judges' exemption from advances and expenses cannot be regarded as a privilege. It is, rather, a special right, the recognition of which is intended to create conditions of objectivity enabling the judge to carry out the task of handing down a judgment with independence and impartiality. This exemption is therefore valid only for proceedings to which the judge is party by virtue of his or her duties.

Under the first of the provisions in the Law – relating to suspension of the effect of administrative decisions – the decision to suspend the effect of the administrative decision may be taken only if there is a possibility that enforcement of the decision will cause damage which is difficult to redress. The Court ruled that this provision was not unconstitutional, since it does not limit the right of appeal to the courts. It governs only the exercise of this right in reasonable and proportionate terms and, accordingly, in terms necessary for the protection of the public interest. Moreover, it is not unconstitutional in terms of violation of the judicial guarantee enshrined, since the revision of the constitution in 1997, in Article 268.4 of the Constitution.

On the question of appeal to the courts, although the public prosecutor's office has the right to appeal against any administrative decision, and although there is also a set of measures for ensuring that such decisions are lawful, the challenged provision of the Law is unconstitutional because, in allowing a representative of the public prosecutor's office to attend hearings and speak during discussions, it violates the right to a fair trial enshrined in Article 20.4 of the Constitution.

### **Supplementary information:**

Bearing in mind the grounds put forward by the European Court and Commission of Human Rights and the clear history of willingness on the part of those who drafted the Portuguese Constitution to follow the example of European case-law relating to the promotion of fundamental rights such as the right to judicial protection, the Constitutional Court departed from the case-law that predated the 1997 revision of the Constitution.

The Court considered, firstly, that the arguments presented by the French government were not valid in the case in question, because the presence of a government commissioner at the deliberations of the *Conseil d'Etat* – comparable to the Portuguese *Supremo Tribunal Administrativo* (*Kress v. France* case) – was still compatible with the requirements of a fair trial; and, secondly, that there was no parallel with the Order of 4 February 2000 of the Court of Justice of the European Communities in case C-17/98, regarding the inadmissibility of the written observations submitted by the parties in response to the Advocate General's conclusions.

Although that Judgment, no. 412/2000, relates to the review of the constitutionality of specific provisions, it was examined by the plenary assembly, by a decision of the President of the Court, pursuant to Section 79-A of the law on the Constitutional Court. Several judges delivered divergent or interpretative opinions.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2011-2-010

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 07.06.2011 / **e)** 281/11 / **f)** / **g)** *Diário da República* (Official Gazette), no. 228 (Series II), 28.11.2011, 46689 / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities**.

5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings**.

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

#### *Keywords of the alphabetical index:*

Contradictory rulings, procedure / Judges, panel, composition.

#### *Headnotes:*

An interpretation of a norm contained in legislation governing the Administrative and Fiscal Courts to the effect that the composition of the Court that hears appeals on the grounds of contradictory rulings can include judges who intervened in the ruling against which the appeal is being brought, or in the ruling on which the appeal is based, is not unconstitutional. Judicial impartiality is assessed on the basis of any functions the judge previously exercised in the same case; in the absence of other factors, even the entire history of the prior interventions by specific judges in that case is not sufficient to prove the existence of justified reasons to suspect partiality on the part of those judges.

#### *Summary:*

The applicant alleged that a breach of the principle of impartiality and of the right to fair process had occurred because of an intervention by certain judges in a decision forming the object of the ruling against which an appeal had been lodged. These judges formed part of the Plenary of the Court which heard the appeal. Four of the judges who made up the Court which handed down the ruling against which that appeal was brought were also members of the Court which found that the pre-conditions for the admissibility of the appeal on the grounds of contradictory rulings were not met. The ruling which was appealed to the Constitutional Court stated that the coincidence between the two compositions did not make the four judges in question parties to the question that was decided by the Plenary, nor did it restrict the impartiality they were bound to observe in their consideration of and verdict on the case.

The Constitutional Court recalled that the right to fair process implies that the principle of fairness must be paramount, to ensure that the way in which the legislator shapes the respective procedure is itself fair, and that the material principles of justice will be at the forefront at all times during the procedure.

The guarantee of judicial impartiality is a corollary of the right to fair process, encompassing the right for a case to be judged by an impartial court. Everyone is entitled to expect that judicial organs will be composed of judges who are independent and impartial and who can offer parties a guarantee of neutrality.

The guarantee of judicial impartiality leads to the imposition of a regime governing disqualifications. Jurisprudence from the European Court of Human Rights has confirmed and emphasised that the guarantee of fair process pre-supposes and requires

this guarantee of an impartial court, with a subjective dimension which takes account of the personal convictions of a given judge on a given occasion, and an objective dimension which seeks to ensure that each judge offers guarantees that are sufficient to exclude any legitimate doubt as to his or her impartiality and to determine whether he or she is in a position to hand judgment down freely, thus excluding any suggestion of partiality. The theory of appearances plays an important role, in the sense that where there is legitimate reason to doubt a judge's impartiality, he or she must be excluded. The decisive element in this assessment is the existence or otherwise of an objectively justified fear of partiality. The judge's objective impartiality is assessed in the light of the functions that he/she has exercised, and not in the light of his or her attitude or convictions.

In the present case, the doubts which the applicant raised over the impartiality of four of the seven judges who heard the appeal on the grounds of contradictory rulings were based on the fact that they had previously intervened in the same case i.e. that they had participated in the earlier decision.

Supporting its position with jurisprudence from the European Court of Human Rights, the Constitutional Court distinguished between two hypotheses: a situation in which the same judge successively exercises different jurisdictional functions in the same case; and one in which, as the result of an appeal, he or she successively exercises the same jurisdictional functions. The first situation represents the accumulation of functions linked to the prosecution, the fact-finding phase and the trial, or of consultative and jurisdictional functions. The European Court of Human Rights has condemned the successive exercise of consultative and jurisdictional functions. The European Court of Human Rights considers that the simple accumulation of functions is not enough to automatically entail a breach of the right to fair process; an assessment must be carried out of the effective role a judge plays in his or her interventions, in order to determine whether the interested party's fears are objectively justified.

The Constitutional Court said that it shared the view expressed by the European Court of Human Rights, and that it considered that a judge must act with independence and impartiality when adjudicating matters and his or her judgment must appear to the public to be objective and impartial. Importance must therefore be attached to the content of the decisions he or she has handed down.

In the present case, the first of the successive interventions of the four judges addressed the substance of the case, while the second occurred as part of an appeal on the grounds of contradictory rulings an extraordinary appeal directed at an object other than that of the original decision.

When a judge who decided at first instance intervenes in a subsequent appeal, the principle of impartiality is at stake along with the *raison d'être* of the challenge if the decision at first instance and that on the challenge against it were to be given by the same judge, then the existence of the appeal itself and the right to appeal would be undermined.

However, the situation before the Court in the present appeal on the grounds of unconstitutionality was different. Jurisprudential standardisation rulings possess a function of providing guidance to other courts on how they should interpret the legal question of whether there is a divergence in the jurisprudence. Such rulings are sought in the interests of the unity of the law; they have no effective influence on the decision in the case in point.

The appeal on the grounds of contradictory rulings is a specific procedural format. At this stage, the aim of the appeal is not to analyse the essence of the case, but to determine whether opposition exists i.e. whether, with regard to the same legal grounds and in the absence of any substantial change in the legal regulations, the Court handed down an opposite solution to that adopted in an earlier ruling issued by the same jurisdiction.

This format is aimed at resolving conflicting situations arising from different rulings by senior courts concerning the same fundamental question of law, in order to ensure that substantially identical situations are treated in the same way. As the aim is to resolve jurisprudential conflicts between senior courts, it is essential that a substantial number of judges participate in the judgment, so that it is a true representation of the understanding of the majority of the judges comprising the Court.

In the case in point, the judges' first and second interventions had addressed different questions. The Constitutional Court was therefore of the view that there were no reasonable grounds to hold that the second intervention would have been prejudiced by a prior opinion formed during the first one. The types of intervention that judges are called on to undertake mean that the successive exercise in the same proceedings of functions in the judgment of the essence of the case on the one hand, and in the appeal on the grounds of contradictory rulings on the other, is not incompatible.

The applicant also pointed out a potentially unconstitutional situation, in that the same judge simultaneously intervened as deputy judge and president of the Court, with the consequence that the president could have had the competence to intervene as one of the judges who judged the case. The Constitutional Court held that the powers of president of the Court and deputy judge are not incompatible. This is the rule in benches composed of several judges, where one of them assumes the powers of president whilst retaining his or her functions as judge in the case.

The functions entrusted by the law to the same judge in cases in which the president is substituted by a deputy judge are those of directing discussions on the one hand, and voting on the other. In the case under consideration, the decision was unanimous, and the deputy judge was not required to give a president's casting vote in order to produce a majority and thus enable the Court to issue a ruling.

#### *Languages:*

Portuguese.



## Romania Constitutional Court

### Important decisions

*Identification:* ROM-1998-2-004

- a)** Romania / **b)** Constitutional Court / **c)** / **d)** 19.05.1998 / **e)** 81/1998 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 6.1 of Law no. 1/1991 on social protection for unemployed persons and returning them to employment / **g)** *Monitorul Oficial al României*(Official Gazette), 220/16.06.1998; *Curtea Constituțională, Culegere de decizii și hotărâri* 1998 (Official Digest), 1169, 1998 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**
- 5.4.15 Fundamental Rights – Economic, social and cultural rights – **Right to unemployment benefits.**

#### *Keywords of the alphabetical index:*

Social protection / Unemployed people, vocational reintegration / Unemployment, benefit, right.

#### *Headnotes:*

By its nature, the principle of equality before the law and the public authorities applies to all rights and all freedoms enshrined in the Constitution or the law. This principle is also established in Article 14 ECHR and in the case-law of the European Court of Human Rights. In *Marckx v. Belgium, Special Bulletin – Leading cases ECHR* [ECH-1979-S-002], for instance, the European Court based its judgment on Article 14, ruling that any difference in the way the State dealt with individuals in similar situations must have an objective and reasonable basis.

**Summary:**

An objection alleging that Article 6.1.e of Law no. 1/1991 on the social protection of unemployed persons and returning them to employment was unconstitutional was referred to the Constitutional Court.

In the grounds of objection, it was argued that Article 6.1.e of Law no. 1/1991, under which secondary school diploma holders did not receive unemployment benefit or assistance in finding employment, discriminated against persons studying at a higher education institution who, having been in employment, then became unemployed. Depriving them of unemployment benefit under the above-mentioned provision was contrary to Articles 16.1, 16.2, 26.2, 32.1, 38.1, 38.2, 43.1, 43.2, 45.1, 45.2 and 134.2.e of the Constitution.

The Court of Appeal took the view that the objection was unfounded in that Article 6 was concerned with exceptions dealt with by legal provisions on measures to guarantee the possibility of obtaining earned income and other social protection measures, including, in the applicant's case, a grant.

In its memorial the Government took the view that Article 6.1.e of Law no. 1/1991 did not contravene the Constitution since throughout the period of university studies students received a grant and the other forms of assistance provided for in the Education Act.

The Constitutional Court ruled as follows:

Under Article 144.c of the Constitution and Article 23 of Law no. 47/1992, the Constitutional Court was competent to examine the objection alleging unconstitutionality.

Article 6.1.e of Law no. 1/1991 specified that those who had completed secondary education and were taking vocational training were not eligible for unemployment benefit or assistance with finding employment. In the present case, the plaintiff had been employed while at university, but had lost his job. Under Article 6.1.e, unemployment benefit was no longer paid to him.

In Decision no. 95 of 18 September 1996, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 350 of 27 December 1996, the Constitutional Court had ruled that the provisions of Article 6.1.e of Law no. 1/1991 were constitutional. However, this decision only referred to the provisions of Article 3.1.a of this law, under which, on certain conditions, holders of a secondary school diploma who had not obtained employment were treated as unemployed. However,

the situation in the present case was different: on the one hand were unemployed persons who had had their employment contracts terminated through no fault of their own and who received unemployment benefit under Law no. 1/1991 while on the other were those who, although unemployed, were not paid unemployment benefit because they were studying at a higher-education institution.

The right to unemployment benefit was not only a legal right, established by Law no. 1/1991, it was also a constitutional right under Article 43.2 of the Basic Law. Withholding unemployment benefit from unemployed persons studying at a higher-education institution was discrimination within the meaning of Article 16.1 of the Constitution, under which citizens were equal before the law and public authorities and had the right to be treated without privilege or discrimination.

That an unemployed person was studying at a higher-education institution was not objective and reasonable justification for not paying unemployment benefit, which was a constitutional right.

As a matter of principle, the exercise of one constitutional right, such as the right to education, could not be used as a ground for withholding another constitutional right such as unemployment benefit and was not one of the grounds set out in Article 49.1 of the Constitution for restricting the exercise of certain rights.

From the grounds of Constitutional Court Decision no. 95 it was clear that withholding unemployment benefit from certain unemployed persons because they were exercising their right to study was discriminatory because it treated them less advantageously than other unemployed persons who did receive unemployment benefit under Article 43.2 of the Constitution and Article 2 of Law no. 1/1991.

Since Law no. 1/1991 predated the Constitution, under Article 150.2 of the Basic Law it needed to be included in the legislation on which the Legislative Council must propose measures to bring it into line with the standards and principles of the Constitution. That review must therefore also remove the discrimination objected to so that suitable regulations could be adopted.

The Constitutional Court allowed the objection and noted that the provisions of Article 6.1.e of Law no. 1/1991 on the social protection of unemployed persons and returning them to employment were unconstitutional when they were applied to a person who, following cancellation of an employment contract through no fault of his or her own, was unemployed and therefore legally entitled to unemployment benefit.

*Languages:*

Romanian.



*Identification:* ROM-1998-3-007

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 10.11.1998 / **e)** 161/1998 / **f)** Decision on a preliminary question on the unconstitutionality of Article IV.7 of Government Order no. 18/1994 / **g)** *Monitorul Oficial al României*(Official Gazette), 3/11.01.1999; Curtea Constituțională, Culegere de decizii și hotărâri 1999 (Official Digest), 141, 1999 / **h)**.

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.9 General Principles – **Rule of law.**

3.25 General Principles – **Market economy.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.10.4 Institutions – Public finances – **Currency.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract.**

*Keywords of the alphabetical index:*

Currency, repatriate, obligation / Liability, strict / Penalty / Penalty for petty offence.

*Headnotes:*

The obligation to repatriate foreign currency is not contrary to the principles of a market economy and free trade, but rather is an expression of the State's obligation to protect the national interests in economic and financial activity. The legislator has the power to set fines either on a fixed-rate or on a percentage basis.

*Summary:*

The decision in question was a Constitutional Court decision on a preliminary question on the unconstitutionality of Article IV.7 of Government Order no. 18/1994 dealing with measures to improve the financial discipline of economic operators, as approved and amended by Law no. 12/1995.

The Court of Oradea asked the Constitutional Court to rule on the objection raised by the commercial joint stock company "GOLDENVIOLET IMPEX" of Salonta, alleging the unconstitutionality of Article IV.7 of Government Order no. 18/1994, as approved and amended by Law no. 12/1995.

In the grounds of objection, it was shown that the relevant provisions infringed the rules laid down in Article 72.3.f of the Constitution, which stated that criminal offences, penalties and the execution thereof must be regulated by "organic", i.e. institutional, laws. Reference was made to the case-law of the European Court of Human Rights, which extended the guarantees specified in Article 6 ECHR to include all categories of "penalty", and hence also penalties for petty offences, which were to be governed by institutional laws.

On examining the preliminary question, the Constitutional Court judged it to be unfounded. Its arguments were as follows:

- As far as changing the system of fines from fixed-rate fines to fines calculated on a percentage basis was concerned, there was nothing in the Constitution to imply that the legislator's freedom of choice should be restricted.
- The provisions of Article IV.7 of Government Order no. 18/1994 were of a financial nature; they fell within the sphere of currency regulation and did not come within the regulatory scope of institutional laws. The case-law of the European Court of Human Rights, based on the interpretation of Article 6 ECHR, could not therefore be relied upon.
- With regard to the alleged violation, in the Government Order, of the principle of freedom of contract, as enshrined in Articles 134.2.a and 134.2.e of the Constitution, the Constitutional Court had handed down a number of decisions, stating that the obligation to repatriate foreign currency was not contrary to the market economy and free trade, but was an expression of the State's obligation to ensure the protection of national interests in economic and financial activity.
- The Court also found that the principle of proportionality invoked did not apply in this instance; the contention that the article in question provided for the introduction of strict liability was likewise unfounded.

For the reasons stated, the Court answered the preliminary question on the unconstitutionality of Article IV.7 of Government Order no. 18/1994 in the negative.

*Languages:*

Romanian.



*Identification:* ROM-2000-1-007

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 28.10.1999 / **e)** 168/1999 / **f)** Decision on the constitutionality of Sections 3.1, first sentence, 3.2.c and 23 of Decree no. 387/1977 approving the Statute on the organisation and functioning of tenants' associations / **g)** *Monitorul Oficial al României* (Official Gazette), 85/24.02.2000 / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force before the entry into force of the Constitution.**

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

3.18 General Principles – **General interest.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

*Keywords of the alphabetical index:*

Association, organisation, special forms / Association, contribution quota, joint expenses.

*Headnotes:*

The fact that they have been established by law, in the instant case by Decree no. 387/1977 approving the Statute on the organisation and functioning of tenants' associations, to ensure the achievement of a goal in the public interest, in this case the proper management of buildings divided into flats, does not make the bodies concerned associations within the meaning of Article 11

ECHR and does not breach Article 37 of the Constitution, enshrining freedom of association as a fundamental social and political right.

*Summary:*

The Constitutional Court was asked to rule on the constitutionality of Sections 3.1, first sentence, 3.2.c and 23 of Decree no. 387/1977 approving the Statute on the organisation and functioning of tenants' associations, in a civil case concerned with tenants' obligation to pay certain sums of money required by their tenants' associations. In the grounds for the appeal, it was argued that the following provisions were in breach of Article 37 of the Constitution, on the right of association: the first sentence of Section 3.1, which stipulated that holders of tenancy contracts were automatically members of the relevant tenants' association, and Section 23, according to which in carrying out their responsibilities tenants' associations were advised, supported and monitored by the committees and executive offices of their local councils. It was also argued that Section 3.2.c, according to which members of tenants' associations were entitled to receive explanations about how the contributions to shared expenses were apportioned, a decision that could not be challenged, and if the challenge was rejected could be raised in the general assembly of the tenants' association, breached Article 21 of the Constitution, concerning free access to justice.

Article 37 of the Constitution made citizens' freedom to associate in political parties and formations, trade unions and other forms of organisation, to enable them to take part in a range of political, social, cultural and other activities, a fundamental social and political right.

The Court found that under Article 20.1 of the Constitution, provisions concerning citizens' rights and liberties were to be interpreted and enforced in conformity with the Universal Declaration of Human Rights, and with covenants and other treaties to which Romania was a party, which included the Convention for the Protection of Human Rights and Fundamental Freedoms. Under Article 11 ECHR, everyone had the right to freedom of peaceful assembly and to freedom of association with others and no restrictions could be placed on the exercise of these rights other than such as were prescribed by law.

With regard to the areas covered by Article 11 ECHR, in its 1981 Judgment in the *Le Compte, Van Leuven and De Meyere v. Belgium* case (*Special Bulletin – Leading cases ECHR* [ECH-1981-S-001]), the European Court of Human Rights had found that a Belgian medical organisation established by law did not constitute an association within the terms of Article 11

ECHR, since the organisation had a public law character whose legal status and specific responsibilities meant that it carried out activities in the public interest.

The Constitutional Court ruled that in certain situations parliament could establish a special form of association designed to protect general interests which did not fall within the ambit of freedom of association, as defined by Article 11 ECHR and Article 37 of the Constitution.

*Mutatis mutandis*, the tenants' associations referred to in Decree no. 387/1977 had been legally established, in the general interest, that of the proper management of buildings containing a number of flats. In the absence of such associations, the legitimate rights and interests of persons living in the buildings could be adversely affected by misunderstandings or disputes.

Turning to Article 3.2.c, the Court did not accept that there had been a breach of Article 21 of the Constitution, concerned with free access to justice, because under Section 7 of Decree no. 387/1977 the parties concerned could ask the courts to review the legality of any decision of a tenants' general assembly concerning the apportionment of contributions to shared expenses.

The Court found that Section 23 of Decree no. 387/1977 had no relevance to the case as it bore no relationship to the right of association enshrined in Article 37 of the Constitution.

These provisions were in any case no longer relevant, in view of the responsibilities granted to local authorities under the Local Public Services Act (no. 69/1991).

#### Languages:

Romanian.



*Identification:* ROM-2000-1-008

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 23.11.1999 / **e)** 199/1999 / **f)** Decision concerning the constitutionality of Sections 6 and 10 of the Organisation and Conduct of Public Meetings Act (no. 60/1991) / **g)** *Monitorul Oficial al României* (Official Gazette), 76/21.02.2000 / **h)** CODICES (English, French, Romanian).

#### Keywords of the systematic thesaurus:

1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force before the entry into force of the Constitution.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions.**

3.17 General Principles – **Weighing of interests.**

3.19 General Principles – **Margin of appreciation.**

3.20 General Principles – **Reasonableness.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

#### Keywords of the alphabetical index:

Law, temporal conflict of laws / Demonstration, legal, prior authorisation, peaceful conduct / Public order.

#### Headnotes:

The legal requirement to seek approval to organise and conduct a public meeting is not unconstitutional. Freedom of assembly may lawfully be subject to limits and restrictions, to protect citizens' constitutional rights and freedoms.

#### Summary:

The Constitutional Court was asked to rule on the constitutionality of Sections 6 and 10 of the Organisation and Conduct of Public Meetings Act (no. 60/1991), on the grounds that they were in breach of Article 36 of the Constitution, on freedom of assembly, and Article 150 of the Constitution, on temporal conflict of laws.

The contested sections are as follows:

Section 6: The organisation of public meetings shall be declared to the municipality or other local authority where the meeting is to be held.

Section 10: After consultation with the local police, the local authority may prohibit the holding of the public meeting, if it has information that the conduct of the meeting would lead to a breach of Section 2 or if there

are major construction or other public works at the location or on the route where the meeting is scheduled to take place.

The Constitutional Court found that Article 36 of the Constitution had to be taken in conjunction with Article 49 of the Constitution, since the exercise of freedom of assembly could be subject to certain legal restrictions and conditions, to ensure that citizens' constitutional rights and freedoms and their interests, and implicitly public order and national security, were not threatened.

In the context of Articles 11 and 20 of the Constitution, the Court noted that under Article 11 ECHR the right of assembly could be subject to certain restrictions which were prescribed by law and were necessary in a democratic society for the prevention of disorder, for the protection of morals or for the protection of the rights and freedoms of others. In this context, the European Court of Human Rights had ruled, in the cases of *Plattform Ärzte für das Leben v. Austria*, 1985, and *Rassemblement jurassien v. Switzerland*, 1979, that Article 11 ECHR allowed each state to adopt reasonable and appropriate measures to ensure the peaceful conduct of lawful demonstrations of its citizens, and that for gatherings taking place on the public highway, the requirement to seek prior authorisation was not unreasonable, since this would enable the authorities to ensure respect for public order and take the necessary measures to ensure that freedom to demonstrate was fully respected.

The Court found that since the contested provisions did not breach Article 36 of the Constitution, neither were they affected by Article 150.1, according to which laws and all other forms of legislation remained in force so long as they were compatible with the provisions of the Constitution.

#### *Languages:*

Romanian.



*Identification:* ROM-2000-3-017

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 06.07.2000 / **e)** 134/2000 / **f)** Decision on the objection challenging the constitutionality of Article 207 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 393/23.07.2000 / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

#### *Keywords of the alphabetical index:*

Criminal proceedings, accused, defendant / Evidence, truth / Aim, legitimate / Defamation.

#### *Headnotes:*

Article 207 of the Criminal Code, on evidence of the truth, affords the accused the opportunity to prove the truth of statements or allegations he or she has made about a particular person. In such cases, the statement is not treated as a criminal offence, in view of the absence of danger to society, if, exceptionally, it was made in order to protect a legitimate interest.

The existence of a legitimate interest must be established by the trial courts in each criminal case.

The fact that the admissibility of the evidence of the truth of what was stated or alleged is contingent on the existence of a legitimate interest does not contravene the presumption of innocence (Article 23.8 of the Constitution) or the rights of the defence, as enshrined in Article 24.1 of the Constitution.

#### *Summary:*

It was alleged that the provisions in issue breached Articles 23.8 and 24.1 of the Constitution.

The Constitutional Court held that Article 207 of the Criminal Code, on evidence of the truth, did not govern the establishment of guilt where offences of insult and defamation were concerned. On the contrary, it is for the prosecution to establish the existence of all the possible ingredients of a criminal offence, guilt being one of them. Those accused of such offences are entitled to dispute the factual and legal basis of the prosecution, including their guilt, throughout the proceedings and by all evidential means permitted by law. Until criminal responsibility for an offence is established by means of a final court decision, the accused is presumed innocent.

In accordance with Article 30.6 of the Constitution and Article 10.2 ECHR, the Court held that in some cases, protecting citizens' rights and freedoms meant imposing criminal sanctions when statements and allegations, even if true, were not made in order to protect a legitimate interest.

In view of the foregoing, it is also worth referring to the case-law of the European Court of Human Rights regarding the media's freedom of expression.

On similar grounds, and because anyone accused of the offences of insult or defamation is entitled, in his or her defence, to refute the accusation using any evidential means permitted by law, including court appeals, the Court held that there had been no violation of the rights of the defence.

#### *Cross-references:*

Regarding the media's freedom of expression:

European Court of Human Rights:

- *Bladet Tromso and Stensaas v. Norway*, no. 21980/93, 20.05.1999;
- *Lingens v. Austria*, 08.07.1986, *Special Bulletin – Leading cases ECHR* [ECH-1986-S-003];
- *Dalban v. Romania*, no 28114/95, 28.09.1999, published in the *Monitorul Oficial al României* (Official Gazette), Part I, no. 277 of 20.06.2000.

#### *Languages:*

Romanian.



*Identification:* ROM-2001-1-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 25.10.2000 / **e)** 208/2000 / **f)** Decision on a charge of unconstitutionality brought in respect of Act no. 105/1997 (amended by Government Order no. 13/1999) for the resolution of objections, disputes and complaints concerning sums calculated and levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance / **g)** *Monitorul Oficial al României* (Official Gazette), 695, 27.12.2000 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.
- 2.1.3.1 Sources – Categories – Case-law – **Domestic case-law**.
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions**.
- 2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms**.
- 5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

#### *Keywords of the alphabetical index:*

Administration, appeals, internal / Tax, assessment, objection / Constitutional Court, legislative role.

#### *Headnotes:*

1. The statutory establishment of an administrative appeals procedure is not in itself unconstitutional.
2. Use of the preliminary administrative appeals procedure, as laid down in Sections 2-7 of Act no. 105/1997, to resolve objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance, is contrary to the principle of "reasonable time" set out in the first sentence of Article 6.1 ECHR. The provisions of Sections 2-7 of Act no. 105/1997 are therefore unconstitutional.
3. The rules governing the Court's jurisdiction specify that it is not expected to play a "proactive" legislative role. Legislators, however, while exercising their constitutional powers, may make regulatory changes to preliminary quasi-judicial procedure.

### **Summary:**

By an interlocutory Judgment of 8 March 2000, the administrative disputes section of the Supreme Court of Justice brought a question of constitutionality before the Constitutional Court in respect of Act no. 105/1997 for the resolution of objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance.

It was claimed that the provisions of Act no. 105/1997, which established an internal administrative appeals procedure to resolve objections, disputes and complaints concerning monetary sums levied through inspection and assessment documents drawn up by agencies of the Ministry of Finance, breached Articles 11, 16.2, 21, 24, 48.1, 48.2 and 49 of the Constitution and Article 6 ECHR, in that the administrative appeals procedure delayed to an unacceptable degree the period during which a party could complain to a court concerning violation of his rights. Consequently, there was no guarantee that judgment would be delivered within a reasonable time.

I. The Plenary Assembly of the Court ruled in its landmark Decision no. 1 of 8 February 1994 that the establishment of administrative appeals procedures did not breach constitutional provisions.

The Court also found that the existence of a preliminary internal administrative appeals procedure was accepted, with reference to Article 6 ECHR, in the case-law of the European Court of Human Rights (case of *Le Compte, Van Leuven and De Meyere v. Belgium*, 1981).

II. From the standpoint of the guarantee as to the delivery of judgment within a reasonable time, however, the Court observed that the administrative appeals procedure introduced through Sections 2-7 of Act no. 105/1997 was unconstitutional.

Under the terms of Articles 11 and 20.2 of the Constitution, this procedure contravened the first sentence of Article 6.1 ECHR.

In this connection, concerning the application of Article 6 ECHR, the Court found as follows: it had been established in the case-law of the European Court of Human Rights that the requirement to settle cases "within a reasonable time" included the length of such procedures prior to referral to a court, and that the expression "reasonable time" referred to the period until the *dies ad quem*, i.e. the final decision in the case.

Delivery of a judgment which did not also establish the precise amount of a monetary sum was not deemed to be the final settlement of a case.

The guarantee of "reasonable time" did not extend to procedures for a judgment's implementation. The "reasonable time" requirement attached considerable importance to the circumstances in which penalties were collected on the monetary sum in dispute.

Finally, the Court found that the expression "reasonable time" was to be understood as also signifying "as reasonably appropriate".

From a different standpoint, in accordance with paragraphs 10.1 and 10.2 of Government Order no. 11/1996, subsequently amended, in most cases collection of tax debts is enforced before preliminary administrative appeals procedures are exhausted. As a result, when agencies of the Ministry of Finance implement these procedures, the legal person lodging the objection, claim or complaint has already been deprived, as the case may be, of sums seized from his bank account or other fixed or moveable property identified for execution by force.

III. The Court is not expected to play a legislative role, nor is it expected to take the place of the legislative bodies by partly or totally replacing the unconstitutional provisions of Sections 2-7 of Act no. 105/1997 or determining which of the three legal instruments governing the three stages of the preliminary administrative appeals procedure should be declared unconstitutional.

Correspondingly, the legislator is empowered under the Constitution to draft new regulations governing the procedure prior to referral to the courts, thereby ensuring that cases are settled "within a reasonable time".

### **Supplementary information:**

Act no. 105/1997 was subsequently repealed by Emergency Government Order no. 3/2001.

### **Cross-references:**

European Court of Human Rights:

- *Le Compte, Van Leuven and De Meyere v. Belgium*, 23.06.1981, *Special Bulletin – Leading cases ECHR* [ECH-1981-S-001].

### **Languages:**

Romanian, French (translation by the Court).



*Identification:* ROM-2001-1-003

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 27.02.2001 / **e)** 70/2001 / **f)** Decision on a charge of unconstitutionality brought in respect of the final provisions of Section 19.3 of Act no. 85/1992 (republished) governing the sale of housing and other property built with public money or with that of State economic or budgetary entities / **g)** *Monitorul Oficial al României* (Official Gazette), 236, 27.02.2001 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.2 Fundamental Rights – **Equality.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

*Keywords of the alphabetical index:*

Housing / Sale, contract / Nullity, absolute / Expenditure, recovery / Expenditure, adjustment / Interest, compensation, non-payment / *Restitutio in integrum.*

*Headnotes:*

The final part of Section 19.3 of Act no. 85/1992, concerning the non-payment of interest and the non-adjustment of recovered expenditure following a ruling that a housing sale contract is null and void *ab initio*, is unconstitutional and breaches the first sentence of Article 41.2 of the Constitution, according to which private property enjoys equal protection irrespective of its owner.

*Summary:*

By an interlocutory Judgment of 21 September 2000, the civil section (Section IV) of Bucharest Court of Appeal brought a question of unconstitutionality before the Constitutional Court in respect of the final provisions of Section 19.3 of Act no. 85/1992 governing the sale of housing and other property built with public money or with that of State economic or budgetary entities.

Section 19 of Act no. 85/1992 renders null and void *ab initio* contracts of sale of housing or other property

which are concluded in breach of the provisions of this Act and of Legislative Decree no. 61/1990.

Section 19.3 provides that nullity is determined by the courts, which also rule on restoration of the former position and on restitution of the sale price, less any rent received during the period between conclusion of the contract and recovery.

It was alleged that the final part of Section 19.3 of the Act was unconstitutional. According to this provision recovered expenditure did not include interest or other adjustments.

It was claimed that these provisions breached Articles 16.1, 16.2, 41.1, 41.2, 135.1, 135.2 and 135.3 of the Constitution. While only one of the contracting parties had failed to comply with the civil law, the other was penalised although not guilty of non-compliance and despite the fact that all civil sanctions are founded on the notion of liability attaching to the parties to a legal relationship.

On examining the text in question in the light of Article 41.1 and 41.2 of the Constitution, the Court held that terminating a contract of sale by declaring it null and void *ab initio* required a return to the position prior to the date on which the contract was concluded and application of the principle of *restitutio in integrum*. This implied that everything transferred by virtue of the annulled contract would be restored to each party in full and at its real value. The final part of Section 19.3 of the Act conformed to this principle only as regards the rights of vendors which were also commercial companies, which recovered both the property and any rent, while the purchaser received only the unadjusted price paid, less the rent for the period in question. The purchaser had no entitlement to unrealised earnings in the form of interest for the period during which this money was not accruing.

Accordingly, the Court found that the final part of Section 19.3 of Act no. 85/1992 favoured State private-property ownership above individual property-owners and consequently breached the first part of Article 41.2 of the Constitution, according to which “private property shall be equally protected by law, irrespective of its owner”.

In accordance with Article 20.1 of the Constitution and Article 1.1 Protocol 1 ECHR, the Court found that the constitutional principle that private property should be protected equally, as laid down in Article 41.1 and 41.2, must be honoured whatever the property rights and “possessions” concerned.

In this connection, in the case of *The former King of Greece and others v. Greece*, Judgment of 23.11.2000,

the European Court of Human Rights ruled that the notion of "possessions" was not limited to ownership of moveable assets, and that certain property rights and interests served to constitute a "right of property" and were consequently "possessions".

Similarly, in the case of *Pressos Compania Naviera S.A. and others v. Belgium*, 1995, it was decided that the right to compensation was generated when damage occurred. A claim for damages of this sort constituted a "possession" and was therefore a right of property within the meaning of the first sentence of Article 1.1 Protocol 1 ECHR.

The Court found that this provision applied in the case in question. It therefore ruled that the charge of unconstitutionality was well-founded and must be accepted.

#### Cross-references:

European Court of Human Rights:

- *Pressos Compania Naviera and others v. Belgium*, 20.11.1995, *Bulletin* 1995/3 [ECH-1995-3-019];
- *The former King of Greece and others v. Greece*, no. 25701/94, 23.11.2000.

#### Languages:

Romanian, French (translation by the Court).



#### Identification: ROM-2002-1-002

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** 349/2001 / **f)** Decision concerning the objection to the provisions of Articles 53 and 54.2 of the Family Code on grounds of unconstitutionality / **g)** *Monitorul Oficial al României* (Official Gazette), 240/10.04.2002 / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

#### Keywords of the alphabetical index:

Child, protection / Child, assistance.

#### Headnotes:

The stipulation in Article 54.2 of the Family Code of the presumptive father's sole right to bring an action contesting presumed paternity is unconstitutional in that it ignores the legitimate interest in so doing which the mother and a child born in wedlock may have.

#### Summary:

By a preliminary request of 28 March 2001, the Court of first instance at Alba Iulia referred to the Constitutional Court an objection challenging the constitutionality of Articles 53 and 54 of the Family Code.

In the statement of grounds of unconstitutionality, the impugned statutory provisions were alleged not to comply with Articles 16.1.2, 26.2, 44.1 and 45.1 of the Constitution.

According to Article 53 of the Family Code, "the father of a child born in wedlock is the mother's husband. The father of a child born after the dissolution, invalidation or annulment of a marriage is the mother's ex-husband, if the child was conceived while they were married and was born before the mother contracted another marriage".

On examining the plea of unconstitutionality with regard to Article 53 of the Family Code, the Court found that it was not contrary to Articles 16.1.2, 26.2, 44.1 and 45.1 of the Constitution.

Article 54.2 of the Family Code, though, provides that an action contesting paternity can be instituted only by the husband, whose heirs may continue the action instituted by him.

The Court held that the complaint of unconstitutionality bore on the right to family and private life, also secured by Article 8 ECHR.

In its Judgment of 27 October 1994 in the case of *Kroon and others v. the Netherlands* (*Bulletin* 1994/3), the European Court of Human Rights decided that it was contrary to Article 8 ECHR for a national law to prevent a married woman from denying her husband's presumed paternity in respect of a child conceived during their marriage.

The Court therefore considered it necessary to review its case-law regarding the unconstitutionality of Article 54.2 of the Family Code, as it found the text contrary to the provisions of Articles 16.1, 26, 44.1 and 45.1 of the Constitution.

Accordingly, it was noted that the stipulation in Article 54.2 of the Family Code of the presumptive father's right to institute an action challenging his paternity, to the exclusion of the mother and a child born in wedlock, infringes the principle of equal rights set out in Article 16.1 of the Constitution.

The fact that the presumptive father and the mother of the child each have a personal and separate motive for overturning the presumption of paternity does not warrant the discriminatory arrangements made by the impugned text. The specific motives may be different, but the common logic consists in ensuring that truth prevails over falsehood and, the reason being the same, the solutions must also be identical.

The Court also noted that Article 54.2 of the Family Code infringed Article 44.1 of the Constitution establishing equality between spouses, in denying mothers the right also to bring an action challenging presumptive paternity.

Regarding Article 26.1 of the Constitution on personal, family and private life, the Court held that the stipulation of the presumptive father's sole right to bring the action contesting the presumed paternity failed to reflect the requirements of paragraph 1 of the constitutional provision.

It further observed that the text at issue also infringed Article 26.2 of the Constitution in that it did not acknowledge the right of the child to bring an action contesting the presumed paternity.

It was accordingly noted that the conferment of this right on the child, being an expression of every persons' constitutional right to self-determination, would not go against the rights and freedoms of other people or offend public policy or morality.

Lastly, the Court found that Article 54.2 of the Family Code also infringed Article 45.1 of the Constitution securing to children and young people a special system of protection and assistance in the exercise of their rights.

#### *Supplementary information:*

Decision no. 349/2001, 19.12.2001 was published at the time, *Bulletin* 2002/2 [ROM-2002-2-002].

#### *Cross-references:*

##### *European Court of Human Rights:*

- *Kroon and others v. the Netherlands*, 27.10.1994, Vol. 297-C, Series A; *Bulletin* 1994/3 [ECH-1994-3-016].

#### *Languages:*

Romanian, French (translation by the Court).



#### *Identification:* ROM-2002-1-003

- a)** Romania / **b)** Constitutional Court / **c)** / **d)** 21.02.2002 / **e)** 57/2002 / **f)** Decision on the objection challenging the constitutionality of the provisions of Article 915.2 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 182/18.03.2002 / **h)** CODICES (Romanian, French).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.

#### *Keywords of the alphabetical index:*

Recording, audio, video / Criminal procedure, principles / Evidence, assessment.

### Headnotes:

Articles 911-915 of the Code of Criminal Procedure concerning the use of audio and video recordings as evidence in criminal proceedings not only fulfil the need to make available to criminal courts new and effective means of proof recognised by systems of modern law, but also complies with the principle of safeguarding fundamental rights and freedoms.

In fact the provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights acknowledge the legitimacy of restrictions to the exercise of certain rights and freedoms on condition that they are prescribed by law in order to protect important social values such as the conduct of the criminal investigation or the prevention of criminal acts.

### Summary:

By preliminary request dated 27 September 2001, Criminal Division I of the Bucharest Court referred to the Constitutional Court an objection challenging the constitutionality of the provisions of Article 915.2 of the Code of Criminal Procedure stipulating that "the audio and video recordings referred to in this section [Section V (Articles 911-915) – Audio and video recordings] which are submitted by the parties may serve as evidence insofar as they are not prohibited by law".

It was alleged in the statement of grounds for the objection that the impugned statutory provisions did not comply with:

1. the principle of inviolability of personal, family and private life laid down in Article 26 of the Constitution, in that the provisions enabled the public authorities to interfere in the individual's personal life under other conditions than those governed by law in accordance with the Constitution;
2. the secrecy of correspondence provided for in Article 28 of the Constitution, in that the challenged provisions made it possible for any person, even a party to criminal proceedings, to record telephone or other conversations which could subsequently be used as evidence, and
3. Articles 6 and 8 ECHR.

On examining the objection, the Constitutional Court found the impugned provisions consistent with the principles of the law of criminal procedure, particularly disclosing the truth (Article 3 of the Code of Criminal Procedure), weighing evidence, and assuming that the

value of evidence is not established in advance (Article 63.2 of the Code of Criminal Procedure). Thus, the impugned provisions are held to limit and determine the use of audio and video recordings as evidence that there are certain facts or tangible clues as to the planning and perpetration of an offence. They regulate the possibility of the audio and video recordings being subjected to technical appraisals at the request of the prosecutor, the parties or the Court of its own motion. The assessment of each piece of evidence is made by the judge following an attentive analysis of all evidence adduced. The trial court is thus required to verify whether it was legal and justifiable to make recordings whenever it is presented with evidence in the form of recordings of conversations or of scenes which parties to the proceedings have made.

The Court also considered the challenged provisions to be in accordance with the international principles invoked by the originator of the objection. In this connection reference was made to the Judgment delivered by the European Court of Human Rights in the case of *Klass and others v. Germany* of 1978 (*Special Bulletin – Leading cases ECHR* [ECH-1978-S-004]).

Lastly, the Court recalled that it had already ruled on the constitutionality of the provisions of Articles 911-915 of the Code of Criminal Procedure in its Decision no. 21/2000. In that decision, it held that the interception and recording of conversations or the recording of certain scenes without the consent of the person concerned constituted a restriction on the exercise of the right to respect for personal, family and private life and to its protection by the public authorities, as well as restricting the exercise of the right to inviolability of the secrecy of conversations and other legal means of communication, rights secured by Articles 26.1 and 28 of the Constitution.

The Constitution itself, in Article 49, allows the exercise of certain rights and certain fundamental freedoms to be restricted in cases and under conditions which are exhaustively and precisely defined. In its earlier analysis of the formulation of the impugned statutory provisions, the Court had found that the conditions laid down by the Constitution for restricting the exercise of the rights secured by Articles 26.1 and 28 were complied with.

In the present case, the Court confirmed the terms of its previous decision.

### Cross-references:

- no. 21, 03.02.2000, published in *Monitorul Oficial al României*, Part I, no. 159 of 17.04.2000.;

European Court of Human Rights:

- *Klass and others v. Germany*, 06.09.1978, Vol. 28, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1978-S-004].

*Languages:*

Romanian, French (translation by the Court).



*Identification:* ROM-2002-2-004

- a)** Romania / **b)** Constitutional Court / **c)** / **d)** 16.04.2002 / **e)** 129/2002 / **f)** Decision on an objection alleging the unconstitutionality of the provisions of Article 206 of the Penal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 399/2002 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.12 General Principles – **Clarity and precision of legal provisions.**

3.17 General Principles – **Weighing of interests.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

*Keywords of the alphabetical index:*

Libel, through the press / Criminal law / Fact, material, concerning others.

*Headnotes:*

The provisions of Article 206 of the Penal Code which define defamatory acts as offences against the dignity of the individual are meant to safeguard other people's rights and freedoms and are not a violation of freedom

of expression. This text concerns the punishment not of value judgments but of specific material facts about or ascribed to a person.

The inviolability of freedom of expression stipulated in Article 30.1 of the Constitution does not justify injury to the individual's dignity and right to a personal image. Freedom of expression is not an absolute freedom; it may have restrictions placed on it, provided that they are necessary for safeguarding the rights and freedoms of others.

The limits to freedom of expression must be established by law and must be necessary to ensure respect for the rights of others or protection of national security, law and order, public health or public morality.

*Summary:*

The Constitutional Court had before it an objection alleging that the provisions of Article 206 of the Penal Code were unconstitutional.

In the statement of grounds for the objection, Article 206 of the Penal Code was alleged to infringe Articles 11.2 and 20 of the Constitution, in conjunction with the provisions of Article 10.1 ECHR and of Article 19.1.2 of the International Covenant on Civil and Political Rights. The objecting party asked the Court, also having regard to the provisions of Article 30 of the Constitution, to find the provisions of Article 206 of the Penal Code unconstitutional, at least in part from the angle of criminalising journalists' value judgments.

In its examination of the objection alleging unconstitutionality, the Court found that under the provisions of Article 206 of the Penal Code the legislator defined acts of defamation as punishable offences against human dignity, an essential value set forth in Article 1.3 of the Constitution. The impugned statute prescribes criminal sanctions for words, deeds and any other means whereby a person's honour or reputation is damaged, or for any statement or allegation in public of specific facts which, if true, would expose the person concerned to a criminal, administrative or disciplinary penalty or to public opprobrium, but not for value judgments.

The Court held that Article 206 of the Penal Code concerned punishment not for value judgments but for specific material facts about or ascribed to a person.

The Constitutional Court also found that not even the allegation of a violation of Article 10.1 ECHR was founded, because Article 10.2 ECHR requires that a measure restricting freedom be prescribed by law and necessary in a democratic society. In the cases relied

on by the objecting party, *Dalban v. Romania*, and *Constantinescu v. Romania*, the European Court of Human Rights, having regard to the above criteria, held that the provisions of Article 206 of the Romanian Penal Code were not such as to infringe the provisions of Article 10 of the Convention.

The Court thus concluded that the provisions of Article 206 of the Penal Code concerning libel were not contrary to Article 30 of the Constitution (freedom of expression) or to the provisions of international human rights instruments.

Nor did the Court accept the argument that Articles 19.1 and 19.2 of the International Covenant on Civil and Political Rights had not been observed, considering that Article 19.3 thereof expressly prescribes the limits to freedom of expression.

#### Cross-references:

European Court of Human Rights:

- *Dalban v. Romania*, no. 28114/95, 28.09.1999, *Reports of Judgments and Decisions* 1999-VI;
- *Constantinescu v. Romania*, no. 28871/95, 27.06.2000, *Reports of Judgments and Decisions* 2000-VIII.

#### Languages:

Romanian.



**Identification:** ROM-2002-3-007

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 05.11.2002 / **e)** 293/2002 / **f)** Decision on the challenge to the constitutionality of the provisions of Article 28.3.1 of Law no. 92/1992 on the organisation of the judiciary, with subsequent amendments and additions / **g)** *Monitorul Oficial al României* (Official Gazette), 04.12.2002, 876 / **h)** CODICES (French).

#### Keywords of the systematic thesaurus:

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.

#### Keywords of the alphabetical index:

Public prosecutor, power / Public prosecutor's Office, organisation / Hierarchical subordination.

#### Headnotes:

The Principal State Prosecutor's power to discharge any of the responsibilities of his or her subordinate public prosecutors does not constitute a substitution of the latter's powers, but rather the implementation of the principle of hierarchical subordination of public prosecutors enshrined in Article 131.1 of the Constitution as the principle of "hierarchical control". The limits and conditions of exercise of this principle are stipulated by separate statute.

#### Summary:

Galatzi Trial Court referred a question to the Constitutional Court for a preliminary ruling on the constitutionality of the provisions of Article 28.3.1 of Law no. 92/1992 on the organisation of the judiciary, with subsequent amendments.

The ground for the reference regarding constitutionality is that Article 28.3.1 of Law no. 92/1992 on the organisation of the judiciary is incompatible with Article 131.1 of the Constitution because it is inconceivable for the hierarchically superior public prosecutor to be allowed to supervise an official and at the same time assume the right to perform the work incumbent upon the person whom he or she is supervising. The Court considers that the Constitutional principles regulating the activity of public prosecutors should include the principle of hierarchical subordination, which typified the organisation and operation of the old State Counsel's Office that was abolished simultaneously with the adoption and entry into force of the Constitution. When examining the issue of the constitutionality of the provision in question, the Court noted that the legal provisions complained of, which allow the hierarchically superior public prosecutor to discharge any of the duties of his or her subordinate prosecutors, add nothing to Article 131.1 of the Constitution. Article 131 is in Section 2 – The Public Prosecutor's Office, Chapter VI – The Judiciary, Title III – The Public Authorities, and sets forth the three principles governing the activities of public prosecutors, viz the principle of legality, the principle of impartiality and the principle of hierarchical control.

The principle of hierarchical subordination refers to relations among law officers operating in the Public Prosecutor's Office, requiring that such officials submit to their superiors, i.e. to draw up, or refrain from drawing up, specified documents or decisions on their orders.

In the Constitution, the principle of hierarchical subordination was referred to as "hierarchical control" in order to harmonise with the other two principles set out in Article 131.1, the principle of legality and the principle of impartiality. Article 28 of Law no. 92/1992 establishes the substance and limits of this principle: the hierarchically superior prosecutor may discharge any of the duties of his or her subordinate prosecutors and suspend or invalidate any decisions or measures they may have adopted.

The legislator has introduced a series of restrictions to the principle of hierarchical control: hierarchically superior prosecutors may suspend or invalidate subordinate prosecutors' decisions or measures only where the latter violate the law. Only measures taken in accordance with law are binding upon subordinate prosecutors, and any prosecutor is free to submit to courts any conclusions which he/she considers legally justified, together with the evidence adduced in individual cases. The hierarchically superior prosecutor may not oblige subordinate prosecutors to draw up documents or adopt measures contrary to their convictions, based on analysis of the cases under consideration and the applicable legal standards, by virtue of the prosecutor's status enshrined in the Constitution.

Hierarchical control of the prosecutors' work necessitates allowing the hierarchically superior prosecutor to draw up documents and conduct other prosecution activities in person. The superior prosecutor is responsible for supervising the activity of his or her subordinate prosecutors. The Court noted that in its case-law on the concept of the judiciary, the European Court of Human Rights has ruled that where a member of the judiciary is empowered by law to exercise judicial functions, subordination to other members of the judiciary cannot be excluded.

#### *Languages:*

French.



*Identification:* ROM-2003-1-001

- a) Romania / b) Constitutional Court / c) / d) 27.02.2003 / e) 86/2003 / f) Decision on the application challenging the constitutionality of the provisions of Section 8 of Law no. 543/2002 on remission of certain penalties and lifting of certain measures and sanctions / g) *Monitorul Oficial al României* (Official Gazette), 207/31.03.2003 / h) CODICES (French).

#### *Keywords of the systematic thesaurus:*

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

#### *Keywords of the alphabetical index:*

Pardon, collective, application criteria / Amnesty, criteria.

#### *Headnotes:*

Pardon, as a collective measure of clemency, granted by an organic law, must be applicable to all persons who, being in similar positions, may obtain release from penalty.

The laying down by the law on pardons of certain random requirements governing the use of clemency which are extraneous to the conduct of the sentenced person, viz. the existence of a final judicial ruling delivered up to the date of publication of the law in Romania's Official Gazette (*Monitorul Oficial*), Part I, is contrary to the principle of equality before the law safeguarded by Article 16.1 of the Constitution.

#### *Summary:*

The Constitutional Court had before it a reference on a preliminary objection, on grounds of unconstitutionality as to the provisions of Section 8 of law no. 543/2002 on remission of certain penalties and lifting of certain measures and sanctions.

In the statement of reasons for the preliminary objection, it was alleged that the impugned provisions, which introduced "the principle of discrimination between citizens according to the procedural stage they are at", impeded free access to justice and the right to a defence, and infringed the principle that nobody must be placed at a disadvantage by appealing and the principle of non-retroactivity of the law, excepting the most favourable criminal law.

The persons raising the preliminary objection considered that the application of the law on pardons was also in patent contradiction with the case-law of the

European Court of Human Rights regarding the interpretation of the principle of equality before the law.

On examining the objection, the Court held that it was founded, reasoning as follows.

A pardon is a measure of clemency consisting in the sentenced person's release from all or part of the execution of the penalty imposed, or in commuting the sentence to a lighter one. From the standpoint of the persons to whom it is applied, it is individual, in which case it is granted by the President of Romania in accordance with Article 94.d of the Constitution, or collective, in which case it is conferred by Parliament through the enactment of an organic law in accordance with the provisions of Article 72.3.g of the Constitution.

Another essential difference between the two forms of pardon is the reason for granting it. With individual pardon, the President of Romania usually has humanitarian motives in view, whereas the dominant considerations in collective pardon are to implement a social and criminal justice policy vis-à-vis a specific category of persons convicted of offences that do not present a high social risk where the culprits have given serious indications of reform, and to reduce the number of prisoners in custody.

Collective pardon, through a legislative enactment of general application, lays the groundwork for rectifying the social behaviour of a whole category of convicted persons. The law granting pardon is impersonal, unlike the decree of the President of Romania, applying to one or more designated persons. The ambit of the law is determined by the fixing of certain objective criteria, which falls within the exclusive powers of the legislature, subject to the provisions of the Constitution and the generally valid principles of law.

Law no. 543/2002 confers the benefit of pardon on persons sentenced to up to 5 years' imprisonment, including persons whose penalty was a criminal fine, and minors held in reformatory.

The criterion on which collective pardon is granted, set out in Section 8, viz. the existence of a final judicial ruling delivered up to the date of publication of the law in Romania's Official Gazette (*Monitorul Oficial*), Part I, is determined by a series of factors that cannot be predicted or connected with the sentenced person as an individual.

The Court found that laying down such a criterion was inconsistent with the principle of equality before the law set out in Article 16.1 of the Constitution, which, in equal circumstances, forbids any difference in the legal treatment of persons. As a law, the act whereby pardon was granted must apply to all persons who, being in

similar circumstances, could qualify for remission of sentence.

The circumstances in which certain categories of persons were placed must be differentiated in essence if difference in legal treatment were to be justified, and any such difference must be founded on an objective, rational criterion. This solution was also consistent with the case-law of the European Court of Human Rights (*Marckx v. Belgium*, 1979).

Regarding the effect of the act of collective clemency, all offenders having committed the same class of offences prior to the date of the law's entry into force were held to be in exactly the same position, as the date of their conviction was of no significance for prescribing differentiated legal treatment, as that would depend on factors unrelated to the offenders' procedural conduct.

The objective criterion on which the benefit of collective pardon was granted could be determined only by the fact that the punishable offence was committed in the period up to the date when the act governing pardon took effect, or else up to a different and earlier date, legally established, such as, for example, the date on which the bill for the law was proposed. This conclusion was also dictated by the principle of the non-retroactivity of criminal law, governed by Article 10 of the Criminal Code.

Section 8 of law no. 543/2002 did not comply with this principle, however.

In the earlier legislation in this field, the legislature's consistent intent had been that the recipients of the pardon were to be persons having committed criminal acts prior to the publication of the law, irrespective of when the judgment convicting them became final.

The Court found that the fact of referring to the date when this judicial decision became final, this being the date prescribed in the impugned statute, was conducive to discrimination between persons who, though in an objectively identical position, received different legal treatment, which was contrary to the provisions of Article 16.1 of the Constitution.

#### Cross-references:

- Decision no. 86 of 27.02.2003 was delivered by a majority of votes. By government emergency Order no. 18 of 02.04.2003, published in the Official Gazette (*Monitorul Oficial*) of Romania, Part I, no. 224 of 03.04.2003, Section 8 of Law no. 543/2002 was amended in conformity with the findings made by the Constitutional Court in Decision no. 86/2003.

European Court of Human Rights:

- *Marckx v. Belgium*, 13.06.1979, Vol. 31, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002].

*Languages:*

French.



*Identification:* ROM-2003-3-004

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 16.09.2003 / **e)** 342/2003 / **f)** Decision on the plea of unconstitutionality in respect of Article 84.2 of Government Emergency Order no. 194/2002 on the rules governing foreigners in Romania / **g)** *Monitorul Oficial al României* (Official Gazette), 755/28.10.2003 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.18 General Principles – **General interest**.  
 3.22 General Principles – **Prohibition of arbitrariness**.  
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.  
 5.2 Fundamental Rights – **Equality**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.  
 5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges**.  
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.

*Keywords of the alphabetical index:*

Foreigner, undesirable / National security, protection / Information, secret, prohibition on communication to the person concerned.

*Headnotes:*

The difference between the situation of foreigners declared undesirable for the purpose of protecting national security and of safeguarding classified information and the situation of other foreigners is justified by the existence of certain distinct rules which does not impinge on the principle of equal rights. A

measure taken by the State Counsel which has the consequence that a foreigner is declared undesirable ensures free access to the courts, as it may be challenged before a judicial body.

*Summary:*

A question was referred to the Constitutional Court on the plea of unconstitutionality in respect of Article 84.2 of Government Emergency Order no. 194/2002 on the rules governing foreigners in Romania. The plea was raised by A.S.R.A.A. in proceedings against the State Counsel attached to the Bucharest Court of Appeal, the Directorate-General for Computerised Personal Evidence and the Romanian Information Service.

Article 84.2 of Government Emergency Order no. 194/2002 provides: The data and information constituting the grounds on which a decision declaring [a foreigner] undesirable for reasons of national security may be communicated only on the conditions established and to the persons expressly defined in normative acts governing the regime of activities relating to national security and the protection of classified information. Such data and information shall not be brought either directly or indirectly to the knowledge of the foreigner declared undesirable.

The party raising the plea maintained that when a court adjudicated on his appeal against the order of the State Counsel declaring him undesirable, that court was unable to review the grounds on which the order was made, as the relevant information was secret. Nor, according to the law, could those grounds be revealed in the text of the order whereby the competent State Counsel took the administrative measure declaring the foreigner undesirable. There had thus been a violation of Articles 16.1, 20, 21 and 123.2 of the Constitution and also of Article 6.1 ECHR and Articles 9 and 10 of the Universal Declaration of Human Rights, which provide that no one may be arbitrarily arrested or expelled.

As regards the unconstitutionality of Article 84.2 in relation to Article 16.1 of the Constitution, the Constitutional Court has consistently held that the principle of equality before the law presupposes equal treatment in situations which, according to the aim pursued, are not different. Generally, a breach of the principle of equality and of non-discrimination is established where differentiated treatment is applied to equal cases without objective and reasonable grounds or where the means employed are disproportionate to the aim pursued by the unequal treatment.

The European Court of Human Rights reached a similar Decision in *Marckx v. Belgium*, where it applied Article 14 ECHR. In the present case, the real difference between the situation of foreigners declared

undesirable and other foreigners justified the existence of certain distinct rules.

At the same time, the Court held that the prohibition imposed by the legislature on providing foreigners declared undesirable with the data and information on the basis of which such a decision was taken was consistent with Article 31.3 of the Constitution.

The Court found that Article 84.2 of the Order did not infringe the principle of free access to the courts enshrined in Article 21 of the Constitution, because in accordance with Article 85.1 of the Order, a foreigner declared undesirable is able to seek a judicial review of the measure declaring him undesirable taken by the State Counsel.

The judgment is consistent with Article 6.1 ECHR, Articles 9 and 10 of the Universal Declaration of Human Rights and also with the case-law of the European Court of Human Rights, for example the Judgment of 5 October 2000 in *Maaouia v. France*.

#### Cross-references:

#### European Court of Human Rights:

- *Marckx v. Belgium*, 13.06.1979, Vol. 31, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002];
- *Maaouia v. France*, no. 39652/98, 05.10.2000, *Reports of Judgments and Decisions* 2000-X.

#### Languages:

French.



**Identification:** ROM-2004-1-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 09.03.2004 / **e)** 100/2004 / **f)** Decision on a plea of unconstitutionality in respect of the provisions of Article 362.1.c of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 261/24.03.2004 / **h)** CODICES (French).

#### Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.

5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction**.

#### Keywords of the alphabetical index:

Proceedings, criminal, injured party, right of appeal.

#### Headnotes:

In accordance with Article 21 of the Constitution (revised), free access to justice covers the bringing of appeals because protection of the rights, freedoms and legitimate interests of individuals also presupposes the possibility of taking action against judicial decisions considered to be unlawful or unfounded. Limitation of the right of certain parties in criminal proceedings to exercise the remedies provided for by law constitutes a restriction on free access to justice, which is unconstitutional because the restrictive conditions laid down in Article 53.1 of the Constitution (revised) are not met.

#### Summary:

An application was made to the Constitutional Court challenging the constitutionality of Article 362.1.c of the Code of Criminal Procedure, which provides that the injured party may lodge an appeal in cases where criminal proceedings were initiated following a complaint, but only with respect to the criminal-law aspects.

In the application, a legislative provision is challenged: it provides that in criminal cases where the criminal action was initiated *proprio motu*, injured parties taking part in the proceedings do not have the right to appeal against a judgment which they consider unlawful or unfounded, although, in their capacity as victims of the offence, they have a profound interest in the settlement of the case. Their access to justice is restricted and their right to a fair trial is infringed. This therefore constitutes a violation of Articles 16.1, 21.3, 24, 53.1 and 124 of the Constitution (revised).

In examining the plea of unconstitutionality, the Court found that Article 362.1.c of the Code of Criminal Procedure violates the revised Constitution, specifically Article 16.1 thereof, because it places the injured party, as victim of the offence, in a position of inferiority in relation to the accused, the perpetrator of the offence, who has the right to make unrestricted use of the available remedies. It is unacceptable that the accused

should be able to bring an appeal, whereas the injured party in the proceedings does not have that right.

The fact of making the initiation of criminal proceedings conditional on the existence of a prior complaint by the injured party represents an exception to the general principle of *proprio motu* action in criminal proceedings and applies only to less serious and less dangerous offences. In the case of the most serious offences, the injured party's interest in proper application of the punitive measures provided for by law is more marked.

The direct personal exercise by the injured party of the right to challenge before a higher court a judicial decision which he or she considers erroneous supplements, in the interests of the proper application of the law, the role and functions of the public prosecutor, who is the person entitled to initiate criminal proceedings in cases concerning offences which it is in the public interest to punish.

Thanks to judicial review, it is possible to make good any errors made in the decisions of lower courts. It is possible that the public prosecutor might mistakenly fail to challenge an unlawful or unfounded decision in an appeal and, because the injured party does not have the right to bring an appeal, the judicial errors contained in those decisions cannot be removed.

Regarding the application of the principle of equality, the case-law of the Constitutional Court and the European Court of Human Rights stipulates that any difference of treatment by the state between persons in similar situations must have an objective and reasonable justification.

Those requirements are not met where an injured party's right to exercise the ordinary remedies against criminal judgments is limited to cases where the criminal prosecution was initiated following a complaint.

Article 24.1 of the Constitution (revised), guaranteeing the right to defence, also covers the right to defence through use of the legal remedies against certain findings in fact or in law or certain solutions adopted by a trial court which one of the parties to the criminal proceedings considers erroneous. In a situation where injured parties are prevented from exercising ordinary remedies, they cannot assert and uphold their rights before the appellate court or at the appellate level.

The Court infers from a combined reading of Articles 129 and 126.2 of the Constitution (revised) that the legislature cannot abolish the right of an interested party to exercise remedies and can only restrict the exercise of that right under the restrictive conditions laid down in Article 53 of the Constitution (revised).

Lastly, the Court holds that the impugned legal text is contrary to Article 21.3 of the Constitution (revised) and to Article 6.1 ECHR on the right to a fair trial and the right of a person to appeal to a higher court.

In the light of the foregoing, the Constitutional Court departs from previous case-law and finds that, in view of the unconstitutionality of the clause "in cases where criminal proceedings were initiated following a complaint, but only with respect to the criminal-law aspects" in Article 362.1.c of the Code of Criminal Procedure, it follows that an injured party may lodge an ordinary appeal whatever the means by which the criminal proceedings were initiated (*proprio motu* or following a complaint).

#### *Supplementary information:*

According to Article 147.1 of the Constitution (revised), "the provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the parliament or the government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*".

Decision no. 100 issued by the Constitutional Court on 9 March 2004 was published in the Romanian Official Gazette (*Monitorul Oficial*), Part I, no. 261/24.03.2004.

#### *Languages:*

Romanian.



*Identification:* ROM-2004-3-005

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 14.10.2004 / **e)** 417/2004 / **f)** Decision on an application challenging the constitutionality of Articles 504.3 and 506.2 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 11.11.2004, 1044 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

4.5.2 Institutions – Legislative bodies – **Powers**.

#### 4.7.2 Institutions – Judicial bodies – **Procedure**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

#### *Keywords of the alphabetical index:*

Compensation, claim, time-limit / Detention, unjustified, compensation.

#### *Headnotes:*

The circumstances in which wrongfully convicted persons or persons whose liberty has been unlawfully restricted are entitled to compensation from the State for the damage incurred are laid down by Article 504.3 of the Code of Criminal Procedure. Anyone not in the circumstances set out in Article 504.3 of the Code of Criminal Procedure may make use of their right of free access to justice through other legal remedies, as prescribed by law.

The limitation period of 18 months set by Article 506.2 of the Code of Criminal Procedure is a reasonable length of time, offering any injured person the best possible conditions for taking legal action to obtain compensation.

#### *Summary:*

An application was made to the Constitutional Court challenging the constitutionality of Articles 504.3 and 506.2 of the Code of Criminal Procedure. It was alleged in the application that the provisions of Article 504 relating to the circumstances entitling wrongfully convicted persons or persons whose liberty had been unlawfully restricted to claim compensation for pecuniary or non-pecuniary damage were unconstitutional in so far as they infringed Articles 20.1, 21.1 and 53 of the Constitution and Article 6 ECHR. The applicant also submitted that the provision of Article 506.2 of the Code of Criminal Procedure which limited the time within which legal action for reparation could be brought was unconstitutional under the same articles of the Constitution and international instruments.

On examining the application, the Court ruled that it was ill-founded.

It decided that Article 504.3, which described the circumstances in which cases give rise to compensation for pecuniary or non-pecuniary damage in the event of wrongful conviction or illegal deprivation or restriction of liberty, put into practice the principle provided for in Article 52.3 of the Constitution, under

which “The State shall bear liability in tort for any damage caused by miscarriages of justice. Liability of the State shall be determined according to the law [...]. Consequently, the entitlement to compensation from the State for damage caused by miscarriages of justice was implemented in accordance with the law.

Not only could Article 504.3 not be said to restrict free access to justice, but it actually established the circumstances in which this right could be exercised, in full compliance with Article 126.2 of the Constitution.

The specific rules concerning the circumstances in which individual liberties had been violated were not such as to limit the free access to justice of persons who were not in any of the circumstances described in Article 504.3, as it was possible for them to exercise their right to justice through other legal remedies. Any person with an interest could refer their case to the courts in accordance with the conditions and procedures prescribed by law.

Under the Constitutional Court’s case-law, free access to justice implied that any person could take their case to a court if they considered that their rights, freedoms or legitimate interests had been violated, but did not mean that this access was always unconditional. Under Article 126.2 of the Constitution, the power to lay down the rules on the conduct of court proceedings lay with the legislature. This view had also been reflected in the case-law of the European Court of Human Rights in cases such as *Ashingdane v. the United Kingdom* of 1985, Series A, no. 93.

The Constitutional Court noted that Article 506.2 of the Code of Criminal Procedure was in conformity with the Constitution. No provision was made in the Constitution or in the international covenants or treaties to which Romania was a party for no limitation period on the right of persons unlawfully imprisoned to take legal action to obtain compensation, but neither did any of these instruments set a specific time-limit for the exercise of the right. Through the expression “determined according to the law”, the second sentence of Article 52.3 of the Constitution entrusted the legislature with the task of establishing the procedural framework for exercising the right to compensation. The same idea could be found in Article 3 Protocol 7 ECHR.

The 18-month time-limit set by Article 506.2 provided the best possible conditions for the injured person to take legal action to obtain compensation. The determination of claims for compensation and the rules concerning the referral of the case to a trial court did not infringe Article 53 of the Constitution, which could be applied only if there had been a restriction on the fundamental rights and freedoms of citizens, and no such restriction had been found in the instant case.

**Languages:**

Romanian.



**Identification:** ROM-2007-2-002

**a) Romania / b) Constitutional Court / c) / d) 20.06.2007 / e) 610/2007 / f)** Decision on a preliminary objection of unconstitutionality concerning Section III.2 and III.3 of Law no. 356/2006 amending and supplementing the Code of Criminal Procedure and amending other laws / **g) Monitorul Oficial al României** (Official Gazette), 474/16.07.2007 / **h) CODICES** (French).

**Keywords of the systematic thesaurus:**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

4.7.11 Institutions – Judicial bodies – **Military courts.**

5.2 Fundamental Rights – **Equality.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

**Keywords of the alphabetical index:**

Court martial, jurisdiction / Court martial, civilian, trial.

**Headnotes:**

Constitutional standards and principles do not rule out the existence and functioning of military prosecutor's offices.

The provisions governing the composition of courts martial, which are to be made up of independent judges solely obedient to the law, and the rules of procedure followed by such courts entail no infringement of the right to a fair trial.

For reasons of good administration of justice and in view of the tendency to limit the jurisdiction of courts martial solely to offences committed by military personnel, a tendency similarly shown by the European Court of Human Rights, it is justifiable to establish the civil courts' jurisdiction to try cases in which persons without military status are accused of offences perpetrated with military accomplices.

Giving the military prosecutor's offices and the courts martial jurisdiction over cases pending at the time of the law's entry into force constitutes discrimination under Article 16.1 of the Constitution by reason of the civilian status of one of the defendants.

**Summary:**

I. In a preliminary Decision of 7 December 2006 the Military Appeal Court referred to the Constitutional Court an objection of unconstitutionality concerning Section III.2 and III.3 of Law no. 356/2006 amending and supplementing the Code of Criminal Procedure and amending other laws. It argued that the impugned provisions – which continued to allow courts martial to try offences perpetrated by civilians – contravened Articles 15.2, 16.1, 21.3, 124.2, 124.3 and 126.5 of the Constitution and were incompatible with Article 6 ECHR.

II. Having examined these arguments of unconstitutionality, the Court held that, in accordance with Article 35.1 and 35.2 of the Code of Criminal Procedure, as amended by Section I.17 of Law no. 356/2006, if in joined or related proceedings more than one court by law had jurisdiction in respect of the various defendants or the various charges and, among those courts, one was civil and the other military, jurisdiction should be vested in the civil court. The law previously provided that, in the same situation of joined or related proceedings, jurisdiction should be vested in the military court, as a result of which persons without military status were tried by courts martial. In the light of Article 126.2 of the Constitution, concerning the jurisdiction of the courts and trial procedure, the Court found that both the current and the earlier legislation were consistent with the Constitution and, accordingly, the existence and functioning of the military prosecutor's offices and the courts martial entailed no breach of constitutional standards or principles.

The Court found that the trial of civilians by courts martial for offences perpetrated with military accomplices did not infringe the civilians' rights to an impartial, independent court and to a fair hearing. By reason of the status of the judges composing them and the procedure they followed courts martial were impartial, and military judges were independent and solely obeyed the law.

Section 301 of Law no. 303/2004 provided that the appointment, promotion and career development of military judges and prosecutors would be governed by the same conditions as were applicable to the members of other courts and prosecutor's offices.

The only additional requirement was that they should have the status of active military officials within the Ministry of Defence. This did not mean, however, that

they performed their duties under instructions or orders. Military judges and prosecutors accordingly had all the rights and obligations conferred by law on judges and prosecutors in general.

The change in the law was made so as to guarantee good administration of justice and follow the trend, shown by other democratic judicial systems, to limit the jurisdiction of military courts solely to criminal offences committed by military personnel. The case-law of the European Court of Human Rights (*Maszni v. Romania*, 2006) was also in favour of giving civil prosecutor's offices and the civil courts jurisdiction to deal with cases which involved military personnel and civilians to the same degree.

In addition, the Court found that, through Section III.2 and III.3 of Law no. 356/2006, Parliament had unjustifiably maintained the jurisdiction of the courts martial and the military prosecutor's offices to deal with cases pending at the time of the law's entry into force. This meant that the military bodies retained their jurisdiction over cases pending which involved civilians.

This derogation was clearly discriminatory in the light of the criterion applied by Parliament when amending Article 35.1 and 35.2 of the Code of Criminal Procedure, namely the lack of military status of one of the defendants. On that basis the Court found that the provisions breached Article 16.1 of the Constitution in so far as they instituted different rules governing jurisdiction to prosecute and try individuals with the same status and in the same judicial situation, that of being charged with a criminal offence.

The Court consequently allowed the objection and held Section III.2 and III.3 of Law no. 356/2006 to be unconstitutional.

#### *Languages:*

Romanian.



*Identification:* ROM-2007-3-003

a) Romania / b) Constitutional Court / c) / d) 09.10.2007 / e) 871/2007 / f) Decision on the constitutionality or otherwise of Emergency Government Ordinance no. 110/2005, regarding the sale of premises belonging to the State and to

administrative territorial units which were used as consulting rooms; or for the practice of medicine, approved with amendments and supplements by Law no. 236/2006 / g) *Monitorul Oficial al României* (Official Gazette), 701/17.10.2007 / h) CODICES (French).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

#### *Keywords of the alphabetical index:*

Asset, public, sale, forced / Health, protection, obligation.

#### *Headnotes:*

The case arose from an Emergency Government Ordinance, ordering the sale of assets belonging to administrative territorial entities. A maximum price was set for these assets, which included consulting rooms, and premises where medical practice took place. This represented a forced transfer of ownership, in contravention of the provisions on expropriation, enshrined within the Romanian Constitution and the European Convention on Human Rights. It also contravened the right to health protection and flouted the State's obligation to safeguard public health and hygiene, set out in the Constitution.

#### *Summary:*

I. On 23 March 2007, the Cluj District Court (Division of Contentious Administrative and Fiscal Matters, Employment Disputes and Social Security) issued an Interlocutory Order, making a referral to the Constitutional Court. The District Court challenged the constitutionality of Emergency Government Ordinance no. 110/2005. This governed the sale of assets owned by the State or by administrative-territorial entities, which were used as consulting rooms or for the practice of medicine. The District Court also challenged the constitutionality of certain provisions of Law no. 236/2006, on the approval of the Government Emergency Ordinance no. 110/2005.

In support of its arguments about the lack of constitutionality, the District Court pointed out that the

legislation under scrutiny covered assets within the public domain of administrative-territorial entities, rather than the private domain. The Government of Romania could not make decisions about assets within the private ownership of another public institution. The District Court also relied upon constitutional provisions under Article 136.2 and 136.4 of the Constitution on the guarantee and protection of private property, and the inalienability of public property.

II. The Constitutional Court noted that the ordinance placed local authorities under an obligation to list in full the premises used as consulting rooms and those used for the practice of medicine; and to sell them. If administrative territorial units cannot dispose of their assets freely, and cannot decide whether to sell them, this impinges upon their ownership rights. The Court therefore ruled that the ordinance contravened the provisions of Article 44.1 (first sentence) on the guarantee of the right to private property.

The Court also pointed out that the Ordinance brought about a forced transfer of ownership, in breach of the provisions on expropriation within Article 44.3 of the Constitution and Article 1 Protocol 1 ECHR. There is a clear line of authority from the European Court of Human Rights to the effect that deprivation of ownership must take place in accordance with national legislation, and it must be in the public interest. With regard to compensation for the owner for the loss of his right, the European Court of Human Rights has held that, in absence of reparatory compensation, Article 1 Protocol 1 ECHR would only assure an illusory and ineffective protection of the ownership right (see "*James and others v. the United Kingdom*", 1986). Thus, where there is deprivation, the State must provide compensation of an amount reasonably related to the value of the asset. If this does not happen, the measure represents a disproportionate interference with the right to private property and a breach of the balance between the requirement to safeguard ownership rights and exigencies of a general nature. The Court also noted the discrepancy between the prices set out in the Ordinance and the market value of the assets. As the prices in the Ordinance were unreasonable, it was out of line with the requirements imposed by constitutional and international norms.

The Court found the ordinance to be in breach of Article 33 of the Constitution, which places the State under an obligation to take measures to safeguard public health and hygiene. Implicit in this obligation is the guarantee of sufficient material resources for the medical service. As the ordinance would result in the sale of premises used as consulting rooms, and for the practice of medicine, the premises would probably be used for a different purpose. As a result, the State

would no longer have the material resources to fulfil its constitutional obligation. It would be unable to guarantee citizens' rights to health protection.

The Court upheld, by majority vote, the District Court's contention that Emergency Government Ordinance no. 110/2005, approved with amendments and supplements by Law no. 236/2006, was unconstitutional.

#### *Cross-references:*

The same decision was made, by majority vote, as to the unconstitutionality of the provisions of Articles 1, 4.1, 5.1 and 8 of the Emergency Government Ordinance no. 110/2005, through Decision no. 870 of 9 October 2007, published in the Official Gazette of Romania, Part I, no. 701/17.10.2007. This decision was pronounced in previous proceedings, where only the provisions of Articles 1, 4.1, 5.1 and 8 of the Emergency Government Ordinance no. 110/2005 were challenged for unconstitutionality.

#### *Languages:*

Romanian.



*Identification:* ROM-2010-1-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 08.10.2009 / **e)** 1258/2009 / **f)** Decision on the issue of constitutionality of the provisions of Law no. 298/2008 on the retention of data generated or processed by the providers of publicly available electronic communications services or public communications networks, which also amends Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector, published in the Official Gazette of Romania, Part I, no. 780 of 21 November 2008 / **g)** *Monitorul Oficial al României* (Official Gazette), 798/23.11.2009 / **h)**.

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.12 General Principles – **Clarity and precision of legal provisions.**

3.16 General Principles – **Proportionality.**

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications.**

*Keywords of the alphabetical index:*

Interception, invasion of privacy, personal data, secrecy of correspondence, storage.

*Headnotes:*

Law no. 298/2008 on personal data processing establishes as a rule this data's continuous retention for a period of 6 months from the time of their interception.

*Summary:*

The author of the objection claimed that the impugned law breaches the right to privacy and to secrecy of correspondence, removing the presumption of innocence, denigrating human dignity and leading to abuse in terms of use of the information by authorised bodies. In the author's opinion, the impugned law infringes Article 25 of the Constitution on free movement, Article 26 of the Constitution on personal, family and private life, Article 28 of the Constitution on secrecy of correspondence, and of Article 30 of the Constitution on freedom of expression.

Analysing the objection, the Constitutional Court held the Law to be unconstitutional, as a whole, for the following reasons:

1. The right to respect for private life necessarily involves also the secrecy of correspondence, whether this component is expressly stated within the same text of Article 8 ECHR, or it is regulated separately, as in Article 28 of the Constitution.

2. Law no. 298/2008 transposes into the national legislation Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. The legal status of such a Community instrument makes it compulsory for EU Member States as concerns the legal solution covered, not also in terms of practical arrangements leading to this result, the States enjoy a wide margin of appreciation to adapt them to specific legislation and national realities.

3. Neither the European Convention on Human Rights, nor the Constitution preclude the adoption of legislation allowing interference of state authorities in the exercise of those rights, but state intervention must comply with strict rules, expressly mentioned in Article 8 ECHR and in Article 53 of the Constitution, respectively.

4. In accordance with the principles of limitation expressed in the case-law of the European Court of Human Rights, for example in the case of *Klass and others v. Germany* 1978, or the case of *Dumitru Popescu v. Romania* 2007, a normative act regulating measures likely to cause interference in the exercise of the right to privacy and family life, correspondence and freedom of expression must include appropriate and adequate safeguards to protect the person from any arbitrary intervention by state authorities.

5. The Constitutional Court acknowledges the power of the legislator to limit the exercise of certain fundamental rights or freedoms, as well as the need to regulate certain aspects which would provide the bodies with specific powers in criminal prosecution with effective tools for the prevention and detection of terrorism, in particular, as well as of serious crimes. Romanian legislation regulates, in the Code of Criminal Procedure, the ways in which public authorities can interfere with the exercise of rights to personal life, correspondence and free expression with respect to all guarantees required by such interference.

6. The Constitutional Court holds that Law no. 298/2008 as drafted, is likely to affect, even indirectly, the exercise of the fundamental rights or freedoms, in this case the right to personal, private and family life, the right to secrecy of correspondence and the freedom of expression, in a manner that does not meet the requirements established by Article 53 of the Constitution.

7. The Constitutional Court considers that the absence of clear legal rules that would determine the exact scope of those data needed to identify the user – individuals or legal entities – leaves room for abuse in the work of retention, processing and use of data stored by the providers of publicly available electronic communications services or of public communications networks. The restriction on the exercise of the right to private life, secrecy of correspondence and freedom of expression, must also occur in a clear, predictable and unequivocal manner as to remove, if possible, the occurrence of arbitrariness or abuse of the authorities in this area.

8. The Constitutional Court notes the ambiguous wording, not compliant with the rules of legislative technique, because the legislator does not define what is meant by "threats to national security" so that in the absence of precise criteria of delimitation, various actions, information or normal activities, of routine, of the

natural and legal persons can be considered, arbitrarily and abusively, as having the nature of such threats.

9. The use of the expression "can have" leads to the idea that the data covered by Law no. 298/2008 are not retained for the exclusive use thereof by the state bodies with specific powers to protect national security and public order, but also by other persons or entities, since they "can have" not just "have" access to such data, according to the Law.

10. The legal obligation that requires the continuous retention of personal data makes the exception to the principle of effective protection of the right to personal life and freedom of expression, an absolute rule. The regulation of a positive obligation that concerns a continual restriction on the exercise of the right to private life and on the secrecy of correspondence cancels the very essence of the right by removing the guarantees concerning its exercise.

11. In this case, the Court needs to also examine the compliance with the principle of proportionality. The Law requires continuous retention of data from the time of its entry into force, without considering the need to terminate the restriction once the cause that led to this measure disappeared. Interference with the free exercise of the right takes place continuously and independently of the occurrence of a certain justifying act, of a determinant cause and only with the purpose of prevention of crime or detection – after occurrence – of serious crime.

12. The Law under examination aims to identify not only the person who sends a message or information through any means of communication, but also the recipient of that information. This operation concerns all recipients of the law equally, whether or not they have committed criminal acts or whether or not they are under criminal investigation, which is likely to overturn the presumption of innocence and *a priori* transform all users of electronic communications services or of public communications networks in persons likely to commit crimes of terrorism or other serious crimes.

Restriction on the exercise of certain personal rights in consideration of collective rights and public interest, aimed at national security, public order or prevention of crime, was always a sensitive operation in terms of regulation, so as to maintain a fair balance between the interests and rights of the individual, on the one hand, and those of the society, on the other. It is not less true, as noted by the European Court of Human Rights in the case of *Klass and others v. Germany* 1978, that taking surveillance measures, without adequate and sufficient safeguards, can lead to "destruction of democracy on the ground of defending it".

For the reasons set forth herein, the Court held that the law is unconstitutional as a whole.

#### *Languages:*

Romanian.



*Identification:* ROM-2010-2-002

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 07.06.2010 / **e)** 820/2010 / **f)** Decision concerning the application for review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 / **g)** *Monitorul Oficial al României* (Official Gazette), 420/23.06.2010 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

3.12 General Principles – **Clarity and precision of legal provisions.**

3.16 General Principles – **Proportionality.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

#### *Keywords of the alphabetical index:*

Penalty, collective / Lustration, delay.

#### *Headnotes:*

The Law of Lustration regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 establishes a new basis for limiting access to public offices, consisting in affiliation to the structures of the communist regime. However, a law cannot introduce collective penalties, based on a presumption of guilt resulting from a mere affiliation to the regime. A law cannot be adopted in violation of the principle of non-retroactivity, and, moreover, the delay in passing this Law – 21 years after the fall of communism – is

relevant in determining the disproportionate nature of the restrictive measures.

#### *Summary:*

Acting in accordance with Article 146.a of the Constitution, within the context of *a priori* review, a group of 29 senators and 58 deputies made an application for the review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989.

The applicants alleged that the Lustration Law breached Article 37.1 of the Constitution in conjunction with Articles 16.3 and 40.3 of the Constitution, in that the Law provided for a new situation which would justify a restriction on the right of access to public offices – a situation not provided for by Article 53 of the Constitution. Even if it were possible to restrict the right of access to public offices on grounds of membership in certain bodies of the communist regime, the question would still arise of the proportionality and legal effectiveness of such measures in the light of their adoption more than 21 years after the fall of the communist regime. Thus, the Law violated the requirement of foreseeability of the rule of law by introducing a limitation on the right to stand for election on the basis of a general guilt founded on the mere criterion of membership in the structures of a system which, at the time of its existence, was consistent with the constitutional and statutory provisions applicable in the Romanian State. The applicants further submitted that the Lustration Law clearly created discrimination between Romanian citizens with respect to access to public functions, appointed or elected, on the ground of membership in the Communist Party between 6 March 1945 and 22 December 1989. The Lustration Law contravened Articles 11.2 and 20 of the Constitution on the supremacy of international legal instruments ratified by Romania in the field of human rights.

The main flaw of the Lustration Law was that it created a genuine collective sanction, based on a form of collective responsibility and general guilt based on political criteria. Thus, mere membership in a political structure or a body belonging to a political regime amounted to a presumption of guilt, regardless of how a person acted and behaved while holding a position. In that connection, the applicants invoked the conclusions by the Venice Commission in Opinion no. 524/2009 (CDL(2009)132) with respect to the Lustration Law of Albania stating the provisions of the Lustration Law on the termination of mandate violated the constitutional guarantees of their [the persons holding the offices in question] mandate, and it found “there are several elements which indicate that the Lustration Law could

interfere in a disproportionate manner with the right to stand for election, the right to work and the right of access to the public administration.”

Analysing the application to the Court alleging the unconstitutionality of the law as a whole, the Constitutional Court holds as follows:

In Romania, communism was condemned as doctrine, and the change of the regime was established by legal acts which rank as constitutional law, such as the Message to the People of the Council of the National Salvation Front (FSN), published in the Official Gazette, Part I, no. 1 of 22 December 1989, and the Legislative Decree on the establishment, organisation and functioning of the National Salvation Front and of regional councils of the National Salvation Front, published in the Official Gazette, Part I, no. 4 of 27 December 1989.

Every country faced with the problem of lustration has adopted a certain method of achieving lustration based on the aim pursued and the national specific situation. The Czech Republic adopted a radical model, Lithuania and the Baltic countries adopted an intermediate model, and Hungary, Poland and Bulgaria adopted a moderate model.

After an unsuccessful attempt – that of 1997 – the adoption of the Lustration Law in Romania has no legal effect – it is not up-to-date, necessary or useful; it is only of moral significance, given the long period of time which has elapsed since the fall of the communist totalitarian regime. Citing Article 53 of the Constitution, the initiators of the Law themselves state that the Lustration Law refers to the constitutional rule that the “the exercise of certain rights or freedoms may solely be restricted by law, and only if necessary, as the case may be: for the defence of [...] morals, [...], morals tainted by customs of communism.

With respect to high public positions in Romania, non-affiliation with the old communist structures is currently not a condition of employment; there is only an obligation for such persons to declare their affiliation or non-affiliation with the former political police.

The Court notes the imprecise, confusing and inadequate wording of the preamble to the Law, which leads to the conclusion that the restrictions and prohibitions in this Law are aimed at the “restriction on the exercise of the right to be appointed or elected to public offices of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989”.

The Court also notes that the provisions of the Lustration Law, not being sufficiently clear and precise, have no regulatory rigour.

The Court observes that according to the impugned law, liability and penalties are based on the fact that a person held an office in the structures and repressive apparatus of the former communist totalitarian regime. Liability, regardless of its nature, is primarily an individual responsibility, and it arises only on the basis of acts and actions carried out by a person and not on presumptions.

The Lustration Law is excessive in relation to the legitimate aim pursued, since it does not allow for the individualisation of its measures. The Law establishes a presumption of guilt and a genuine collective punishment, based on a form of collective responsibility and a generic, comprehensive guilt, established on political criteria; this contravenes the principles of the rule of law, the legal order and the presumption of innocence laid down by Article 23.11 of the Constitution. Even if the impugned law allows recourse to justice for justifying the prohibition of the right to stand for election and be elected to certain offices, it does not provide for an adequate mechanism for determining the actual activities carried out against fundamental rights and freedoms.

No one shall be subjected to lustration for his or her personal opinions and own beliefs, or for the mere reason of association with any organisation which, at the time of association or carrying out of the activity, was legal and did not commit any serious human rights violations. Lustration is permitted only with respect to those persons who actually took part, together with State bodies, in serious violations of human rights and freedoms.

Article 2 of the law under constitutional review provides for one of the major collective penalties listed concerning the right to stand for election and the right to be elected to high public offices for persons who belonged to certain political and ideological structures. The statutory provisions of that article are contrary to the constitutional provisions of Articles 37 and 38, which enshrine the right to be elected, with the prohibitions being expressly and exhaustively listed. It is clear that the provisions of Article 2 of the Lustration Law exceed the constitutional framework, creating a new ban on the right of access to public office, which fails to comply with Article 53 of the Constitution relating to restrictions on the exercise of certain rights or freedoms.

The Court considers that the Lustration Law infringes the non-retroactivity principle enshrined in Article 15.2 of the Constitution, which states: "The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions." A law applies to facts occurring and acts committed after its entry into force. Therefore, it cannot be

maintained that when respecting the laws in force and acting in the spirit thereof, citizens should consider any possible future regulations.

The Court notes that the Lustration Law was passed 21 years after the fall of communism. Consequently, the late enactment of this law, without being decisive in itself, is considered by the Court as relevant with respect to the disproportionate nature of the restrictive measures, even if they pursue a legitimate aim. The proportionality of the measure to the aim pursued must be considered in each case in the light of an assessment of the country's political situation as well as other circumstances.

In this respect, the case-law of the European Court of Human Rights on the legitimacy of lustration law over time is relevant; here, the Court refers to the case of *Zdanoka v. Latvia*, 2004.

For the reasons set forth herein, the Constitutional Court finds that the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 is unconstitutional.

#### *Languages:*

Romanian.



*Identification: ROM-2010-3-002*

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 20.10.2010 / **e)** 1354/2010 / **f)** Decision on the constitutionality of Articles I.1 and II of Emergency Order no. 62/2010 amending and amplifying Law no. 221/2009 on sentences of a political character and similar administrative measures imposed during the period from 6 March 1945 to 22 December 1989 / **g)** *Monitorul Oficial al României* (Official Gazette), 761/15.11.2010 / **h).**

#### *Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation ratione temporis.**

5.3.38.2 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Civil law.**

*Keywords of the alphabetical index:*

Non-pecuniary damage, redress / Final and binding decision.

*Headnotes:*

A statutory provision instituting differential treatment between applicants taking action directed at compensation is contrary to the principle of equality of citizens before the law, when such a difference of treatment does not have an objective and reasonable justification.

*Summary:*

I. The Defender of the People (hereinafter, the "Ombudsman") brought before the Constitutional Court a plea of unconstitutionality requesting a review of the provisions of Articles I.1 and II of Emergency Order no. 62/2010 (hereinafter "the Order") amending and amplifying Act no. 221/2009 on sentences of a political character and similar administrative measures imposed during the period from 6 March 1945 to 22 December 1989.

The statutory provisions whose constitutionality was challenged had the following substance:

"The payment of a sum in compensation for non-pecuniary damage may attain the maximum amount of:

1. 10 000 euros for a person on whom a sentence of a political character was imposed during the period from 6 March 1945 to 22 December 1989, or an administrative measure of a political character.
2. 5 000 euros for the husband/wife or descendants in the first degree of kinship.
3. 2 500 euros for descendants in the second degree of kinship.

The provisions of the law as amended and amplified are applicable to actions and claims in respect of which final judgment has not been delivered up to the time when the present Order takes effect."

To substantiate his plea of unconstitutionality, the Ombudsman submitted that in setting a ceiling on the amount of compensation payable to persons whose actions or claims had not yet been settled by the adoption of a final judicial ruling, the Order instituted different legal treatment from that applicable to persons

already in receipt of a final ruling on their actions or claims under the same laws. This could lead to an injustice, to the extent that, persons in a like situation and concurrently bringing actions for redress of non-pecuniary damage might receive different legal treatment, consisting of awarding somebody who had already obtained a final decision unlimited compensation, but compensation limited by the Order to someone who, for reasons beyond his control, had not yet obtained such a ruling.

The Ombudsman thus considered that the impugned provisions violated the fundamental right to equality as secured by Article 16 of the Constitution.

II. In response to this plea of unconstitutionality, the Court found as follows:

1. The impugned statutory provisions did not institute a uniform legal treatment for persons on whom a sentence of a political character or a similar administrative measure had been imposed, because they generated an inequality between similarly placed recipients as to the compensation granted in respect of non-pecuniary damage.

2. The impugned statutory provisions created an inequality without relying on a sound, objective and cogent reason. Thus they contravened the established constitutional precedent that the principle of equality before the law required equal treatment to be established for situations which did not have different objectives. In this case, the different legal treatment meted out to persons claiming redress for non-pecuniary damage was determined by the speed with which the claim had been handled by the courts and had culminated in the adoption of a final judicial ruling. To lay down such a criterion, random and unrelated to the conduct of the person concerned, was in contradiction with the principle of equality before the law. Thus the establishment of differential treatment in such a context had no objective and reasonable justification.

The Court held that the impugned provisions created discrimination between persons who, despite being in objectively identical situations, received different legal treatment, which was contrary to the provisions of Article 16 of the Constitution.

3. The Court further ruled that the law infringed the principle of non-retroactivity enshrined in Article 15.2 of the Constitution, in that it applied to situations in respect of which a provisional judicial ruling, delivered at first instance, could have been pronounced.

4. The Court also found the impugned provisions contrary to Article 115.6 of the Constitution as they affected a fundamental right, namely equality of citizens in rights, enshrined in Article 16.1 of the Constitution.

Having regard to the foregoing arguments, the Court noted that the violation of these constitutional provisions infringed Article 1.5 of the Constitution providing for mandatory observance of the Constitution, of its supremacy and of the laws.

For these reasons, the Constitutional Court found the impugned statutory provisions unconstitutional.

#### *Languages:*

Romanian.



*Identification:* ROM-2011-2-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 17.06.2011 / **e)** 799/2011 / **f)** Decision on the draft law for the revision of the Constitution / **g)** *Monitorul Oficial al României* (Official Gazette), 400/23.06.2011 / **h)** CODICES (Romanian).

#### *Keywords of the systematic thesaurus:*

1.2.4 Constitutional Justice – Types of claim – **Initiation ex officio by the body of constitutional jurisdiction.**

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**

2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**

3.4 General Principles – **Separation of powers.**

4.4.3 Institutions – Head of State – **Powers.**

4.5.1 Institutions – Legislative bodies – **Structure.**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

#### *Keywords of the alphabetical index:*

Constitution, revision / Protection, supervision by the Constitutional Court / Police custody, length / Judicial error / Parliament, immunity / Parliament, unicameral.

#### *Headnotes:*

Police custody of up to 48 hours is justified to ensure the effectiveness of the measure.

The deletion of the second part of Article 44.8 of the Constitution, which establishes the presumption of lawful acquisition of property, is unconstitutional because its effect is to remove a guarantee of the right to property.

The constitutional principle of the independence of justice cannot be interpreted as exempting those who apply it from liability for judicial errors committed, in view of the consequences of those errors for citizens seeking justice and for the Romanian state.

The adoption of a unicameral parliament and the limitation of the number of members of parliament to 300 are not inconsistent with any of the limits to revision of the Constitution provided for in Article 152 thereof, but represent exclusively a political choice.

The President's power to confer decorations and honorary titles also implies the power to withdraw them.

The well-established constitutional maxim that "judges are independent and subject only to the law" represents the constitutional guarantee of the "non-submission" of judges to any other authority, persons or interests, inside or outside the judicial system, and their "submission" to the law only, so that any mechanisms of subordination or control which might affect them are precluded and may not affect their independence.

The creation, by means of infra-constitutional legislation, of new categories of administrative acts exempt from judicial supervision is contrary to the constitutional principle enshrined in Article 1.5 on the supremacy of the Constitution, as well as to the principle laid down in Article 21 on free access to justice and, implicitly, to Article 152.2, which prohibits the revision of constitutional provisions where the effect would be to deprive citizens of fundamental rights and freedoms.

The appointment of the 6 representatives of civil society by the parliament and by the President of Romania as representative of the executive represents interference by the other constitutional powers in the activities of the judiciary, calling into question the role of the Supreme Council of the Judiciary as guarantor of the independence of justice.

**Summary:**

I. In accordance with Article 146.a of the Constitution, the Constitutional Court automatically assumed jurisdiction in respect of a government bill concerning a revision of the Constitution.

The most significant changes concerned the following aspects: the taking of supplementary measures to protect the identity of national minorities; an increase in the length of police custody from 24 to 48 hours; removal of the provision under which the acquisition of property is presumed lawful; establishment of the liability of judges for judicial errors committed; the adoption of a unicameral parliament; the abolition of parliamentary immunity; establishment of the right of the President of Romania to withdraw previously awarded decorations and honorary titles; the placing of an obligation on the Prime Minister to consult the President before making proposals for the dismissal or appointment of members of the government; establishment of the binding nature of the Constitutional Court's decision in the procedure for suspending the President of Romania from office; the placing of limits on the government's possibility of committing its responsibility on the adoption of a bill; establishment of an obligation for judges to obey only the Constitution and to comply with the decisions of the Constitutional Court; exemption of administrative acts concerning fiscal and budgetary policy from judicial supervision; and an increase in the number of representatives of civil society in the structure of the Supreme Council of the Judiciary.

II. Having examined the draft law on the revision of the Constitution, the Constitutional Court found that some of the proposed amendments were unconstitutional.

The right to identity Article 6 of the Constitution. The draft law places an obligation on public authorities to consult organisations of citizens belonging to national minorities on decisions relating to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity, and an obligation on the state to recognise and guarantee the right of this category of persons to the preservation, development and expression of their identity as provided for in paragraph 1 of that article, this being one of the means of guaranteeing the right established by the Constitution.

This amendment does not mention any of the limits to revision provided for in Article 152.1 and 152.2 of the Constitution. If these rules were to be retained, to ensure that decisions taken by organisations of citizens belonging to national minorities on the preservation, development and expression of their ethnic, cultural, linguistic and religious identity are not contrary to the principles of equality and non-discrimination towards other Romanian citizens, an obligation should be placed on those organisations to consult the public authorities in writing on the decisions they plan to take.

This proposed amendment is therefore constitutional.

Individual freedom amendment to Article 23.3 of the Constitution extension of the maximum period of police custody from 24 to 48 hours. The proposed amendment is designed to meet the obligation placed on the state to ensure a proper balance between the interest in defending the individual's fundamental rights and the interest in defending the rule of law, while taking account of the problems which the current length of police custody has created in practice for the work of the prosecution service, with direct consequences for the protection of society's general interests and the rule of law. Police custody of up to 48 hours is therefore justified to ensure the effectiveness of the measure.

This proposed amendment is therefore constitutional.

The right to private property Article 44 of the Constitution. The proposed amendment concerns the deletion of the second part of Article 44.8 of the Constitution, which provides that "[t]he legality of acquisition shall be presumed". The Court notes that it has given rulings on other occasions on initiatives to revise the same constitutional provision pursuing substantially the same aim: to remove from the Constitution the presumption of the lawful acquisition of property. For example, in Decision no. 85 of 3 September 1996 published in the Official Gazette (*Monitorul Oficial*) of Romania, Part I, no. 211 of 6 September 1996, the Court gave a ruling on an initiative to revise the Constitution, which proposed replacing the text establishing this presumption with the following text: "Property whose lawful acquisition cannot be proved shall be confiscated". On this occasion the Court held that the presumption of the lawful acquisition of property was one of the constitutional safeguards of the right to property, in accordance with Article 41.1 of the Constitution [now Article 44.1], under which the right to property is guaranteed. This presumption is also based on the general principle that any juridical act is deemed lawful unless proved otherwise, which creates an obligation to prove that a person's property was acquired unlawfully. While noting that this proposed amendment reversed the burden of proof regarding the

lawfulness of the acquisition of property, so that a person's assets were presumed to have been acquired unlawfully unless proved otherwise by their owner, that legal certainty as to the right of ownership of the assets constituting a person's property was indissolubly linked to the presumption of lawful acquisition and that the removal of this presumption meant removing a constitutional guarantee of the right to property, the Court held that the proposed amendment was unconstitutional. Without the presumption of lawful acquisition, a property owner would be exposed to constant uncertainty because, whenever the unlawful acquisition of that property was alleged, the burden of proof would not fall upon the person making that allegation, but upon the owner of the property.

Pursuant to Article 152.2 of the Constitution, under which no revision shall be made which results in the suppression of citizens' fundamental rights and freedoms, or of the safeguards thereof, the Court finds that the deletion of the second part of Article 44.8 of the Constitution, providing that "[t]he legality of acquisition shall be presumed", is unconstitutional because its effect is to remove a guarantee of the right to property.

The right of a person prejudiced by a public authority Article 52 of the Constitution. It is noted that, by removing the terms "bad faith" and "serious negligence", which constitute detailed conditions of the liability of judges, the proposed amendment brings into line the two sentences of the same paragraph of Article 52 concerning respectively the liability of the state and the liability of judges for judicial errors committed, so that the conditions of liability may then be laid down by law. The amendment therefore draws a distinction between a constitutional principle the material liability of the state and judges for judicial errors, and infra-constitutional rules the conditions under which such liability may be incurred. There is no reference to the limits to revision of the Constitution because the constitutional principle of the independence of justice cannot be interpreted as exempting those who apply it from liability for judicial errors, in view of the consequences of those errors both for citizens seeking justice and for the Romanian state.

This proposed amendment is constitutional.

The role and structure of parliament Article 61 of the Constitution. The proposed amendment concerns the adoption of a unicameral parliament and the limitation of the number of members of parliament to 300. First of all, the Court notes that the proposed amendment to this effect is consistent with the result of the national referendum of 22 November 2009 initiated by the President of Romania, which was confirmed by the Constitutional Court in its Decision no. 37 of

26 November 2009. This amendment is not inconsistent with any of the limits to revision provided for in Article 152 of the Constitution, but represents exclusively a political choice which will be analysed by the parties to the constitutional revision procedure.

This proposed amendment is therefore constitutional.

Parliamentary immunity Article 72 of the Constitution. The constitutional rules on parliamentary immunity are justified by the need to protect the mandate of parliamentarians as a guarantee of the exercise of their constitutional powers and, at the same time, a condition for the proper functioning of the law-based state. While noting that the draft law for the revision of the Constitution removes the procedural immunity which protects parliamentarians from unreasonable or vexatious criminal proceedings, thus rendering parliamentary immunity devoid of substance, the Court finds the proposed amendment unconstitutional because it leads to the removal of a safeguard of a fundamental right of persons holding public office and thus violates the limits to revision as provided for in Article 152.2 of the Constitution.

Appointment of the government Article 85.2 of the Constitution. Through the addition of the requirement that the Prime Minister must consult the President before proposing the dismissal or appointment of members of the government, the solution advocated by the Constitutional Court is incorporated into this constitutional provision.

The proposed amendment is therefore constitutional.

Other powers (conferring decorations and honorary titles) Article 94.a of the Constitution. In its new form the text empowers the President to withdraw decorations and honorary titles previously awarded to certain persons. Although the Constitution did not expressly confer on the President, in addition to the power to award decorations and honorary titles, the power to withdraw them, the Constitutional Court finds that the former implies the latter, and that the fact of withdrawing decorations derives from the constitutional power to award them.

This proposed amendment is therefore constitutional.

Suspension from office Article 95 of the Constitution. The proposed amendment gives binding force to the Constitutional Court's opinion and provides for its legal effects. A favourable opinion from the Court is needed to continue the suspension procedure. If the opinion is unfavourable, the suspension procedure is discontinued. If the opinion is favourable, it is impossible to see how it could be binding on parliament, which is required to take a decision by a

majority of its members' votes. Furthermore, in such a situation, the Constitutional Court's opinion would lead directly to the holding of a referendum, parliament's role being confined to initiating the suspension procedure. In the light of these observations, it is proposed that the word "binding" be deleted from the Article as it is sufficient to make express provision for the extictive effect of a negative opinion from the Constitutional Court.

Commitment of legal responsibility by the government Article 114 of the Constitution. A quantitative limitation of the government's possibility of resorting to this procedure during a session of parliament precludes any possible misuse by the government of the constitutional right to commit its responsibility before parliament, and the legislature, for its part, can exercise its full power as conferred by Article 61.1 of the Constitution.

The Court recommends expanding the provision in Article 114.1 of the Constitution in order to limit the subject-matter on which the government can commit its responsibility to: a programme, a general policy declaration or a draft law regulating social relations in a specific field in a unitary manner.

This proposed amendment is constitutional.

The administration of justice Article 124 of the Constitution. The Court considers that the proposed addition to Article 124.3 of the Constitution is unnecessary because the obligation placed on judges to obey the Constitution and comply with the decisions of the Constitutional Court is already enshrined in the Constitution. Furthermore, the well-established constitutional maxim that "judges are independent and subject only to the law" represents the constitutional guarantee of the "non-submission" of judges to any other authority, persons or interests, inside or outside the judicial system, and their "submission" to the law only, so that any mechanisms of subordination or control which might concern them are precluded and may not affect their independence.

Courts of law Article 126.6 of the Constitution. The purpose of the proposed amendment is to make an addition to paragraph 6 excluding the government's fiscal and budgetary policies from judicial supervision of administrative acts. An interpretation allowing the ordinary legislature to add to the Constitution, by means of infra-constitutional legislation, a new category of constitutional acts exempt from judicial supervision is contrary to the constitutional principle of supremacy of the Constitution enshrined in Article 1.5, to the principle of free access to justice in Article 21 and, indirectly, to Article 152.2, which prohibits any revision of constitutional provisions resulting in the suppression of citizens' fundamental rights and freedoms.

The Court notes that the proposed amendment is unconstitutional.

The Supreme Council of the Judiciary Article 133 of the Constitution. The main amendment concerns paragraph 2 on the structure of the Supreme Council of the Judiciary: the total number of members is still 19, but the number of representatives of civil society increases (from 2 to 6) and the number of members having the status of judge or prosecutor decreases correspondingly (from 14 to 10). By virtue of its powers, the composition of the Supreme Council of the Judiciary must reflect the specific nature of its activity, the judicial status of its members, inherent in the name of this supreme representative body, and their direct knowledge of the implications of judicial activity being of decisive importance for the decisions taken by the Council. The appointment of the 6 civil society representatives by the parliament and the President as representative of the executive represents interference by the other constitutional powers in the activity of the judiciary, calling into question the role of the Supreme Council of the Judiciary as guarantor of the independence of justice.

The Court notes that the proposed amendment is unconstitutional.

#### *Languages:*

Romanian.



*Identification: ROM-2012-1-002*

- a)** Romania / **b)** Constitutional Court / **c)** / **d)** 25.01.2012 / **e)** 51/2012 / **f)** Decision on the objection of unconstitutionality of the Law on organisation and conduct of elections for local public administration authorities and elections for the Chamber of Deputies and the Senate in 2012, as well as for the amendment of Title I of the Law no. 35/2008 for elections to the Chamber of Deputies and the Senate and for the amendment of Law no. 67/2004 for election of local public administration authorities, the Local Public Administration Law no. 215/2001 and Law no. 393/2004 on the status of locally elected officials / **g)** Monitorul Oficial al României (Official Gazette), 90, 03.02.2012 / **h)**.

*Keywords of the systematic thesaurus:*

- 3.4 General Principles – **Separation of powers.**
- 3.9 General Principles – **Rule of law.**
- 3.13 General Principles – **Legality.**
- 4.5.6 Institutions – Legislative bodies – **Law-making procedure.**
- 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**
- 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
- 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**
- 5.3.41.6 Fundamental Rights – Civil and political rights – Electoral rights – **Frequency and regularity of elections.**

*Keywords of the alphabetical index:*

Election, law, electoral / Parliament, procedure, minimum guarantees / Powers, separation and interdependence, principle.

*Headnotes:*

Changing the electoral law less than one year before the elections and increasing the complexity of operations involved in the exercise of electoral rights (determined in this case by the organisation at the same time of general elections and local elections) infringe on the principle of legal certainty and can lead to restriction on the exercise of the right to vote.

Organising two types of elections at the same time breaches the right to be elected because a person cannot run simultaneously for the office of mayor and for a mandate as a Deputy or Senator; and for the office of President of the County Council and for a mandate as a Deputy or Senator. The re-dimensioning of the current term of office of elected officials violates the principle of non-retroactivity.

*Summary:*

On the grounds of Article 146.a of the Constitution and Article 15.1 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the Secretary General of the Chamber of Deputies forwarded to the Constitutional Court the referral concerning the unconstitutionality of the Law on the organisation and unfolding of elections for local public administration authorities and elections for the Chamber of Deputies and the Senate of 2012. It also requested the Constitutional Court to review Title I of Law no. 35/2008 for the election to the Chamber of Deputies and the

Senate and amending and supplementing Law no. 67/2004 for the election of local public administration authorities, of Law on local public administration no. 215/2001 and Law no. 393/2004 on the of the locally elected officials, formulated by 88 Deputies belonging to the Social Democratic Parliamentary Group and of 58 Deputies belonging to the National Liberal Party Parliamentary Group.

As grounds for objection, the applicants offered challenges to the norms, claiming they are both intrinsically and extrinsically unconstitutional.

In the first group of challenges, the applicants argued that there is no motivation to adopt the impugned Law by means of the Government's assumption of responsibility (i.e. a regulation), which can be used only *in extremis*. For this reason, violation of Article 114 of the Constitution on the Government also involves violation of provisions of Article 1.4 and 1.5 of the Constitution, both on the separation of powers and obligation to observe the Constitution and the laws, in conjunction with Article 61.1 of the Constitution on the role and structure of Parliament.

In terms of intrinsic constitutionality, the applicants contended that the law violates Article 11.1 and 11.2 of the Constitution relating to international law and domestic law, in conjunction with Article 1.5 of the Constitution on the obligation to respect the Constitution, its supremacy and the laws. The reason is that the regulation on "merging" local elections and parliamentary elections and organisation thereof in November 2012 amended the electoral legislation less than a year before the elections. The regulation disregarded the Code of Good Practice in Electoral Matters adopted by the Venice Commission and induced a state of confusion among the electorate that will be forced to vote with a high number of ballots.

It was also claimed that by disposing the "merging" elections, the law regulated only the 2012 elections an extension of approximately six months of the current mandates of local elected officials (as they gained seats after the elections in June 2008), thus violating the constitutional principles of the rule of law and its retroactivity.

Regarding legal provisions that establish, under sanction of rejection, a Series of procedural terms, it was argued that they violate the principle of separation of powers and the principle of judicial independence in that they establish the possibility to sanction the court for failure to resolve appeals in those terms.

Another objection of the applicants concerned Article 126.6 of the Constitution, which exempts from judicial review the administrative acts of public authorities regarding relations with Parliament, and acts of military command.

## II. Allowing the referral of unconstitutionality, the Court held as follows:

The extrinsic criticism of unconstitutionality is unfounded. This law meets the criteria for which compliance is required by Article 114 of the Constitution for the Government's assumption of responsibility on a bill, as specified in a case-law of the Constitutional Court (Decision no. 1.655 dated 28.12.2010, published in the Official Gazette, Part I, no. 51 of 20 January 2011). Given the importance of this area, the Court recommended that the regulations in electoral matter be debated in Parliament. It also recommended that they not be adopted by means of exceptional proceedings, where Parliament is bypassed, but rather through a silent vote on a regulatory content almost exclusively at the Government's discretion. The Court noted, in this context, the importance for proper functioning of the rule of law, and cooperation between state powers in the spirit of constitutional loyalty norms.

The intrinsic challenges of unconstitutionality are founded. The Court held, with reference to the Code of Good Practice in Electoral Matters Guidelines and Explanatory Report, adopted by the European Commission for Democracy through Law in the 52<sup>nd</sup> Plenary Session (Venice, 18-19 October 2002), the right to free elections compels compliance with requirements, including that of stability and legal rules in the election. In a broader level, the stability of these rules is an expression of the legal principle established implicitly by Article 1.5 of the Constitution. By making changes in less than one year before the election procedure, the impugned law violates these requirements. Such a legislative change may create unexpected additional difficulties to enforcement authorities, including adaptation to newly established procedure and corresponding technical operations as well as difficulties in exercising voting rights, which can result in the restriction of this right. In addition, a cumbersome voting due to the large number of ballots, and various public authorities on which voters must express at the same time their option may have the effect of preventing the free expression of their opinion.

The Court also held that the organisation at the same time of two types of elections determines the infringement of the right to be elected as provided by Article 37 of the Constitution. This is because there are situations where a candidate who has not won a

local elective office might express his desire to participate in national elections for a parliamentary mandate, which is possible only in elections taking place at different times. But the impugned law stipulates the organisation and conduct of elections for Parliament on the same date as elections for local government. As such, a person cannot run simultaneously for mayor and for a mandate of Deputy or Senator or for president of the County Council and for a mandate of Deputy or Senator.

On the other hand, by changing the duration of the ongoing terms of office of the locally elected, the impugned law violated the principle of non-retroactivity of law, enshrined by Article 15.2 of the Fundamental law. From this perspective, the Constitutional Court has stated in its case-law that the legislator was free to modify, through a new law, the duration of the office terms for management positions in a different manner than according to the law in force. The change shall only apply for the future, not for the ongoing terms of office. Otherwise, it would mean ignoring the rule of non-retroactivity of law, which is a rule of constitutional level, referred to in Article 15.2 of the Fundamental law" (Decision no. 375, 06.07.2005, published in the Official Gazette of Romania, Part I, no. 591, 08.07.2005).

The Court has also stated that provisions regulating, under the sanction of preclusion, deadlines for settling actions lodged against Government decisions that delimit single-member constituencies where the elections for the Chamber of Deputies and the Senate in 2012, respectively the appeal against the decisions to resolve these actions, actually penalised the court, a sanction incompatible with the role and status of the courts.

The Court also found that the impugned norms submitted to judicial control of an administrative act Government decision to delimit the single-member constituencies concerns the constitutional relations between Parliament and Government, an act exempted from review in accordance with Article 126.6 of the Constitution.

Also on the regulation in terms of the composition of special parliamentary committees, respectively "two representatives from each parliamentary group", the Court found that it is contrary to Article 64.4 and 64.5 of the Constitution, which impose the principle of political configuration in the composition of parliamentary committees.

## III. A judge of the Constitutional Court formulated dissenting opinion, and two judges concurring opinion.

*Languages:*

Romanian.



## **Serbia Constitutional Court**

### **Important decisions**

*Identification:* SRB-2010-3-007

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 21.04.2010 /  
**e)** IuZ-52/2008 / **f)** / **g)** Sluzbeni glasnik Republike Srbije (Official Gazette), no. 34/2010 / **h)** CODICES (English, Serbian).

*Keywords of the systematic thesaurus:*

4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities**.  
 4.9.13 Institutions – Elections and instruments of direct democracy – **Post-electoral procedures**.  
 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.  
 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

*Keywords of the alphabetical index:*

Election, electoral list / Election, candidate list, minimum signatures / Election, public nature.

*Headnotes:*

Respect for the constitutional principle of free and direct elections within the system of proportional representation and closed electoral lists would suggest that those proposing the list should distribute the councillors' mandates to the candidates according to the order in which their names are stated in the list.

A mandate is a public legal relationship between the voters and the representatives. It cannot be the subject of a contract between the councillor and the submitter of the electoral list. Councillors must be able to express their opinions freely, in the performance of their duties.

**Summary:**

I. On 2 July 2009 the Constitutional Court initiated proceedings to assess the constitutionality of the provisions of Articles 18, 43 and 47 of the Law on Local Elections (Official Gazette, no. 129/07).

The Law on Local Elections prescribes a uniform, proportional system of distribution of mandates, as well as closed (linked) lists of candidates. Under this system, the proposer of the list defines the list independently; the elector has only one vote and may only vote for one list.

Under Article 43 of this Law, those submitting the electoral list must inform the electoral commission, within the allotted time span following the date the election results are announced, as to which candidates from the electoral list are to be assigned the councillor mandates. The election commission must then assign all mandates obtained by that list to candidates from the list, in accordance with the order in the list.

II. The Constitutional Court found that Article 43 violated the constitutional principles relating to public representation and free and direct elections. It took the view that the contents of the right to candidacy are exhausted in the right of those proposing the electoral list to freely nominate the candidates for positions as councillors and their order in the list. A political party and other proposers of the electoral lists may not be granted the power to elect (in effect to decide), after the elections have been conducted and the will of the voters expressed, who is to be a councillor in the assembly of the local government authority.

Article 47 allows for an institute of the contract between candidates for councillor positions and the submitters of electoral list, which may in turn prescribe the right of those submitting the list to resign on behalf of councillors from the position of councillors in the local government assembly, on which basis those submitting the electoral list gain the right to free disposal of councillors' mandate. It also allows for the possibility of blank resignation.

The Constitutional Court noted that the capacity of councillors is accomplished by direct election by citizens, and that councillors are at liberty to exercise their functions and represent citizens in the local government assembly. However, this does not imply that councillors are free to dispose of their mandates in the manner prescribed in the contested provisions of Article 47, but rather that they are independent from outside influence when votes are taken and decisions made in the local representative assembly. A mandate is a public legal relationship between the voters and the

representatives; it cannot be the subject of a contract between those standing for election as councillors and those submitting the electoral list.

Furthermore, the institute of a blank resignation contained in Article 47 is not compatible with the basic legal principle that the expression of will as to resignation should be in compliance with the actual will of the holder of a public function. It is also at variance with the constitutional provision prescribing that a public function may cease at the personal request of the holder of a public function.

The right of citizens to be elected also implies that councillors are entitled to keep and peacefully enjoy their mandates within the period for which they have been elected, and that they are guaranteed protection against arbitrary deprivation.

The Constitutional Court took the view that the contested provisions also limited councillors' rights to freedom of thought and expression. They must be free to express their opinions (to speak and to vote in accordance with their beliefs) in the performance of their duties. This constitutionally guaranteed right is important for all citizens and of particular significance for elected representatives, as they represent citizens and their interests in the assembly.

The Constitutional Court noted that Article 18 prescribed the conditions for submitting the electoral list. These were general conditions, relating equally to all participants in the election process. It prescribed two cumulative conditions necessary to define an electoral list. At least thirty voters had to support the proposal for each candidate by their signatures and the proposer had to propose at least one third of the candidates for the total number of vacant positions as councillors. There was no specific provision at this stage of the election process for members of national minorities. Article 18.2 of the Law made some provision for smaller election units; the electoral list in local self-government units with fewer than twenty thousand voters need to be supported by at least two hundred voters.

In the view of the Constitutional Court, the provisions of Article 18 setting out the minimum number of voters to support the electoral list and the minimum number of councillors to be proposed in the list in order for the electoral list to be legally valid did not have the potential to bring members of the national minorities into an unequal position in relation to members of the majority population. The Constitutional Court noted that national minorities in the Republic of Serbia tend, according to information from the competent statistical institution, to be concentrated in certain areas and that, in some municipalities, the national minorities are the majority population. Therefore the requirements in the legislation

should not in principle pose any particular problem for the political parties of the national minorities.

#### *Languages:*

English, Serbian.



*Identification:* SRB-2011-2-011

**a) Serbia / b) Constitutional Court / c) / d) 05.05.2011 / e) IUz-231/2009 / f) / g) Sluzbeni glasnik Republike Srbije (Official Gazette), 41/2011 / h) CODICES (English, Serbian).**

#### *Keywords of the systematic thesaurus:*

4.6.2 Institutions – Executive bodies – **Powers**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.

#### *Keywords of the alphabetical index:*

Division of powers / Freedom of media.

#### *Headnotes:*

The manner of exercising the rights and freedoms guaranteed by the Constitution may be prescribed by law only.

#### *Summary:*

The Constitutional Court on 22 July 2010 decided that certain provisions of the Law Amending the Law on Public Information (hereinafter, the “Law”) are not compliant with the Constitution and ratified international treaties and the Ruling instituting the procedure for assessing the constitutionality of the provisions of Article 2 of the Law in the part of Article 14b.2 that was added after Article 14 of the Law, as well as of Article 7 of the Law.

The said provisions authorise the competent minister to more specifically regulate the manner of keeping a Public Media Register and prescribe the time interval in which the minister shall enact this regulation as well as the time intervals in which the founders of public media shall file applications for entry of a public medium in the

Public Media Register. The plaintiffs claimed that the legislator had “ceded to the executive power body to regulate in a non-public manner and according to its own discretion the manner of keeping the Public Media Register”, thereby making entry in the Register “subject to indirect approval”. In this way, the contested provisions are primarily not compliant with the guarantee of freedom of the media referred to in Article 50.1 of the Constitution.

The Constitutional Court held the following:

Pursuant to Article 97.10 of the Constitution it is within the competence of the Republic of Serbia to organise and provide for the system in the domain of public information and that, accordingly, it was within its competence to organise and provide for by enacting the Law on Public Information the manner of exercising the freedom of the media guaranteed by the Constitution.

The Constitutional Court held in its decision that the prescribed entry of a public media in the Register does not, *per se*, violate the freedoms guaranteed by the Constitution or the principles of the Constitution, as the contested Law does not stipulate that entry in the Register is a constitutive element of establishment of a public medium which, indirectly, would give it the character of approval. Also, the Court held that the provision which stipulates that the Public Media Register shall be kept by an organisation competent for keeping Company Registers is not incompatible with the Constitution, as the determination of which body or organisation will be competent for keeping certain public records relates to the objectives of a concrete legal solution the assessment of which is not within jurisdiction of the Constitutional Court.

In relation to the provision of Article 14b.2 of the Law, the Constitutional Court indicated that granting powers by law to a minister to specify in detail by his or her by-law the specific matters stipulated by the law is not open to legal or constitutional challenge. The reason is that a minister, in conformance with the Law on State Administration or a ministry as part of the executive power, is authorised to enact legislation; however, only within the limits of the competence of the executive power to enact bye-laws. The executive power’s position in this regard stems from the constitutional principle of the separation of powers and, accordingly, from the constitutional position of the National Assembly which holds legislative power. As Article 123.3 of the Constitution stipulates that the Government, as holder of the executive power in the Republic, enacts regulations and other general acts for the purpose of law enforcement, and as Article 136.1 of the Constitution provides that the state administration is bound by the Constitution and law, it means, in the



Constitutional Court's view, that state administration authorities may also enact regulations from the scope of their competence in order to prescribe in greater detail the matters already regulated by law, for the purpose of their enforcement. In accordance with the above, the envisaged authorisation of a minister to prescribe in greater detail the manner of keeping a Public Media Register is not, *per se*, open to challenge, or not open to challenge if the manner of keeping the Register is prescribed by the Law itself, which primarily means that the law has stipulated the rules of procedure for entry in the Register.

However, the contested Law concerning the Public Media Register does not contain any provisions prescribing the procedure of entry in the Public Media Register or prescribing the manner in which the Register is to be kept. Accordingly, the Constitutional Court held that the authority granted to the line minister to prescribe in greater detail specific matters contained in the law by his or her general act (provision) for the purpose of law enforcement essentially goes beyond the framework of the constitutional competence of the executive power. Rather, it is the authority for independent regulation both of the manner of keeping the Public Media Register and of the procedure for entry in the Register.

The Constitutional Court held that the matters comprising the regulation of the manner of keeping the Register directly relate to the exercise of the guaranteed freedom of the media referred to in Article 50.1 of the Constitution, because the manner in which these matters are regulated essentially depends on the exercise of the constitutional guarantee that newspapers and other forms of public information may be established freely, without permission. In view of the fact that, in conformity with the provision of Article 18.2 of the Constitution, the manner of exercising guaranteed rights and freedoms may be prescribed by law only, the Constitutional Court held that the contested provision of the Law is not compliant with Article 18.2 of the Constitution.

As the contents of the provisions of Article 7 of the contested Law are legally and logically correlated with the provision of the newly added Article 14b.2 of the Law on Public Information, the Constitutional Court found that these provisions are also not compliant with the Constitution.

#### *Languages:*

English, Serbian.

*Identification:* SRB-2012-2-002

- a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 11.07.2012 / **e)** VIIIU-534/2011 / **f)** / **g)** *Sluzbeni glasnik Republike Srbije* (Official Gazette), 71/2012 / **h)** CODICES (English, Serbian).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

4.7.4.1.3 Institutions – Judicial bodies – Organisation – Members – **Election**.

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

#### *Keywords of the alphabetical index:*

Judge, appointment, conditions.

#### *Headnotes:*

If a person is not entitled to take part in the decision-making of a particular body, they cannot participate in the conduct by that body of a procedure which is concluded by the rendering of a decision, and they cannot be counted in the quorum.

#### *Summary:*

109 persons lodged appeals with the Constitutional Court against decisions made by the High Judicial Council (hereinafter, the "HJC") in proceedings arising from objections they had made to decisions by which the first composition of the HJC held that in the process of the general election of judges, the applicants had not been elected to judicial office with permanent tenure under the Law on Judges (*Official Gazette of the RS*, no. 116/08, 58/09 and 104/09) and that their tenure as judges should end on 31 December 2009. The objections filed by the applicants sought the review of the decisions passed by the first composition of the HJC, which were rejected by the decisions challenged in the appeals before the Court.

The appeals were brought on the grounds of substantive violation of the rules of procedure, erroneous and incomplete finding of fact, violations of substantive law, and the violation of constitutional rights and rights guaranteed by the European Convention on

Human Rights. The applicants drew attention to the composition of the HJC which decided on the objections, and the manner in which those decisions were made, as one of the substantive violations.

The Court noted that certain permanent members of the HJC which decided on the objections of the unelected judges were members *ex-officio* who had acted in the same capacity as members of the first composition of the HJC (President of the Supreme Court of Cassation, Minister in charge of the judiciary and Chair of the Competent Committee of the National Assembly) and that this also applied to one of the elective members of the HJC; that they were present at sessions and that they were counted in the quorum; that they refrained from voting; that during the decision-making procedure, criminal proceedings were instituted against an elective member and he was held on remand; that one of the elective members resigned from office during the process; that during the proceedings, the Anti-Corruption Agency (hereinafter, "ACA") passed a decision against an elective member who had been holding public office as Dean of the Faculty, establishing that he had breached the ACA Act by assuming another public office (membership of the HJC), on which grounds his public office as member of the HJC was terminated under compulsion of law; that the Board of the ACA, deciding on the objection he filed against the above first-instance decision, resolved to overturn his objection as without merits, while the National Assembly rejected the motion for the termination of office of the above member.

An objection against a decision of the HJC constitutes a legal remedy. Impartiality comes under question when a member who was part of the decision-making process at first instance then decides on the legal remedy. The option of refraining from voting is not possible in a body that proceeds and decides in the manner of a tribunal established under the law.

The office of an HJC member elected from among faculty of law professors may only be terminated by a decision passed by the National Assembly. However, the Court held that the ACA's decision objectively called into question the impartiality of the above member.

A provision within Article 5.1 of the Law on Amendments to the Law on Judges (*Official Gazette of the RS*, no. 101/10) prescribes that the HJC, in its permanent composition, shall review all decisions on the termination of judicial office passed by the first composition of the HJC, referred to in Article 101.1 of the Law on Judges.

The Court found that in the review procedure, certain omissions were made which carried such weight that the presumption that the unelected judges were entitled

to be elected was not overturned even where the permanent composition of the HJC passed decisions on the basis of legally valid votes. Cases included decisions in which certain unelected judges were accused of being unqualified, incompetent or unworthy of exercising judicial function. This is based on the fact that in decision-making procedure, the principle of equality of arms was violated, while decisions by which objections were overturned were founded on a clearly arbitrary application of substantive law.

The qualification may not be assessed based on the percentage of set aside decisions which is determined in relation to the total number of decisions against which appeals were lodged. Neither may the minimum level of success be viewed on its own.

In terms of the criterion of competence, the notions of "gross breach" clearly do not meet the standards of a legal norm that is sufficiently precise.

Regarding the criterion of worthiness, the Court stressed that the principle of equality of arms is only one feature of the right to a fair trial. Unelected judges whose worthiness was challenged should have been given the opportunity to contest those allegations in a public hearing, but this was not the case. The same applied to the criteria of qualification and competence.

The Constitutional Court was accordingly of the view that the presumption of having the right to be elected was not overturned. The Court annulled all decisions made by the HJC and ordered it to elect, in accordance with Article 30 of its Rules, the applicants to serve as judges in courts that have assumed jurisdiction or partial jurisdiction of the court in which they performed their judicial function, taking into account the type of court in which they worked, the matters they handled, and their application to the public notice on the election of judges.

The passing of this decision and the decision by the HJC to the effect that this body shall elect the applicants to judicial office with permanent tenure does not interfere with the HJC's application of a provision contained in Article 6 of the Law on Amendments to the Law on Judges and reconsideration on the existence of grounds for calling into question their qualification, competence or worthiness.

#### *Languages:*

English, Serbian.



# Slovakia

## Constitutional Court

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### Important decisions

*Identification:* SVK-2000-2-004

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 15.06.2000 / **e)** III.US 16/00 / **f)** / **g)** Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky (Official Digest), 14/00 / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.4 General Principles – **Separation of powers.**

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities.**

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

*Keywords of the alphabetical index:*

Judge, impartiality, objective / Judge, duties at the Ministry of Justice.

*Headnotes:*

Under no circumstances may a person with duties at the Ministry of Justice simultaneously sit as a judge in a court of law.

*Summary:*

The appellant, M.M., was on trial for murder before B. regional court. During proceedings he challenged the independence and impartiality of judge I.S., a member of the court, on the grounds that I.S. was simultaneously employed at the Ministry of Justice. The Supreme Court threw out this objection on the grounds that the judge in question had been temporarily relieved of his duties at the ministry in order to bring to a conclusion cases pending in the court of which he had been a member before his appointment to a post at the Ministry. Following the Supreme Court ruling, the regional court tried the appellant's case in the same

composition, found him guilty and sentenced him to thirteen years' imprisonment without remission.

The appellant lodged a complaint (podnet) with the Constitutional Court, alleging that the right guaranteed to him under Article 48.1 of the Constitution – namely, that no one may be removed from the jurisdiction of his or her lawful judge – had been violated. The Constitutional Court upheld the complaint and ruled that the Supreme Court decision and the regional court's retention of the judge had violated the appellant's fundamental right under this article of the Constitution.

The Constitutional Court noted in particular that the function of judge is a constitutional office and that the holding of such office is incompatible with the holding of any other constitutional office, including one in a government department. This principle derives from the principle of separation of powers and is intended, from the point of view of judicial independence and impartiality, to ensure that court decisions are not influenced by other bodies of the state.

Referring to the case-law of the European Court of Human Rights – principally the Judgments in the cases of *Delcourt v. Belgium* (1970) and *Ferrantelli and Santangelo v. Italy* (1996) – the Constitutional Court stressed that the key issue in the case in question was that of inadequate objective impartiality. It observed that the judge whose objectivity was contested in the appellant's case, in which the state was one of the parties, simultaneously held a government post as director-general of the criminal law department at the Ministry of Justice. In the view of the Court, this situation legitimately gave rise to concern about the judge's capacity for impartiality.

In this connection, the Court noted that the duties of the director-general of the criminal law department at the Ministry of Justice entailed entering into various relations which, among other things, had numerous repercussions in the exercise of judicial functions. In the view of the Court, it was unacceptable to combine the two offices, even where a judge was temporarily relieved of his or her duties at the Ministry of Justice in order to decide pending cases.

*Cross-references:*

European Court of Human Rights:

- *Delcourt v. Belgium*, 17.01.1970, Series A, no. 11, *Special Bulletin – Leading cases ECHR* [ECH-1970-S-001];
- *Ferrantelli and Santangelo v. Italy*, 07.08.1996, *Reports of Judgments and Decisions* 1996-III.

**Languages:**

Slovak.

**Identification:** SVK-2009-2-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 11.02.2009 / **e)** PL. ÚS 6/08 / **f)** / **g)** Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky (Official Digest) / **h)** CODICES (Slovak).

**Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates**.

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

**Keywords of the alphabetical index:**

Prisoner.

**Headnotes:**

Election deposits to both the national and the European Parliament at the present level is constitutionally acceptable. Preventing those serving prison sentences from exercising the right to stand for election does not breach the Constitution. Preventing prisoners from exercising the right to vote in elections to both the national and the European Parliament is not in conformity with the Constitution, but preventing them from voting in elections to local and regional councils is constitutionally acceptable.

**Summary:**

The Prosecutor General filed a petition with the Constitutional Court challenging the duty of political parties to pay a sum of money (election deposit) as a necessary precondition to stand for election to the European Parliament or to the national Parliament. It was suggested in the petition that the system of deposit infringed the principle of equality, the right to stand for election and the right to vote. It was also argued that it hampered the principle of free competition of political parties.

The rationale behind the Prosecutor General's argument that the election deposit restricts the right to stand, the principle of equality and thus the right to vote was that only citizens supported by economically strong political parties could participate in political competition. This also affects the right to vote and violates the principle of equality because it prevents the electorate from voting for candidates not supported by rich parties. Lack of resources does not automatically mean lack of voters. The final election results themselves show how each political party is represented, so every political party should have the possibility of being elected. The minimum vote clause (electoral threshold) is a sufficient measure to secure the integrity and functionality of both the national and the European Parliament. There is no need for an election deposit in this sense.

Under the Law on Elections the electoral threshold is 5% and if a political party gains at least 2% of the vote, the government repays the election deposit.

The Court found the election deposit to both the European and the national Parliament to be in conformity with the Constitution. The Court took the position that the principle of free competition is not absolute and the right to stand for election may be subject to legitimate restriction. The official explanation for the governmental bill stated as a reason for election deposits the bad experience with the previous system of candidacy based on verifying the number of members or supporters of non-parliamentary political parties. This aim of the election deposit (to eliminate the previous problems) was not considered as legitimate by the Court.

Nevertheless, election deposits have several other purposes. Contribution to election expenses is not legitimate, due to the public interest in democratic elections. Securing integrity and functionality was not fully accepted as a legitimate aim, because less intrusive means (such as a minimum vote clause) are available. The Court found that the main and fully acceptable legitimate aim for election deposits is to prevent political parties that are not serious contenders from participating in the elections. The deposit should

serve as a motivating factor for political parties which genuinely wish for power and which have a real chance of success, as opposed to parties which merely wish to publicise themselves or undermine others. The Court also took into consideration the sum of money required as election deposit. Election deposit for the European Parliament is 1670 Euro, which the Court found completely acceptable. The deposit for the national Parliament is 16 600 Euro, which the Court considered to be almost too much, but still acceptable.

The Prosecutor General also challenged provisions preventing those serving prison sentences from exercising their right to vote or the right to stand for election to the European Parliament, national Parliament, or local and regional councils. He suggested that these provisions resemble the penal sanction of losing political rights, which is no longer part of the Slovakian legal order. He went on to observe that whilst service of a prison sentence may prevent a prisoner from carrying out public office, it should not prevent him/her from competing for such office or supporting a candidate for such office through voting. From the technical point of view, there are no obstacles to the exercise of the right to vote in prison. Ultimately laws adopted by Parliament are also binding on prisoners.

The Court decided that preventing prisoners from exercising the right to stand for any type of election conforms to the Constitution. This prevention is implicit in their restriction of personal liberty. For practical reasons prisoners cannot compete in electoral campaigns. Candidacy for and membership of Parliament cannot be practically exercised by prisoners. The Court also pointed out that under Article 81a.f of the Constitution, a prison sentence will result in a Member of Parliament losing his mandate. Thus it is a *minore* and *maius rationale* to prevent prisoners from exercising the right to stand for election.

The Court decided that preventing prisoners from voting in election to national and the European Parliament is not in conformity with the constitutional right to vote, with basic electoral principles, the principle of a state governed by the rule of law and the principle of democracy. The Court noted that there is no legitimate aim for such restriction. The territory of the Slovak Republic is one constituency for the parliamentary elections. There are no obstacles to organizing these elections in prison. Ultimately Parliament adopts laws which are binding on everyone under Slovakian jurisdiction including prisoners. The Court adopted a similar approach to elections to the European Parliament. It pointed out that the European Parliament has some effect on prisoners. The Court applied the European Court of Human Rights Decision *Hirst v. United Kingdom* in this part of its reasoning.

The Court decided that denying prisoners the right to vote for both local and regional elections conforms to the Constitution, principally because while serving their sentences, prisoners are not part of their local community and local governments does not affect their lives in prison.

#### *Supplementary information:*

A dissenting opinion was expressed regarding the part of the decision relating to election deposits by Justice Mészáros. He stressed that post-totalitarian countries should be more careful when restricting political rights. This is the reason for Article 31 of the Constitution. Preventing political parties that are not 2 serious contenders" is not a legitimate aim. All registered parties fulfil the criteria for elections. Their level of success in Parliament should be a matter of popularity rather than sponsorship. Election deposits are not helpful to small and non-parliamentary parties. Although the European Court of Human Rights allows for election deposits, a margin of appreciation should have been applied in this case. Although some Eastern European Constitutional Courts have recently upheld election deposits [UKR-2002-1-002, EST-2002-2-006, EST-2003-2-001, ROM-2008-1-001], the dissenting judge concurred with the opposite stance of the Czech Constitutional Court in PL. ÚS 42/00 [CZE-2001-1-001].

#### *Cross-references:*

European Court of Human Rights:

- *Hirst v. The United Kingdom* (no. 2)[GC], no. 74025/01, 06.10.2005, *Bulletin* 2004/1 [ECH-2004-1-003].

#### *Foreign case-law:*

- *Bulletin* 2002/1 [UKR-2002-1-002];
- *Bulletin* 2002/2 [EST-2002-2-006];
- *Bulletin* 2003/2 [EST-2003-2-001];
- *Bulletin* 2008/1 [ROM-2008-1-001];
- *Bulletin* 2001/1 [CZE-2001-1-001].

#### *Languages:*

Slovak.



# Slovenia

## Constitutional Court

### Important decisions

*Identification:* SLO-1993-1-003

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.02.1993 / **e)** U-I-148/92 / **f)** / **g)** *Uradni list RS* (Official Gazette), 12/93; *Odločbe in sklepi ustavnega sodisca* (Official Digest), 1993, 15 / **h)** CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

4.6.8 Institutions – Executive bodies – **Sectoral decentralisation.**

*Keywords of the alphabetical index:*

Medical Council, compulsory membership / Membership, compulsory.

#### Summary:

By Resolution no. U-I-148/92 of 11 February 1993, the Constitutional Court found that the legislative arrangement which makes membership in the Medical Council compulsory for doctors who work directly with the sick is not in conflict with the Constitution. The Medical Council is an institution which is charged with the public supervision of medical practice in accordance with the law. In consequence, compulsory membership in the Medical Council does not signify a restriction of constitutional rights guaranteed by Article 42.2 of the Constitution. The Constitutional Court discussed this decision also in the light of the decision of the European Court of Human Rights, Decision A/43 paragraph 51 of 23 June 1981, in the case of *Le Compte, Van Leuven and De Meyere, Special Bulletin – Leading cases ECHR* [ECH-1981-S-001].

#### Languages:

Slovene.



*Identification:* SLO-2005-2-002

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 23.06.2005 / **e)** U-I-145/03 / **f)** / **g)** *Uradni list RS* (Official Gazette), 69/05 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.2 Fundamental Rights – **Equality.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

*Keywords of the alphabetical index:*

Contempt of court, penalty, excessive.

#### Headnotes:

The prohibition against contemptuous applications, according to Article 109 of the Civil Procedure Act (hereinafter, “ZPP”), does not limit the party’s right to make a statement before the court, which is guaranteed as a human right, as part of the right to the equal protection of rights in a procedure, pursuant to Article 22 of the Constitution. Thus, Article 109 of ZPP does not concern this right, but only the determination of the manner of its exercise. However, when the court applies the above-mentioned statutory provision, it must pay attention to all the above-mentioned aspects in every definitive case.

In this regard, it is necessary to consider, on the one hand, that the circumstance that the statement was made while defending one’s right before the court requires greater tolerance. On the other hand, it is necessary to take into consideration the special significance that trust in the judiciary and respect for the courts’ authority have for the judicial branch of power to be able to implement its tasks.

When punishment is in issue, according to Article 109 of ZPP, a particular judge is not a “victim”, and, by deciding upon Articles 11 and 109 of ZPP, they do not protect their personal honour and good reputation. If their honour and good reputation are in jeopardy they have the possibility to claim protection in accordance with criminal and tort law. In view of this objective and

the definition of punishment according to Article 109 of ZPP (in conjunction with Article 11 of ZPP), it follows that the concern that the judge decides on a case in which they are a victim or an injured party is not substantiated (provided that the judge properly understands Article 109 of ZPP, and gives proper reasoning when ruling on punishment). Therefore, the challenged regulation is not inconsistent with the right to an impartial judge according to Article 23.1 of the Constitution.

The regulation of punishment in accordance with Article 11 of ZPP, particularly in view of the penalty of imprisonment, which for a natural person can be as much as 30 days and (*inter alia*) for a lawyer even 100 days, evidently reaches an extent such that it can be concluded that it concerns deciding on criminal charges (for which all procedural and substantive guarantees concerning the criminal procedure and criminal offences must be ensured). It is clear that the regulation of punishment – not in itself but due to the magnitude of the penalties prescribed in Article 11 of ZPP (i.e. within the criminal procedure) – is not in conformity with the requirements of Article 23.1 of the Constitution and Article 6 ECHR, and concerning guarantees in the criminal procedure.

It is inconsistent with the Constitution insofar as it determines excessive penalties such that a conclusion can be made that it concerns ruling on criminal charges, which is why all the procedural guarantees concerning the criminal procedure (also according to Article 29 of the Constitution) should have been fulfilled.

What is of primary significance for the punishment of contemptuous applications is the symbolic meaning of punishment, which is to ensure an immediate response of the court to conduct that can jeopardise the course of judicial proceedings and the authority of the judiciary. As it is also the case that punishment for contemptuous applications pursuant to Article 109 of ZPP does not prevent criminal responsibility, which can be decided upon within a criminal procedure, there is no sound reason why the penalties prescribed in Article 11 of ZPP must be so high (and at the same time inappropriately high concerning the penalties that, given all the guarantees of the criminal procedure and a different intention of punishment, may be pronounced by the court for the criminal offence of contempt according to Article 169 of the Penal Code).

The concept of “contempt” has been sufficiently documented both in theory and in case-law not only in the area of criminal matters but also in connection with claims for damages for pain and suffering due to a damage to one’s honour and good reputation. Thus, it is not possible to hold that it has not been well defined.

The same applies to the definition of possible reasons for the exclusion of illegality.

#### **Summary:**

I. The petitioners (attorneys at law) challenged Article 11 and Article 109 of the Civil Procedure Act (hereinafter, “CPA”). The latter provision determines that a civil Court should punish the person who in their submission insults the court, a party and other participants in proceedings, according to the provisions of Paragraphs 3 to 7 of Article 11 of the same act. In the event of such contempt of Court, Paragraphs 3 to 7 of Article 11 prescribed a penalty of up to 300.00 Slovene tolars (1 EUR approx. 240 tolars) for natural persons, and up to 1.00.00 tolars for legal entities, independent entrepreneurs, and attorneys. If they did not pay the penalty in due time, a penalty of imprisonment of up to 30 days for natural persons, and up to 100 days for independent entrepreneurs and attorneys was prescribed, and a 50 % increase in the penalty (fine) in the event of non-compliance was determined for legal entities.

II. First, by five votes against three, the Constitutional Court upheld Article 109 CPA. Second, it set aside a part of Article 11.3 (leaving as valid only that part determining that any person may be punished for contempt of Court by a penalty of (only) up to 300.00 tolars). Third, it also set aside other challenged paragraphs of Article 11 (the penalty of imprisonment and the provision that in the case of non-compliance the penalty (fine) for legal entities is increased by an additional 50 %).

At the beginning, the Constitutional Court reviewed whether the possibility of punishment according to Article 109 CPA, irrespective of the definitive system of sanctions pursuant to Article 11 CPA, is inconsistent with human rights. Concerning such, the petitioners claimed the violation of freedom of expression according to Article 39 of the Constitution. However, the Court held that the expression (either oral or in writing) of a party (or their representative) to judicial proceedings is in the function of effective implementation of constitutional procedural safeguards. Therefore, the Court did not review the challenged provisions directly in view of freedom of expression, but in the framework of the evaluation of the conformity of this regulation with the right to make a statement before the Court, determined in Article 22 of the Constitution.

The Court held that the challenged regulation limits a party’s right to make such statements only to the extent that the party must not make a statement in an inappropriate, insulting manner, to the benefit of defending their rights in proceedings. However, this

does not limit the human rights themselves, but only determines the manner of their exercise. At that point, the Constitutional Court emphasised that the essential circumstance of the matter at issue was the fact that it concerned making a statement before the Constitutional Court, not a case of making a statement in the framework of artistic expression. In the latter case, the Constitution (according to the guaranteed freedom of expression according to Article 39.1 of the Constitution) ensures the protection of both the content and form of making a statement, which means that the limitation of a party in determining the form of expression can already be considered as a fetter on the human right. Making a statement before the court carries a different and special position: it is typical for judicial proceedings that both the manner and form of carrying out procedural activities, including statements made before the Court, are regulated and subject to certain formal requirements.

The Constitutional Court held that the prohibition against the contempt of court determined in Article 109 CPA does not prevent a party from openly and arguably claiming the reasons which in their opinion refer to the illegality of a judicial decision. According to the Constitutional Court, the challenged article determines only the limits of the manner of giving a critique. Such critique can always be made in a manner that does not diminish the respect of the court or the entire judiciary. To support its position, the Court cited the case of *Nikula v. Finland*, 21.03.2002, *Reports of Judgments and Decisions* 2002-II, in which the European Court of Human Rights dismissed as unfounded the argument of the claimant that freedom of expression of an attorney in representing a client should never be limited by any measure. Holding that the matter concerned the determining and defining of a proper limit to such expression, the Constitutional Court, finally, dismissed the petitioners' arguments as to this point of the petition as unsubstantiated.

Having found that the prohibition and sanctioning of contemptuous applications in civil proceedings is not inconsistent with the right to make statements before the Constitutional Court, pursuant to Article 22 of the Constitution, the Constitutional Court went on to review the corresponding system of sanctions according to Paragraphs 3 to 7 of Article 11.3-11.7.

Concerning the already established positions of the Constitutional Court and in view of the case-law of the European Court of Human Rights, the Constitutional Court took the position that it was evident that the regulation of punishment according to Article 11 CPA, in particular regarding the penalty of imprisonment (up to 30 days for natural persons, and up to 100 days for attorneys), amounted to a degree that substantiated the conclusion that it concerned deciding on criminal

charges (for which all procedural and substantive safeguards concerning the criminal procedure and criminal offenses must be ensured). Thus, the Constitutional Court opined that it was evident that the system of punishment determined in Article 11 CPA, not in itself but due to the extent of the prescribed penalties, was not in conformity with the requirements determined in Article 23.1 of the Constitution (the right to judicial protection) and Article 6 ECHR, and concerning safeguards in the criminal procedure (Article 29 of the Constitution – legal guarantees in criminal proceedings, e.g. the right to have adequate time and facilities to prepare one's defence). Therefore, the Court held that the challenged regulation was unconstitutional, not because any punishment within the criminal procedure is not possible, but because such severe penalties led to the conclusion that it was decided on the basis of criminal charges, and thus all procedural guarantees concerning the criminal procedure should have been ensured). Accordingly, the Constitutional Court set aside the mentioned paragraphs of Article 11 CPA. However, it did not strike out the provision concerning the penalty of up to 300.00 tolars, which, according to the Constitutional Court, does not amount to the degree requiring fulfillment of all the criteria of the criminal procedure, which is the case in the event of the penalty (which was set aside) of up to 1.00.00 tolars for attorneys.

Three judges dissented by arguing that the majority missed the point by evading the direct review of the conformity of the challenged provisions with Article 39 of the Constitution (freedom of expression). They argued that if the limitation of the constitutional right (freedom of expression) was reviewed, not only its manner of exercise, the strict test of proportionality should have been applied. In their opinion, this could lead to finding that Article 109 CPA was also inconsistent with the Constitution.

#### Cross-references:

Legal norms referred to:

- Articles 2, 14.2, 22 and 23 of the Constitution (URS);
- Articles 21 and 43 of the Constitutional Court Act (ZUstS).

#### Languages:

Slovenian, English (translation by the Court).



*Identification:* SLO-2005-3-003

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.09.2005 / **e)** U-I-65/05 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 92/05 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

*Keywords of the alphabetical index:*

Trial, excessive length, remedy after termination of procedure.

*Headnotes:*

The right to trial without undue delay is the core element of the right to judicial protection. The right can be viewed as one of the essential conditions for the effective exercise of all other human rights. If judicial protection is too late, the affected person is in the same position as if there is no judicial protection. The legal maxim is “justice delayed is justice denied”.

Article 15.4 of the Constitution, which affords judicial protection of human rights and remedies if they are breached, must be interpreted in the light of recent case-law from the European Court of Human Rights, according to which effective judicial protection of the right to trial within a reasonable time is ensured only if an appropriate remedy is available for a party whose right had been violated in proceedings which had already finished. The criteria of the European Court of Human Rights, assessing whether the hearing has taken an inordinate length of time, must also be taken into consideration.

*Summary:*

The petitioner challenged Articles 62.1, 62.2 and 34 of the Administrative Dispute Act (hereinafter, “*ZUS*”).

The Constitutional Court reviewed whether affected persons were ensured effective judicial protection of the right to trial without undue delay under Article 23.1 of the Constitution if the proceedings in which this right had been violated were terminated. It decided that *ZUS* was not consistent with the Constitution.

The Constitutional Court had dealt previously with cases regarding legislation governing the situation where the proceedings in which the right to trial without delay had allegedly been violated but those proceedings had come to an end. The affected person was able to file an action for the payment of compensation on the basis of Article 26 of the Constitution. This means that it is decided upon by the court in civil proceedings according to the general rule of torts as regulated by the Code of Obligations.

The Constitutional Court established that no specific statutory provisions exist to enable an affected person to claim the right to just satisfaction in the sense of the European Court of Human Rights. It emphasised that just satisfaction due to a violation of the right to trial within a reasonable time in the sense of the European Court of Human Rights does not entail compensation in the classic meaning according to the criteria of civil liability for property or non-property damage, which also applies to compensation under Article 26 of the Constitution. Here, one is dealing with satisfaction due to the omission of the state to ensure a system or organisation of proceedings which would enable an individual to obtain the decision of the court within a reasonable time. In view of Article 157.2 of the Constitution, *ZUS* does in broad terms govern the judicial protection of the right to trial without undue delay. However, it does not contain the specific provisions mentioned above, which would enable an affected party to gain satisfaction even if the proceedings in question had already concluded. This is why it is inconsistent with Article 15.4 of the Constitution, in conjunction with Article 23.1 of the Constitution.

As the matter concerns the case in which the legislator had failed to regulate an issue which it was obliged to regulate, it was impossible to repeal the legislation in question. Instead, the Constitutional Court reached a declaratory decision. The legislator was ordered to comprehensively regulate the protection of the right to trial without undue delay in *ZUS* or another statute, within one year from the publication of the decision in the Official Gazette of the Republic of Slovenia. The Court expressed the view that the legislator must try not

to place an additional burden on the courts. In other words, the new legal remedy for the protection of the right to trial within a reasonable time must not cause additional delays to judicial proceedings.

In the case in point, the Court only considered whether the legislation in force contained effective judicial protection of the right to trial without undue delay when the original proceedings have already finished. It warned that the case-law of the European Court of Human Rights suggests that the issue of effectiveness of judicial protection of the right to trial without undue delay can also be raised in proceedings which are still pending.

As the remedying of the inconsistency with the Constitution requires more complex legislative regulation, it was not possible to decide, in this particular case, the way in which the decision should be implemented, pursuant to Article 40.2 of the Constitutional Court Act. Accordingly, until the appropriate remedies have been built into the law, anybody whose right may have been breached in proceedings which have already been terminated can only claim compensation under Article 26 of the Constitution.

The Constitutional Court decided unanimously that the Administrative Disputes Act was inconsistent with the Constitution. One judge gave a concurring opinion.

#### *Cross-references:*

Legal norms referred to:

- Articles 15, 23 and 26 of the Constitution;
- Articles 6 and 13 ECHR;
- Article 48 of the Constitutional Court Act.

#### *Languages:*

Slovenian, English (translation by the Court).



#### *Identification:* SLO-2009-3-009

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.09.2009 / **e)** Up-1391/07 / **f)** / **g)** Uradni list RS (Official Gazette), 82/2009 / **h)** Pravna praksa, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

#### *Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

#### *Keywords of the alphabetical index:*

Media, journalist / Politician, defamation / Honour, respect, right.

#### *Headnotes:*

The positions the courts had adopted in the judgments under dispute and their decisions in the civil proceedings did not limit the defendant's freedom of expression in an inadmissible way under Article 39.1 of the Constitution. Thus in weighing freedom of expression on the one hand and the right to personal dignity on the other, the courts did not determine the relation between the above-mentioned constitutional rights in such a way that freedom of expression was excessively limited. In carrying out their work, journalists enjoy a broad scope of protection of the right to freedom of expression, which is a result of their important role in society. If, however, journalists overstep the boundaries of the debate or issue which they are reporting by means of statements which encroach upon an injured party's personality rights to such an extent that it can no longer be claimed that they are in any way contributing to the open public discussion of matters important to society, they cannot argue that the role they are fulfilling in society means that their freedom of expression outweighs the interference with the injured party's personality rights.

#### *Summary:*

There was a clash in this particular case between the human rights of the plaintiff and those of the defendant. In response to a speech made by a deputy of the National Assembly, during the debate on the Registration of a Same-Sex Civil Partnership Act, in which he allegedly expressed by words and gestures a negative opinion regarding homosexuals, the defendant published a magazine article.

In the article it was, *inter alia*, written that the politician "accompanied his brilliant idea with a coffeehouse imitation which was probably supposed to clearly illustrate some orthodox understanding of a stereotypically feminised and phoney faggot, whereas it really turned out to be just in the normal range of a cerebral bankrupt who is lucky to be living in a country

with such a limited pool of human resources that a person with his characteristics can even end up in the parliament, when in any normal country worthy of respect he could not even be a janitor in an average urban primary school."

The courts of first and second instance established that the magazine article was objectively offensive and that it attacked the plaintiff's personality and thereby interfered in an inadmissible way with his honour and reputation. Upon inspecting video recordings of the National Assembly session, it was established that in the speech in question, the plaintiff said: "Imagine a child in a school who is picked up by a father who greets him: "Ciao. I came to get you. Are you dressed yet?" and accompanied this statement with a hand gesture allegedly used to convey the idea of a homosexual man. The plaintiff also stated: "...there is probably no one in the entire assembly room who would wish to have the fruit of their loins declare themselves to be for what we are voting on today by rights [sic]... In other words, not one of us would wish to have a son or a daughter who would declare themselves to be part of such a marriage."

In the constitutional complaint the defendant stressed first and foremost that this particular magazine article is an expression of an opinion on an issue which is important to the public and that the plaintiff's speech was manifestly offensive to a certain, very sensitive group of people. Therefore, the journalist who was outraged by such speech wanted to express his disagreement and disapproval. The applicant also observed that the journalist did not express an opinion about the plaintiff as a person; it related to his conduct.

Article 39.1 of the Constitution guarantees freedom of expression of thought, freedom of speech and public appearance, and freedom of the press and other forms of public communication and expression. As is the case regarding other human rights, the right to freedom of expression is not unlimited. Under Article 15.3 of the Constitution, human rights and fundamental freedoms are limited only by the rights of others. The right to freedom of expression often clashes with rights to personality and privacy (Article 35 of the Constitution), to which the right to the protection of honour and reputation also belongs. The Constitutional Court has already held that journalists must be particularly careful when implementing the right of the public to be informed, with reference to which they act as representatives of the public. They must ensure that information is true, clear, and unambiguous.

The Constitutional Court held that the positions of the courts in the challenged judgments and their decisions in the civil proceedings did not limit the defendant's freedom of expression in an inadmissible way. Thus in weighing up the freedom of expression on the one hand and the right to personal dignity on the other, the courts did not determine the relationship between the above constitutional rights in such a way as to impose an excessive limitation on the freedom of expression. The courts held that the defendant's article did not constitute a serious criticism of the plaintiff's work as a National Assembly deputy, but gave a negative value judgment of him, his abilities, and personal characteristics.

The Constitutional Court held that the freedom of expression of journalists is protected, provided they act within the framework of performing their "mission". The limits to this framework must be decided in each individual case. An issue may be important to society and the statement of the injured party may be inappropriate, provocative, and even offensive. Nonetheless, the response to it can be exaggerated and may exceed the framework of the protection of the right to freedom of expression. This also applies to journalistic reporting.

The Constitutional Court was of the view that this article, in terms of its substance, but not its form, did not contribute to people being informed. Neither did it contribute to a socially important and sensitive public discussion on the position of homosexuals. The Constitutional Court therefore dismissed the complaint.

#### *Languages:*

Slovenian, English (translation by the Court).



*Identification: SLO-2011-2-002*

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 24.03.2011 / **e)** U-I-271/08 / **f)** / **g)** *Uradni list RS* (Official Gazette), 26/2011 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law.**

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

*Keywords of the alphabetical index:*

Police, investigation, withholding / Witness, examination, right of defence.

*Headnotes:*

The non-disclosure of information related to police work pursues constitutionally admissible aims, such as state security, the protection of individuals from interferences with their life or person, and the protection of the tactics and methods of police work. Interference with the defendant's right to a defence is permissible, in order to achieve these aims. The duty to maintain the confidentiality of sources and undercover agents, and withholding such from the defence, is an appropriate measure for achieving the constitutionally admissible aim. Such measures, are, however, only necessary and proportionate if serious danger to the life or person of the witness exists or there are other substantial reasons in the public interest, while at the same time the possibility of examining such a witness upon applying protective measures is ensured. Courts are charged with ensuring the fairness of proceedings against defendants. It is incumbent on them to apply the measure which is shown to be the least burdensome in terms of interference with the defendant's right to a defence.

*Summary:*

Under the Police Act, the disclosure of certain information necessary for the defence in criminal proceedings depends on a decision made at the discretion of the Minister of the Interior. This provision is inconsistent with the defendant's right to judicial protection determined in the first paragraph of Article 23 of the Constitution, which guarantees everyone the right to have a decision over charges brought against them made by an independent and impartial court, not by the

executive branch of power. The non-disclosure of information related to police work pursues constitutionally admissible aims, such as state security, the protection of individuals from interference with their life or person, and the protection of the tactics and methods of police work.

In order to achieve these aims, interference is admissible with the defendant's right to a defence determined in Article 29 of the Constitution, which takes into account the equality of arms in criminal proceedings and ensures that prosecuting authorities disclose to the defence the evidence for the benefit of or against the defendant in their possession. The duty to maintain the confidentiality of sources and undercover agents and withholding such from the defence is an appropriate measure to achieve the constitutionally admissible aim.

However, such a measure is only necessary and proportionate if serious danger to the life or person of the witness exists or there are other substantial reasons in the public interest, while at the same time the possibility of examining such a witness upon applying protective measures is ensured. It is the duty of state authorities who ensure the efficiency of prosecution to assess the threats that would follow from the disclosure of confidential information. Courts are charged with ensuring the fairness of proceedings against defendants, and it is incumbent on them to apply the measure which is shown to be the least burdensome in terms of interference with the defendant's right to a defence.

A delicate balance needs to be struck, between the interests of public order and individual personal safety, and the right to a defence. Whether it can be shown, upon appropriate weighing, that such disclosure is well-founded, depends on the circumstances of the individual case, taking into consideration significant elements such as the criminal offence with which the defendant is charged, possible manners of defence and the importance of testimony. This may only be reviewed in individual cases by an independent and impartial tribunal. Therefore, the statutory regulation which reserved such a decision for the Minister of the Interior is not only inconsistent with the right to judicial protection, but also interferes with the defendant's right to a defence in an inadmissible manner.

*Languages:*

Slovenian, English (translation by the Court).



*Identification:* SLO-2011-3-003

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.04.2011 / **e)** U-I-223/09, Up-140/02 / **f)** / **g)** *Uradni list RS* (Official Gazette), 37/2010 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

*Keywords of the alphabetical index:*

Constitutional Court, re-opening of proceedings / Injustice, redress.

*Headnotes:*

A statutory regulation which does not allow for the re-opening of constitutional complaint proceedings on the basis of a decision from the European Court of Human Rights establishing a violation of human rights is not inconsistent with the right to obtain redress for the violation of human rights under the Constitution or with the right to an effective remedy under the European Convention on Human Rights. These requirements are met if parties to such proceedings are ensured just satisfaction in the form of financial compensation or, in certain cases, merely by establishing the violation.

*Summary:*

The applicant did not show that the statutory regulation, which does not allow for the reopening of constitutional complaint proceedings on the basis of a decision from the European Court of Human Rights establishing a violation of human rights in these particular proceedings, was inconsistent with the right to obtain redress for the violation of human rights determined in Article 15.4 of the Constitution and with the right to an effective remedy determined in Article 13 ECHR. These requirements under the Constitution and European Convention on Human Rights are met if the party in such a case is ensured just satisfaction in the form of financial compensation or, in certain cases, merely by establishing the violation. The Constitutional Court dismissed the petitioner's application for the reopening of the constitutional complaint proceedings on the basis of the European Court of Human Rights judgment because the Constitutional Court Act does not allow the reopening of proceedings on such grounds and

because the petitioner did not demonstrate the existence of a requirement under the Constitution and European Convention on Human Rights for such statutory regulation.

*Languages:*

Slovenian, English (translation by the Court).



# South Africa

## Constitutional Court

### Important decisions

*Identification:* RSA-2002-2-008

a) South Africa / b) Constitutional Court / c) / d) 21.05.2002 / e) CCT 28/01 / f) S v. Walters and Others / g) / h) 2002 (7) *Butterworths Constitutional Law Reports* 663 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

1.6.3.1 Constitutional Justice – Effects – Effect erga omnes – ***Stare decisis.***

1.6.5.4 Constitutional Justice – Effects – Temporal effect – ***Ex nunc effect.***

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.17 General Principles – **Weighing of interests.**

3.20 General Principles – **Reasonableness.**

4.4.3 Institutions – Head of State – **Powers.**

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

*Keywords of the alphabetical index:*

Criminal justice, effectiveness / Firearm, use / Law, entry into force / Supreme Court, decision, binding nature / Court, verification of the constitutionality of laws.

### Headnotes:

The constitutional rights of dignity, life and physical integrity, balanced against the interests of effective criminal justice, prohibit the use of a firearm during an arrest unless the suspect

- a. poses an immediate threat of serious bodily harm to the arrester or to someone else; or
- b. is reasonably suspected of having committed a serious crime involving or threatening such harm.

A trial judge is bound by the Supreme Court of Appeal (hereinafter, “SCA”) on issues of constitutional interpretation, despite the SCA not being the highest court on constitutional matters.

A trial judge should determine a constitutional issue only if and when it proves necessary for determining the guilt or innocence of the accused.

If an Act empowers the President to determine the date of commencement of that legislation, this power cannot be used to veto the legislation or to prevent its coming into force.

### Summary:

Section 49 of the Criminal Procedure Act 51 of 1977 governs the use of force to carry out an arrest, Subsection 2 of which permits deadly force in certain circumstances. This latter provision was relied on as a defence by Mr Walters and his son when they were charged with murder in the High Court for having shot a suspect fleeing from their bakery one night. The prosecution argued that according to a reinterpretation of Section 49.1 by the Supreme Court of Appeal (hereinafter, the “SCA”) the shooting was not authorised. In the alternative, the prosecution challenged the section’s constitutionality. The trial judge disagreed with the SCA decision, held that he was not bound to follow it and upheld the constitutional challenge to the extent that it relates to a fleeing suspect. He then adjourned the case pending confirmation by the Constitutional Court of the order of constitutional invalidity.

The accused and the prosecution took no part in the proceedings before the Constitutional Court. The Minister of Justice submitted argument that Section 49.2 was unconstitutionally wide and contended for the validity of a replacement of Section 49 that had already been adopted by Parliament but not yet put into operation. The National Commissioner of the Police Services, backed by the Minister of Safety and Security, intervened to support

the section in its existing form, contending that it conformed to internationally accepted norms.

The Judgment of Kriegler J for a unanimous court analysed the power to use force, including the use of a firearm, given by the section to persons lawfully carrying out an arrest. Because this power infringes the rights to life, human dignity and bodily integrity guaranteed in the Bill of Rights, the judgment examined the balance between these rights and the interests of effective criminal justice. Regarding the use of a firearm, the judgment endorsed the conclusion of the SCA that Section 49.1 must be interpreted as generally excluding the use of a firearm unless the suspect

- a. poses an immediate threat of serious bodily harm to the arrester or to someone else; or
- b. is reasonably suspected of having committed a serious crime involving or threatening such harm.

Read in this way, Section 49.1 is constitutionally justifiable and the order by the trial court declaring it partially invalid was therefore not confirmed.

The Court found, however, that Section 49.2 authorised the use of deadly force for arrests in circumstances so wide as to be constitutionally unjustifiable, for example an arrest for a trivial offence like shoplifting or for a serious but non-violent one like fraud. This subsection was therefore struck down in its entirety. Because Section 49.1 covers the use of force generally and because the replacement section could be put into operation virtually immediately, the order of invalidation took effect immediately, but did not affect past conduct.

The judgment tabulated the following main points regarding the use of force by police officers and others in carrying out arrests:

The purpose of arrest is to bring before court for trial persons suspected of having committed offences. Arrest is not the only means of achieving this purpose, nor always the best and may never be used to punish a suspect. Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest and only the least degree of force reasonably necessary to carry out the arrest may be used. In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances. Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only. Ordinarily it is not permitted unless the suspect poses a threat of violence to the arrester or

others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later. These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

The judgment also concluded that the trial judge did not have the power to differ from the SCA on a question of constitutional interpretation. He should also have dealt with the constitutional issue only if and when it became necessary for his verdict. As the order of constitutional invalidity did not affect past conduct, the case was referred back for resumption and conclusion on the basis that Section 49.2 is constitutionally valid.

Lastly, the judgment considered the fact that the new Section 49, passed by Parliament in October 1998, had not yet been put into operation by the President. The Act containing the new section gave the President the power to fix the date of its implementation. This power could not lawfully be used to veto or otherwise block an enactment duly adopted by Parliament.

#### Cross-references:

- *S v. Makwanyane and Another*, 1995 (3) South African Law Reports 391 (CC), 1995 (6) Butterworths Constitutional Law Reports 665 (CC), Bulletin 1995/3 [RSA-1995-3-002];
- *Govender v. Minister of Safety and Security*, 2001 (4) South African Law Reports 273 (SCA);
- *Tennessee v. Garner*, 471 United States Reports 1 (1985);

#### European Court of Human Rights:

- *McCann and Others v. UK*, 27.09.1995, (1996) 21 European Human Rights Reporter 97, Bulletin 1995/3 [ECH-1995-3-016].

#### Languages:

English.



# Spain

## Constitutional Court

### Important decisions

*Identification:* ESP-1996-2-015

a) Spain / b) Constitutional Court / c) Second Chamber / d) 27.05.1996 / e) 92/1996 / f) / g) *Boletín oficial del Estado* (Official Gazette), 150, 21.06.1996, 55-58 / h).

*Keywords of the systematic thesaurus:*

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

*Keywords of the alphabetical index:*

Defence counsel, officially appointed.

*Headnotes:*

In accordance with various Judgments of the European Court of Human Rights (Airey case, 1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-003]; Paketti case, 1983), while it is true that refusal to afford the assistance of a defence counsel does not in itself infringe the right granted by Article 24.2 of the Spanish Constitution, the facts surrounding such a refusal may give rise to such an infringement. Thus, the fact that such refusal is occasioned by the unavailability of an official defence counsel, thereby giving rise to a real and effective situation of deprivation of substantive defence since the assumption of one's own defence proves inadequate and prejudicial to the litigant in the light of the circumstances of the case, constitutes an infringement of the rights of the defence.

*Summary:*

The appellant alleged deprivation of defence against a judgment given on appeal allowing an application filed by the owner of an apartment in connection with eviction proceedings instituted against the appellant for default in payment. By means of that application the owner sought not only to obtain the eviction of the tenant but also to ensure that the defendant could not be entitled to mitigation in consideration of any payment

of rent due. The court handling the case had declared the request for an officially assigned defence counsel to be inadmissible on the ground that the intervention of a defence counsel was not compulsory in the case.

The Constitutional Court had declared on several occasions that the right to a fair trial comprised the right to a defence and the assistance of a defence counsel as recognised by Article 24.2 of the Spanish Constitution, not only in criminal cases but in general in any legal proceedings. The purpose of the right was to ensure effective observance of the principle of equality of the parties and the adversarial principle, which imposed on judicial bodies the positive duty to avoid any imbalances between the parties or limitations of the defence such as might result in any lack of defence, a situation prohibited in all cases by the final clause of Article 24.1 of the Spanish Constitution. The fact that intervention by a defence counsel was not obligatory in particular proceedings (in this case, eviction proceedings) in no way deprived the person on trial of the right to a defence counsel, as granted by Article 24.2 of the Spanish Constitution. In particular, the non-obligatory character of the intervention of an official defence counsel in specific proceedings laid no obligation on the parties to act personally, but afforded them the possibility of choosing between conducting their own defence and a formal defence. There were no restrictions on the right to a defence counsel in such circumstances; hence the litigant enjoyed the right to the assistance of an officially assigned defence counsel should he be unable to afford a lawyer of his choice and should he consider such assistance to be in the interests of his defence. As a rule, courts were therefore under an obligation to suspend proceedings until such time as the litigant lacking in financial resources or unable to take a lawyer of his choice could enjoy the assistance of an officially assigned defence counsel conducting his formal defence. However, this did not necessarily imply the obligatory appointment of an officially assigned defence counsel whenever the request was made, since the right to a defence counsel had to be balanced against the right of the opposing party to a trial without undue delay.

*Languages:*

Spanish.



**Identification:** ESP-1999-3-020

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 27.09.1999 / **e)** 162/1999 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 263, 03.11.1999, 9-23 / **h)** CODICES (Spanish).

**Keywords of the systematic thesaurus:**

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

**Keywords of the alphabetical index:**

Court, protection against wrongful criticism / Court, impartial, criteria / Media, statement by a judge / Lawyer, right to choose, renunciation / Hearing, adjournment / Judge, political association or views.

**Headnotes:**

The fundamental right to an impartial judge (Article 24.2 of the Constitution and Article 6.1 ECHR) in no way prohibits the president of a criminal court from making statements to the media on court cases. That having been said, any statement that is insulting to a person who will subsequently be involved in litigation is sufficient to justify suspicions of bias and the exclusion of the judge having made such statements from the court. This applies even if the judge made the statements for the sole purpose of defending the court's reputation against illegitimate and wrongful attacks by the litigant, which attacks are particularly damaging when they come from an individual discharging important public duties.

The judge's impartiality is not at issue when the court dealing with a criminal case has simply declared the complaint initiating the proceedings admissible, or when one of the judges has occasional social or professional relations with any of the prosecution lawyers. A judge's impartiality in no way prevents him/her from holding political opinions.

The right to the assistance of a lawyer (Article 24.2.3 of the Constitution) never necessitates a stay of proceedings where defendants change lawyers on the grounds that they no longer trust their original lawyer.

**Summary:**

Mr Hormaechea, President of the Autonomous Community of Cantabria, was prosecuted for misappropriation of public funds. After the proceedings were commenced he levelled frequent criticisms in various newspapers and other media at the judges who were to try him, mainly because he considered them biased against him owing to their left-wing political views. He even went so far as to illustrate his claims with references to unfortunate events during the Spanish Civil War. The President of the Cantabrian High Court of Justice made various public declarations to defend the independence and impartiality of the Court, and in his last statement countered one of the defendant's claims by saying that he regretted his "pathetic, ludicrous" conduct, even adding that his criticism was "disgraceful" and showed a "state of mind" completely unsuited to the status of President of an Autonomous Community.

The criminal courts rejected the President's challenge to the judge and convicted Mr Hormaechea and other senior officials of the regional administration of a variety of offences committed in the exercise of their official duties. The Constitutional Court also rejected most of the allegations of bias, although it did consider the last statements by the President of the Court unreasonable. For this reason, it afforded constitutional protection (*amparo*) to the applicant and ordered the resumption of the trial with a different judge presiding.

Since accused persons must be able to trust their lawyers during criminal proceedings, the right to the assistance of a lawyer (Article 24.2.3 of the Constitution) protects litigants' freedom to choose, and therefore to change, legal counsel. That having been said, the exercise of this right does not mean that accused persons can arrange the proceedings to suit themselves. Therefore, it can be affirmed that by refusing to adjourn the hearing and forcing the accused (who, it should be added, holds a law degree) to defend himself the court was infringing none of his constitutional rights, given that he renounced the services of his lawyer after the evidence had already been taken.

The fact that courts must be impartial means that judges can never take action or maintain relations with the parties such as to suggest that the law will not be the sole criterion in reaching the judicial decision or that the judge will base his judgment on completely non-legal considerations. If parties raise the slightest doubt on this score they must provide objective evidence for their suspicions. The requirements of impartiality restrict all the judge's judicial and non-judicial activities.

The fact of declaring the complaint initiating criminal proceedings admissible does not justify challenging the trial judge. Current legislation stipulates that a declaration of admissibility of a complaint constitutes a strictly judicial act of responding to the initiative of submitting a complaint.

The only justification for barring a judge from dealing with a given case would be a close friendship with one of the parties. Social or professional relations with the prosecution lawyer in the form of occasional meetings do not affect the judge's impartiality.

The accused's statements and vitriolic criticism of the judges on the bench of the court which was to try him are wrongful (in that they were expressed outside the proceedings) and unlawful (in that they alluded to the judges' political views). The assertions made by the president of the court aimed at defending the court's independence and reputation and publicly announcing that the members of the court did not intend to relinquish the case do not give rise to any suspicion of bias. Moreover, the judge's words do not suggest any moral position for or against the defendant's guilt since he made no reference to the facts under examination. However, his final statements do amount to blatant personal abuse of the defendant, so that there are well-founded legitimate suspicions of bias on his part, making it impossible for him to judge this criminal case impartially.

Even though the action and authority of the courts must be protected against wholly unjustified attacks, judges sitting on the bench are not in the best position to provide such protection.

#### *Supplementary information:*

Judge's impartiality:

- nos. 47/1982, 44/1985, 145/1988, 299/1994;
- no. 60/1995; 17.03.1995, *Bulletin* 1995/1 [ESP-1995-1-012].

In its Judgment, the Constitutional Court quotes the decisions of the European Court of Human Rights:

- *Delcourt v. Belgium*, 17.01.1970; *Special Bulletin – Leading cases ECHR* [ECH-1970-S-001];
- *Piersack v. Belgium*, 01.10.1982;
- *De Cubber v. Belgium*, 26.10.1984, 26.10.1984;
- *Hauschmidt v. Denmark*, 24.05.1989; *Special Bulletin – Leading cases ECHR* [ECH-1989-S-001];
- *Langborger v. Sweden*, 22.06.1989;
- *Holm v. Sweden*, 25.11.1993;
- *Worm v. Austria*, 29.08.1997;
- *Gautrin and others v. France*, 20.05.1998;

- *Castillo Algar v. Spain*, 28.09.1998.

Right to the assistance of a lawyer:

- nos. 47/1987, 37/1988 and 178/1991.

#### *Languages:*

Spanish.



*Identification:* ESP-2000-1-004

**a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 31.01.2000 / **e)** 24/2000 / **f)** Jianquin Ye / **g)** Boletín oficial del Estado (Official Gazette), 54, 03.03.2000, 46-51 / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

- 4.7.9 Institutions – Judicial bodies – **Administrative courts.**
- 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**
- 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

#### *Keywords of the alphabetical index:*

Expulsion, administrative procedure / Criminal proceedings, ongoing / Expulsion, foreigner, procedure, criminal.

#### *Headnotes:*

When the public authorities have the permission of a criminal court judge to expel a foreigner charged with a criminal offence but do so before the hearing, the expulsion measure does not infringe the fundamental rights to judicial protection and to a fair trial (Article 24 of the Constitution). The 1985 Immigration Act prescribed, among other grounds for expulsion from the national territory, the involvement of a foreign national in activities contrary to law and order. The fact that the misdeeds leading to expulsion may constitute a criminal

offence in no way signifies that the expulsion order cannot be in the remit of the administrative authority, further considering that the latter is subject to oversight by the administrative courts. It therefore rests with these courts to ensure judicial protection of the foreign national's rights. In authorising expulsion (after duly weighing the circumstances of each specific case), the criminal courts do not penalise the foreign national but rather afford him/her an additional safeguard.

### **Summary:**

Mr Jianquin Ye, a Chinese national legally resident in Spain, was arrested at Madrid airport on a charge of procuring forged passports for several of his countrymen to enable them to enter the Schengen area. After questioning by the police and the investigating judge, he was released on bail pending investigation of a criminal charge of uttering forgeries and abetting illegal immigration. A month later, the police requested the court to authorise his expulsion without awaiting the outcome of the investigation or the holding of a hearing. The judge consented to the expulsion of Mr Ye, who lodged an application for constitutional protection (*amparo*) before the Constitutional Court.

The Constitutional Court did not allow the application, since it held that neither the fundamental right to receive effective judicial protection without being denied a defence (Article 24.1 of the Constitution) nor the fundamental right to a fair trial (Article 24.2 of the Constitution) had been violated.

The expulsion of a foreigner from the national territory by the public authorities is an administrative sanction which must be prescribed by a law and can be imposed only as the outcome of proceedings which secure the rights of the defence. In the present case, however, expulsion had not yet been ordered since the procedure was then at a preliminary stage. The criminal court judge was in the process of investigating the facts in order to determine whether they constituted an offence; the investigation of the case was not yet completed when the judge authorised the administrative authority to expel the charged foreign national before the hearing. This possibility is expressly contemplated in the 1985 Immigration Act (Sections 21.2 and 26) and does not infringe the rights in respect of judicial process set forth in Article 24 of the Constitution.

In the event of being finally expelled, a foreign national may exercise all rights of the defence as part of the same administrative procedure. Prior judicial action by the examining judge, limited to authorising expulsion before the hearing, does not penalise a foreigner charged with an offence but affords him/her more

guarantees than are available to other foreigners against whom expulsion proceedings are brought for different reasons. The criminal court must have regard *prima facie* to the foreigner's rights without prejudice to the duty of exhaustive supervision of the administrative courts.

### **Supplementary information:**

Articles 13 and 19 of the Constitution.

The 1985 Immigration Act (Organic Law 7/1985 of 1 July 1985) was repealed and replaced by Organic Law 4/2000 of 11 January 2000 concerning rights and freedoms of foreigners in Spain and their social integration: see Section 53.4.

### **Cross-references:**

Fundamental rights of foreigners:

- nos. 99/1985 of 30.09.1985 and 94/1993 of 22.03.1993;
- declaration of 01.06.1992 concerning the Treaty on European Union.

### **Expulsion from the national territory:**

- nos. 94/1993 of 22.03.1993, 116/1993 of 29.03.1993, 242/1994 of 20.06.1994 and 203/1997 of 25.11.1997 (*Bulletin* 1997/3 [ESP-1997-3-024], and
- Constitutional Court Decision no. 33/1997 of 10.02.1997.

### **European Court of Human Rights:**

- *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28.05.1985, Series A, no. 94, *Special Bulletin – Leading cases ECHR* [ECH-1985-S-002];
- *Berrehab v. Netherlands*, 21.06.1988, Series A, no. 138, *Special Bulletin – Leading cases ECHR* [ECH-1988-S-005];
- *Moustaquim v. Belgium*, 18.02.1991, Series A, no. 193, *Special Bulletin – Leading cases ECHR* [ECH-1991-S-001];
- *Ahmut v. Netherlands*, 28.11.1996, *Reports of Judgments and Decisions* 1996-VI.

### **Languages:**

Spanish.



## *Identification: ESP-2000-1-008*

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 17.02.2000 / **e)** 47/2000 / **f)** / **g)** Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / **h)** CODICES (Spanish).

### *Keywords of the systematic thesaurus:*

1.2.4 Constitutional Justice – Types of claim – **Initiation ex officio by the body of constitutional jurisdiction.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.16 General Principles – **Proportionality.**

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

### *Keywords of the alphabetical index:*

Detention on remand, condition, lawful purpose / Law, precision / Criminal procedure.

### *Headnotes:*

The law governing remand in custody is insufficient and does not uphold the right to personal freedom (Article 17 of the Constitution). Detention of a person facing a charge in criminal proceedings must not only be prescribed by law but also fulfil substantive conditions: it must serve a lawful purpose under the Constitution, besides which the court must explain in its decision the purpose justifying the measure and the proportionality of the detention to that purpose. In so doing it must not only take into consideration the seriousness of the penalty which may be imposed in due course but also weigh the specific circumstances of the act in question and the personal circumstances of the accused.

The general social unease caused by an offence in no way justifies remand in custody.

### *Summary:*

Mr Francisco Castillo Lomas and other persons had been remanded in custody pending a judicial investigation to establish their involvement in various serious offences of drug trafficking and illegal possession of weapons. The court decisions challenged merely state that the offences in question carry very severe penalties (up to twenty years of imprisonment) and cause social unease, and that the remand of any person on reasonable suspicion of being implicated in these offences is consequently justified. However, neither the trial court nor the Court of Appeal

(*Audiencia provincial*) had examined the pleadings of the accused, who asserted that there was not the slightest risk of his absconding since he was financially destitute, co-operating with the authorities, and had all his ties in Spain.

The plenary Constitutional Court granted the applicant constitutional protection (*amparo*) and set aside the decisions pursuant to which his remand in custody had been ordered. It also raised an issue of unconstitutionality regarding Articles 503 and 504 of the Code of Criminal Procedure.

In its judgment, the Constitutional Court referred to its extensive case-law concerning the foundation of a measure as serious as detention pending trial for an offence. In line with European Court of Human Rights precedent, the constitutional case-law stipulates, especially as from 1995, the fulfilment of certain conditions for a pre-trial detention measure to comply with the fundamental right to personal freedom (Article 17 of the Constitution), viz:

1. The detention must have a lawful aim, that is to avert risk of the accused absconding, obstruction of the criminal investigation, or a reoffending, but should never anticipate the penalty or forestall the offence as these are outcomes to be secured by the sentence alone and to be imposed only after a fair trial and under the terms of a court decision.
2. The detention must be ordered by a reasoned court decision; it does not suffice to invoke the provision authorising a judge to order it (chiefly Articles 503 and 504 of the Code of Criminal Procedure); all aspects that justify the application and continuation of such a measure must be weighed additionally.
3. The reasons stated must abide by the principle of proportionality: the freedom of a person presumed innocent can be curtailed only to the extent strictly necessary for achieving certain of the lawful outcomes which justify pre-trial detention.

Judgment 47/2000 compares each of these conditions with the provisions of the 1882 Code of Criminal Procedure (amended several times on this specific point, most recently in 1984), which provisions had been applied literally in the court decisions ordering the remand of the applicant. It emerged from this comparison that the Code of Criminal Procedure did not respect the fundamental right to personal freedom; its provisions did not specify the ends justifying the detention measure, and did not require the courts to give reasons for taking such a measure in each specific case; instead, it sufficed that the offence under investigation carry a severe penalty (prison sentence of over six months and a day) and that there be rational

proof that the accused was involved in perpetrating it, while the personal circumstances of the accused were in no way contemplated.

In this judgment, the Constitutional Court accordingly held that the court decisions (which were confined to literal application of the law) violated the Constitution, and of its own motion raised an issue of unconstitutionality concerning the impugned statute, as it was aware that the violation of personal freedom originated in the wording of its provisions (in accordance with Section 55.2 of the Organic Law on the Constitutional Court).

#### *Supplementary information:*

The government has announced its intention to table in parliament a new bill on criminal procedure.

#### *Cross-references:*

Foundation of the pre-trial detention or remand measure:

- no. 128/1995, 26.07.1995, *Bulletin* 1995/2 [ESP-1995-2-025];
- nos. 37/1996 and 62/1996, 15.04.1996, *Bulletin* 1996/1 [ESP-1996-1-011];
- nos. 44/1997 and 66/1997, 07.04.1997, *Bulletin* 1997/1 [ESP-1997-1-008];
- no. 98/1997, 20.05.1997, *Bulletin* 1997/2 [ESP-1997-2-012];
- no. 156/1997.

#### *European Court of Human Rights:*

- *Neumeister v. Austria*, 27.06.1968, Series A, no. 8, *Special Bulletin – Leading cases ECHR* [ECH-1968-S-002];
- *Matznetter v. Austria*, 10.11.1969, Series A, no. 10;
- *Tomasi v. France*, 27.08.1992, Series A, no. 241-A; *Special Bulletin – Leading cases ECHR* [ECH-1992-S-005];
- *W. v. Switzerland*, 26.01.1993, Series A, no. 254-A.

#### *Languages:*

Spanish.



#### *Identification:* ESP-2000-1-011

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 14.03.2000 / **e)** 73/2000 / **f)** Presa de Itoiz / **g)** Boletín oficial del Estado (Official Gazette), 90, 14.04.2000, 61-77 / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

- 1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
- 1.4.7 Constitutional Justice – Procedure – **Documents lodged by the parties.**
- 2.1.1.4 Sources – Categories – Written rules – **International instruments.**
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**
- 2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**
- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 4.5.2 Institutions – Legislative bodies – **Powers.**
- 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**
- 4.7.9 Institutions – Judicial bodies – **Administrative courts.**
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**
- 5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

#### *Keywords of the alphabetical index:*

Legislator, interference with justice / Validation, legislation / Law of general application / Law, interlocutory judicial review / Law, interpretation / Regulation, no subject-matter reserved vis-à-vis statute law / Environment, conservation / Council of Europe, statute.

#### *Headnotes:*

No law may unduly undermine the operative provisions of a final judgment. Otherwise it might breach the fundamental right to the effective protection of the courts, the principle that the courts have sole competence to exercise judicial authority and the obligation of compliance with court decisions (Articles 24.1, 117.3 and 118 of the Constitution). Parliament may make legal reforms even if, in so doing, it prevents the execution of a decision given by a court under the law formerly applicable. However, under no circumstances may it legislate in pursuit of an unlawful aim, such as impeding the administration of justice, or

pass legislation that may unduly sacrifice the specific interests safeguarded by a judgment awaiting execution on the sole ground of serving the interests enshrined in the new law.

Statements made by political representatives in no way constitute guidance for interpreting the law and cannot be used to distort its substance.

Parliament breaches the prohibition on arbitrary action by public authorities (Article 9.3.7 of the Constitution) only where there is no rational explanation for a law. A law laying down generally applicable new rules on the conservation of natural areas cannot be deemed arbitrary, even where the new rules are debatable from a political or technical standpoint.

Under the Constitution, statute law may have any subject matter, and parliament may in principle pass laws on subjects which were previously governed by regulations. Transforming regulatory provisions into statutory provisions in no way prevents their judicial review, since the courts may always refer the legislation to the Constitutional Court.

Only the courts may raise questions of unconstitutionality, after hearing the parties as to the actual legal provisions whose compliance with the constitution is in doubt. Those provisions must moreover be clearly identified by the court, on consulting the parties, as must the articles of the Constitution which the court considers to be breached. Reference to any other constitutional provision by any party to the proceedings shall not be binding on either the court or the Constitutional Court, without this affecting the powers conferred *ex officio* on the latter.

### **Summary:**

The administrative division of the National Court (*Audiencia nacional*) raised a question of unconstitutionality concerning a number of provisions of a Law on nature conservation areas passed in 1996 by the autonomous community of Navarra. That law repealed the earlier "foral" law of Navarra on the same subject, which dated from 1987, and, *inter alia*, replaced various provisions relating to the rules governing the protective areas surrounding nature reserves.

In 1995 the National Court had cancelled a project to build a dam in the Itoiz valley on the ground that it breached various provisions of the law of Navarra on nature conservation then in force. Following an appeal on points of law this decision was upheld by the Supreme Court in a judgment given in 1997 relating to only one aspect: the area which was to be flooded on building the dam affected a number of nature reserves in the Itoiz valley, as the protective strips of land

surrounding them would partly disappear under the waters of the new dam reservoir. The dam project was also partly cancelled by a final judgment prohibiting the building of the upper part of the dam.

When it was preparing to execute the final judgment the National Court received an application from the public authorities seeking recognition that the execution of the judgment was legally impossible, since the new rules of 1996 permitted the existence of nature reserves without surrounding protective areas and the implementation of building projects in the public interest – as was the case with the Itoiz dam – on the protective strips of land. The National Court then raised a question of unconstitutionality in respect of the law passed in 1996 by the autonomous community of Navarra, deeming that it impeded the execution of the judgments handed down in 1995 and 1997.

The Constitutional Court ruled that the law under consideration did not breach the Constitution.

The principle that public authorities were prohibited from taking arbitrary measures (Article 9.3.7 of the Constitution), which must be applied with extreme care where it was a matter of reviewing parliamentary decisions that were nothing other than the expression of the people's will, could be deemed to have been breached only where there was no rational explanation for a law. The impugned law of Navarra in no way established rules *ad casum* (for a particular case), such as to amend the earlier legislation without justification. On the contrary, it constituted generally applicable legislation amending the rules governing natural areas in Navarra in terms which were indeed debatable from the technical and political points of view but were not devoid of justification.

In those circumstances it was of little consequence that a number of politicians and members of parliament had made statements enabling the National Court to find that the sole purpose of the new law was to prevent the execution of the court decision. The law under consideration brought the 1987 legislation of the autonomous community of Navarra into line with a law passed in 1990 at national level, with the aim of giving increased protection to natural areas. It also incorporated and harmonised the provisions of a number of earlier laws. The objective substance of that law could not be distorted by statements or initiatives that came within the realm of political debate or political strategy and in no way amounted to guidance on interpreting the law under consideration.

Parliament was empowered to amend the legislation on a subject or a given part of the legal system, whether or not that legislation had been applied by the courts in connection with earlier proceedings or with cases pending. Otherwise, the legal system would be

immutable, and undue restrictions would be placed on parliament's rightful freedom of action. The question whether, in making such amendments to the legislation, parliament had interfered with judicial proceedings was quite a different matter, and in that case the issue was not arbitrary action by parliament but the right to the protection of the courts.

The fundamental right to the effective protection of the courts (Article 24.1 of the Constitution) guaranteed the execution of final judgments. The mere fact that a judicial decision had become impossible to execute following an amendment of the law on which it was based did not, in itself, constitute a breach of the Constitution, since compliance with court decisions was conditional on the characteristics of each individual set of proceedings and the substance of the decision. Firstly, parliament had very broad latitude to adopt legal reforms; secondly, compliance with final judgments was of considerable importance in a state governed by the rule of law, as established by the Constitution, and was part of the common heritage shared with other European states (Articles 3 and 1.a of the 1949 Statute of the Council of Europe and case-law of the European Court of Human Rights).

Under the Constitution no law could unduly undermine the operative provisions of a final judgment (Articles 24.1, 117.3 and 118 of the Constitution). The law under consideration had a legitimate aim, which was none other than conservation of the environment (Article 45 of the Constitution). Furthermore, it did not clearly or flagrantly disrupt the balance between the interests enshrined in the law and the specific interests safeguarded by the judgment awaiting execution. First, the interests safeguarded by the judgment consisted in guaranteeing the protection of the nature reserves located in the valley to be flooded by the Itoiz dam project; those interests were duly taken into account by preserving a protective 500-metre strip of land around the reserves, as provided for in the final judgment and also in the new rules laid down by the law of 1996, under which the dam waters themselves were a means of guaranteeing the protection of the birds' nests in the area. Second, the new legislation combined conservation of the environment with other public interests, such as the implementation of a public works project intended to permit the irrigation of vast areas of agricultural land and the supply of drinking water to a number of urban areas and industrial estates.

Under the Constitution, statute law could deal with any subject matter, and the legislature could, in principle, assume responsibility for a task previously performed by the executive. It was therefore not unconstitutional that an appendix to the "foral" law of 1996 defined the protective areas surrounding the nature reserves, which had previously been governed by decree. It could not be said that the only reason for giving a higher rank to

the legislation delimiting the nature reserves was to avoid its review by the administrative courts. Moreover, it should be pointed out that the courts could always verify the validity of legislation by referring a question of unconstitutionality to the Constitutional Court, as in the case under consideration.

From a judicial standpoint, the present judgment specified that it was for a court having to decide on referral of a question of unconstitutionality to consult the parties to proceedings, expressly state the articles of the Constitution with which it deemed the provisions in question to be in contradiction, and clearly define which provisions of the relevant law were concerned, so as to facilitate the parties' submissions and the production of state counsel's report. In the case under consideration the question of unconstitutionality had already been found inadmissible once (decision no. 121/1998 of the Constitutional Court, *Bulletin* 1998/2 [ESP-1998-2-012]) on account of a number of defects in satisfying these procedural requirements. The appeal court had then granted the parties a new time-limit for filing their submissions, after specifying the relevant provisions of the law of the autonomous community of Navarra, by means of a fairly complex Series of references to various sections of the law, and the clauses of the Constitution considered to have been breached, and had subsequently once more referred the matter to the Constitutional Court. The Constitutional Court's judgment stated that the division of the National Court could have identified the relevant provisions in a simpler manner but the question of unconstitutionality was none the less properly posed.

Although one of the parties to the proceedings had relied on other grounds of unconstitutionality, the judgment merely dealt with the aspects mentioned by the court having raised the question of unconstitutionality, as there was no call for an *ex officio* examination of those grounds (Section 39.2 of the Organic Law on the Constitutional Court).

#### *Supplementary information:*

Statute of the Council of Europe of 1949, Articles 3 and 1.a.

#### *Cross-references:*

Failure to execute final judgments:

- nos. 61/1984, 67/1984, 15/1986, 167/1987, 92/1988 and 107/1992.

The judgment takes account of Article 6.1 of the European Convention on Human Rights (Article 10.2 of the Constitution) and follows the precedents

established in the following Judgments of the European Court of Human Rights:

- *National and Provincial Building Society and others v. United Kingdom*, 23.10.1997, *Reports of Judgments and Decisions* 1997-VII;
- *Stran and Stratis Andreatis v. Greece*, 09.12.1994, Series A, no. 301B, *Bulletin* 1994/3 [ECH-1994-3-021],
- *Papageorgiou v. Greece*, 22.10.1997, *Reports of Judgments and Decisions* 1997-VI.

Arbitrary measures by parliament:

- nos. 108/1986, 99/1987 and 239/1992.

Possibility of broadening the scope of a question of unconstitutionality:

- nos. 113/1989 and 46/2000 [ESP-2000-1-006].

*Languages:*

Spanish.



*Identification:* ESP-2000-1-012

**a) Spain / b) Constitutional Court / c) First Chamber / d) 27.03.2000 / e) 87/2000 / f) Iván Aitor Sánchez Ceresani contra Repùblica de Italia / g) Boletín oficial del Estado (Official Gazette), 107, 04.05.2000, 77-84 / h) CODICES (Spanish).**

*Keywords of the systematic thesaurus:*

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.8 General Principles – **Territorial principles.**

3.13 General Principles – **Legality.**

4.17 Institutions – **European Union.**

*Keywords of the alphabetical index:*

Fundamental right, core / EU, fundamental right, guarantee throughout member states / Reciprocity / Extradition, national, possibility / Foreign court,

jurisdiction / Offence, international / Treaty, fundamental right / European Convention on Extradition / Dublin Convention of 1996.

*Headnotes:*

When dealing with an extradition request, the Spanish courts must uphold the fundamental rights secured by the Constitution, even where a possible violation of those fundamental rights is attributable to a foreign public authority. This is because fundamental rights are actual components of the legal system that concern all Spanish public authorities. Furthermore, the Spanish courts alone are competent to take decisions in respect of the person whose extradition has been requested.

A Spanish court which allows the extradition of a Spanish national for offences perpetrated in Spain in no way breaches the fundamental right of access to a court (Article 24.2.1 of the Constitution) where the offences are subject to universal jurisdiction under the international treaties to which Spain is a party, as is the case with international offences relating to drug trafficking.

Article 13.3 of the Constitution prohibits the extradition of Spanish nationals only in respect of political offences. This means that, except in such cases, extradition of a Spanish national is entirely in accordance with the Constitution where it is provided for under an international convention or, failing such a convention, under the Law on extradition requests.

Under no circumstances can the extradition of nationals to countries that have signed the European Convention on Human Rights give rise to general suspicions of failure to fulfil a state's obligations to guarantee and safeguard its nationals' constitutional rights. The countries concerned have specifically undertaken to uphold human rights and made themselves subject to the jurisdiction of the European Court of Human Rights, the ultimate guarantor of the fundamental rights of all individuals, irrespective of the different judicial cultures of the states parties to the convention.

Reciprocity in matters of extradition is not a fundamental right susceptible of protection; in this sphere it is enough that the courts respect the right to effective judicial protection (Articles 13.3, 24.1 and 53.2 of the Constitution). For extradition to be lawful, a court need merely certify in a reasoned decision that the foreign authorities from which the extradition request originated have complied with the principle of reciprocity.

*Summary:*

Italy had requested the extradition of a Spanish national accused of taking part in meetings and making

payments in Spain in connection with a number of drug trafficking operations targeted at Italy. The Spanish national concerned was therefore accused of a drug trafficking offence under the international treaties on combating, preventing and punishing such offences ratified by Italy and Spain. The National Court (*Audiencia Nacional*) requested the Italian authorities to make further inquiries, so as to ascertain whether an Italian national might be extradited to Spain in accordance with the reciprocity principle, but the Italians failed to give a conclusive reply. The Spanish court none the less decided to grant extradition, holding that the Italian authorities' response was sufficient.

The applicant argued that this decision infringed a number of his fundamental rights, an argument which was rejected by the Constitutional Court.

The Constitutional Court held that the court's decision allowing the Spanish national's extradition was reasonable. Recognising the Italian courts' jurisdiction to bring charges against a Spanish national, although the person concerned did not have Italian nationality and the offences had been committed in Spain, in no way breached the right of access to the ordinary court prescribed by law (Article 24.2.1 of the Constitution), as it was not arbitrary to base the relevant decision on the European Convention on Extradition and international treaties against drug trafficking, which permitted the extradition of nationals. The finding that Spanish extradition law, which banned the extradition of Spanish nationals, was not applicable in the case under consideration, since the treaties took precedence, was also entirely reasonable.

It was also to be noted that Italy had ratified the European Convention on Human Rights and was subject to the jurisdiction of the European Court of Human Rights, which meant that any general suspicion that its authorities failed to uphold the relevant judicial guarantees was quite unacceptable.

In addition the Constitutional Court held that the Spanish court's finding that the Italian authorities complied with the principle of reciprocity did not constitute a breach of the right to the protection of the courts. In the material circumstances the judicial decision was not arbitrary. In dealing with appeals for constitutional protection (*amparo*), the Constitutional Court indeed took into consideration solely the arbitrariness of the judicial decisions. It also pointed out that, on completion of the judicial phase of the extradition procedure, it was for the government to verify that reciprocal treatment was guaranteed. There was therefore nothing to prevent the government from requiring further guarantees, refusing the extradition request if it deemed that the guarantee given was insufficient or, possibly, granting that request if it took the view that the fact that Spain and Italy were both

members of the European Union afforded sufficient guarantee of reciprocity in the light of the general trend in such matters, reflecting Article 7 of the Dublin Convention of 27 September 1996, which, within the European Union, prohibited refusal of extradition on the ground that the person concerned was a national.

Lastly, the Constitutional Court did not find that there had been any undue delay in the proceedings (Article 24.2.6 of the Constitution), in so far as the applicant had not complained of such a delay at the relevant time. In any case, the delay was essentially attributable to the Italian authorities, who had been slow in sending the Spanish court the result of the additional inquiries requested.

#### *Supplementary information:*

Article 13.3 of the Constitution; Sections 3, 1.2 and 6 of the 1985 Act on extradition requests received; Section 278.2 of the 1985 Organic Law on the Judiciary.

Article 6 of the European Convention on Extradition, signed in Paris on 13 December 1957; Article 7 of the Dublin Convention of 27 September 1996.

#### European Court of Human Rights:

- *Soering v. United Kingdom*, 07.07.1989, Series A, no. 161, *Special Bulletin – Leading cases ECHR* [ECH-1989-S-003].

#### *Cross-references:*

Extradition and Article 13.3 of the Constitution:

- nos. 11/1983, 11/1985, 102/1997, 141/1998 (*Bulletin* 1998/2 [ESP-1998-2-013]) and 147/1999.

#### *Languages:*

Spanish.



*Identification:* ESP-2000-1-013

- a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 30.03.2000 / **e)** 91/2000 / **f)** Domenico Pavigianiti contra Repùblica de Italia / **g)** Boletín oficial del Estado (Official Gazette), 107, 04.05.2000, 99-117 / **h)** CODICES (Spanish).

**Keywords of the systematic thesaurus:**

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.8 General Principles – **Territorial principles.**

5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice.**

**Keywords of the alphabetical index:**

Extradition / Fundamental right, core / EU, fundamental right, guarantee throughout member states / Trial *in absentia* / Right to defend oneself, waiver / Life imprisonment / Death penalty, abstract possibility.

**Headnotes:**

The Spanish courts must ensure that measures taken by foreign public authorities, which they must put into effect within the Spanish legal system, are consistent with the fundamental rights secured by the Spanish Constitution. Those rights are actual components of Spanish law and are part of public policy, which must be complied with in all circumstances.

Acts or omissions by foreign public authorities are not governed directly by the Spanish Constitution, but may indirectly breach the fundamental rights secured therein. Such an indirect breach occurs only where the act or omission adversely affects the very essence of a fundamental right, which is universally valid and applicable in that it has to do with human dignity and constitutes the hard core of the fundamental right concerned, in the light of the provisions of international conventions on human rights, of which the Spanish courts must take account before giving them full effect. Where an act or omission by a foreign public authority that violates the essence of a fundamental right is put into effect in the Spanish legal system by a Spanish

court, the latter automatically breaches that fundamental right, as it does not uphold the essence of the right vis-à-vis the act or omission by the foreign public authority.

When very serious offences are in question, resulting in charges harmful to the personal dignity of the accused and carrying a severe prison sentence, a sentence imposed at the conclusion of criminal proceedings conducted in the absence of the accused breaches the essence of the rights to a defence and to a fair trial secured in Article 24.2 of the Constitution if the person sentenced is not afforded the possibility of subsequently bringing an action to have the judgment by default set aside.

The mere abstract possibility that a sentence of life imprisonment may be pronounced, in accordance with the Italian Criminal Code, does not breach either the right not to be subjected to inhuman or degrading punishment (Article 15 of the Constitution) or the rights of prisoners (Article 25.2 of the Constitution).

By granting the applicant's extradition, without making it conditional on the effective possibility of a second trial in his presence, the National Court (*Audiencia Nacional*) infringed his right to a defence and to a fair trial.

**Summary:**

The applicant, who had been prosecuted, convicted and sentenced *in absentia* in Italy for a number of very serious offences relating to his membership of a mafia-like organisation, was arrested in Spain, following which the Italian authorities requested his extradition with a view to enforcing the final judgments against him and bringing him to trial for various offences carrying a sentence of life imprisonment. The appeal court granted his extradition without imposing any conditions.

The applicant alleged *inter alia* two particularly serious violations of fundamental rights: a breach of his right to defend himself and to a fair trial, since the Italian courts had convicted and sentenced him *in absentia*, and a breach of his right not to be subjected to inhuman or degrading punishment or treatment, since his extradition had been granted without a demand for any guarantee from the Italian authorities that he would not be required to serve a life prison sentence in Italy.

The judgment of the plenary Constitutional Court was primarily concerned with determining to what extent the Spanish courts must project the substance of the fundamental rights secured in the Spanish Constitution on to measures taken by foreign public authorities which Spanish courts are required to recognise and put into effect in Spain. In this connection, the Constitutional Court reiterated its established

precedents on the subject, but none the less gave a number of important clarifications: foreign public authorities were not governed by the Spanish Constitution; however, the Spanish authorities could not co-operate with foreign authorities where, in so doing, they themselves also violated the essence of fundamental rights.

In the case of trial proceedings, not all of the guarantees contained in Article 24 of the Constitution could be projected on to past or future acts by foreign public authorities, and thereby possibly render the action taken by a Spanish court indirectly unconstitutional; only the basic principles enshrined in those guarantees, the very essence of a fair trial, could be projected in that way.

In this judgment it was held that being present at one's trial was not necessarily part of the essence of the right to a defence and to a fair trial with full guarantees (Article 24.2 of the Constitution), although under Spanish criminal law it was generally the case. The guarantees offered in Italy (active presence of counsel where the defendant was absent) were in principle sufficient. However, in the light of the provisions of the European Convention on Human Rights and the case-law of the European Court of Human Rights, the judgment added that it was essential that a person convicted *in absentia* of a very serious offence carrying a severe prison sentence should be able to seek to have the judgment by default set aside in a second trial, with a view to having the court review any prison sentence imposed. The Constitutional Court held that the appeal court's decision should be reversed on this point and the applicant's extradition should be granted on condition that a new trial afforded him sufficient possibility of appeal, thereby safeguarding his right to a defence.

The applicant also alleged that he was liable to life imprisonment (*ergastolo*) for a number of the offences resulting in the extradition measure. In its judgment the Constitutional Court held that this allegation was unfounded, since it had not been specified under what conditions the sentence was to be served and what degree of loss of liberty it entailed. Under these circumstances it was therefore quite impossible to determine whether the punishment was inhuman and degrading (Article 15 of the Constitution), as the applicant had alleged. In addition, attention must be drawn to the fact that Article 25.2 of the Constitution in no way meant that the sole legitimate purpose of a prison sentence was rehabilitation and social re-integration; that provision moreover did not set forth a fundamental right *per se*, but constituted directions from the constitution-making authority to parliament providing guidance on crime and prisons policy.

#### *Supplementary information:*

Two dissenting opinions were issued. The first, by the President of the Court, basically asserted that, where the minimum rights of the defence had been respected in the course of the trial from which the defendant was absent, as had been the case in the proceedings under consideration, the essence of the right to a defence and to a fair trial did not always require a further trial in which the defendant sought to have the judgment by default set aside. The second dissenting opinion (supported by three judges) gainsaid the judgment, asserting that accused persons could defend themselves if they were present in person at their trial or have themselves represented by counsel of their choosing if they did not wish to attend, and there was consequently no violation whatsoever of the rights of the person in question. These two dissenting opinions underlined three key factors: Italy was a member state of the European Union; it did in fact uphold the rights enshrined in the European Convention on Human Rights; and it had accepted the jurisdiction of the European Court of Human Rights in Strasbourg (which was consistent with Judgment no. 86/2000 delivered by the first division of the Constitutional Court). Articles 10, 13.3, 24 and 25 of the Constitution.

#### *Cross-references:*

Essential substance of fundamental rights:

- no. 11/1981.

Human dignity:

- nos. 53/1985 and 120/1990.

Extradition:

- nos. 11/1983, 141/1998 (*Bulletin* 1998/2 [ESP-1998-2-013]) and 87/2000 (ESP-2000-1-011).

The reasoning of the judgment and of the dissenting opinions is based on Articles 3 and 6 ECHR and other provisions and on the following Decisions of the European Court of Human Rights:

- *Soering v. the United Kingdom*, 07.07.1989, Series A, no. 161, *Special Bulletin – Leading cases ECHR* [ECH-1989-S-003];
- *Drozd and Janousek v. France and Spain*, 26.06.1992, Series A, no. 240;
- *Loizidou v. Turkey*, 23.03.1995, Series A, no. 310;
- *Tyler v. United Kingdom*, 25.04.1978, Series A, no. 26, *Special Bulletin – Leading cases ECHR* [ECH-1978-S-002]);
- *T. and V. v. United Kingdom*, 16.12.1999;

- *Colozza v. Italy*, 12.02.1985, Series A, no. 89; *Special Bulletin – Leading cases ECHR* [ECH-1985-S-001];
- *F.C.B.v. Italy*, 28.08.1991, Series A, no. 208-B;
- *Potrimol v. France*, 23.11.1993, Series A, no. 277-A;
- *Lala and Pelladoah v. Netherlands*, 22.09.1994, Series A, no. 297-B;
- *Barberà, Messegue and Jabardo*, 06.12.1988, Series A, no. 146, *Special Bulletin – Leading cases ECHR* [ECH-1988-S-008];
- *Oberschlick*, 23.05.1991, Series A, no. 204;
- *Guerin v. France*, 29.07.1998, *Reports of Judgments and Decisions* 1998-V;
- *Deweerd v. Belgium*, 27.02.1980, Series A, no. 35, *Special Bulletin – Leading cases ECHR* [ECH-1980-S-001].

#### *Languages:*

Spanish.



*Identification:* ESP-2000-2-019

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.05.2000 / **e)** 141/2000 / **f)** Pedro Carrasco Carrasco / **g)** *Boletín oficial del Estado* (Official Gazette), 156, 30.06.2000, 40-46 / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

- 2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989**.
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 3.17 General Principles – **Weighing of interests**.
- 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
- 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
- 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

#### *Keywords of the alphabetical index:*

Marital separation / Child, paternal rights / Sect / Proselytism, of minor children / Fundamental right, restriction, justification.

#### *Headnotes:*

The placing of excessive restrictions on the access of a father separated from his minor children on the grounds of his religious beliefs is in breach of the right to freedom of religion (Article 16 of the Constitution).

Minors enjoy full entitlement to their fundamental rights. The exercise of these rights and the faculty of choice in their regard do not depend entirely on the decisions of those who have parental authority over or custody and care of a minor; they must reflect the child's level of maturity and the different stages of his or her capacity to act as recognised in law.

Minors have the right to freedom of religion and protection from psychological duress. It follows that they have the right not to share their parents' beliefs and not to be exposed to their proselytising. For this reason, where conflict exists between the rights of parents and minor children, it must be settled with regard firstly to the interests of the latter.

Justification must be given for all restrictions imposed by the authorities on freedom of religion.

#### *Summary:*

The applicant's wife had sought marital separation on the grounds *inter alia* that ever since her husband had joined the organisation known as the "Gnostic Christian Universal Movement of Spain" he had consistently failed to comply with his obligations towards his family, had placed conditions on the couple's intimacy and had pressurised her to join the movement. The court at first instance had ruled for separation and granted custody of the children to the wife, although parental authority was awarded to both parents.

Under the terms of this ruling, the father had access on alternate weekends and for half of all holidays. He was also explicitly barred from exposing the children to his religious beliefs or making them attend gatherings associated with those beliefs. Granting an application brought by the wife, the Provincial Court of Appeal (*Audiencia Provincial*) drastically curtailed the father's access, limiting it to weekends only with no rights during holidays and placing an absolute prohibition on the children spending the night in his home. The Court of Appeal based its decision on a psychosocial report introduced into the file which

stated that the movement to which the father belonged could be identified as a destructive sect and that measures should therefore be taken to prevent the father, as a member of this organisation, from exposing his children to his beliefs.

The father lodged an appeal for constitutional protection, alleging that the Provincial Court of Appeal decision to restrict his right of access to his minor children because of his membership of the Gnostic Christian Universal Movement of Spain contravened his freedom of religion. The Constitutional Court allowed the father's appeal, set aside the restrictions imposed by the Court of Appeal and reinstated the access decreed by the trial court.

The Court held that parents' freedom of religion and their right to proselytise their children were limited by the children's own freedom of religion and right to protection from psychological duress. Children had the right not to share their parents' beliefs or to be exposed to their proselytising. For this reason, where these rights were in conflict the interests of minors must always be given priority (Articles 15 and 16 of the Constitution, in the light of Article 39).

The Court held as a general rule that the freedom of religion established in Article 16 of the Constitution meant that one could lawfully profess the beliefs of one's choice, behave as dictated by those beliefs, argue them with other people and engage in proselytism. The nature of this freedom varied according to whether it related to the conduct itself or to the religious freedom of others. In the first case, freedom of religion as laid down in Article 16 of the Constitution afforded total protection which ended only where this freedom overlapped with other fundamental rights and interests which were constitutionally guaranteed. However, where freedom of religion impinged on other people it was limited not only by the restrictions mentioned above and by those necessary for the statutory preservation of law and order, but also by the right of others not to believe and not to be involved in or subjected to proselytism by third parties (a negative demonstration of religious freedom). The right not to be subjected to psychological duress (Article 15 of the Constitution) placed a further restriction on the right to freedom of religion. In no circumstances could differences in belief result in different treatment under the law.

In the present case, the Constitutional Court found that the disputed court decision to restrict freedom of religion was legitimate in its purpose. Nonetheless, the disproportionate nature of the restrictions imposed by the Provincial Court of Appeal involved discrimination against the applicant on grounds of his beliefs. The Constitutional Court judgment indicated that the

decision by the court at first instance to prohibit the children's exposure to their father's beliefs (a decision which was not contested) was sufficient to prevent the threat which these beliefs posed for them. Any further restriction on the father's freedom of religion would have required specific evidence that it was necessary, and such evidence did not exist in the preliminary civil proceedings.

#### *Supplementary information:*

Article 14 of the United Nations Convention on the Rights of the Child.

European Parliament resolution on the European Charter on the Rights of the Child (Resolution A3-0172/92 of 08.07.1992, paragraphs 25 and 27 § 8).

Organic Law no. 1/1996 of 15.01.1996 on the legal protection of minors.

#### *Cross-references:*

Freedom of religion and ideology:

- Constitutional Court Judgments nos. 9/1985, 20/1990, 292/1993, 173/1995, 166/1996 (*Bulletin 1996/3 [ESP-1996-3-026]*) and 177/1996.

European Court of Human Rights:

- *Kokkinakis v. Greece*, 25.05.1993; *Special Bulletin – Leading cases ECHR [ECH-1993-S-002]*;
- *Larissis and others v. Greece*, 24.02.1998.

#### *Languages:*

Spanish.



*Identification: ESP-2000-2-025*

- a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 24.07.2000 / **e)** 202/2000 / **f)** María Renshaw Sandoval contra Ministerio Fiscal / **g)** Boletín oficial del Estado (Official Gazette), 203, 24.08.2000, 41-45 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

*Keywords of the alphabetical index:*

Right to remain silent / Evidence, circumstantial / Correspondence, opening, affidavit.

*Headnotes:*

The right to remain silent and to refrain from self-incrimination is closely linked with the right to the presumption of innocence. It is also an essential part of the right to a fair trial and amounts to a genuine functional guarantee of due process.

Refusal to explain questionable conduct, as part of the legitimate exercise of the right to remain silent, may be used by a court as grounds for conviction provided that the prosecution has brought evidence of guilt and that the defendant can justifiably be expected to give an explanation. It may in no case be so used where the decision is not substantiated, the grounds given are unreasonable or arbitrary or they rely solely on the fact that the defendant remained silent in the presence of the police.

Where the defendant denies involvement and no direct evidence exists, proof that he/she committed an offence may rest on facts which have been fully proved or on circumstantial evidence from which guilt can be deduced by a process of reasoning which relies on human discernment. This process must be duly explained in the court decision by which the defendant is convicted. No conviction supported in this way by circumstantial evidence at all undermines the right to the presumption of innocence.

The principles in Article 9.3 of the Constitution cannot be cited or defended in the context of a claim for constitutional protection (Article 53.2 of the Constitution and Section 41.1 of the organic Law on the Constitutional Court). Moreover, the purely rhetorical pleading of rights likely to benefit from constitutional protection need not be taken into consideration in Constitutional Court judgments.

*Summary:*

Ms Renshaw Sandoval was taken into custody after visiting a post office to retrieve a parcel addressed to her, which contained cocaine. Having originated in Brazil, the parcel had aroused the suspicion of the police, who had opened it to ascertain its contents before passing it on to its recipient. The prisoner refused to sign the affidavit drawn up in the presence of the judge who had authorised the operation to the effect that the parcel had been opened. After her transfer to the offices of the customs service, where the investigation was to continue, she also refused to make any statement to the police. The prisoner's hearing concluded with her conviction by the Madrid Provincial Court (*Audencia Provincial*) of an offence against public health, following a court decision confirmed on appeal by the Supreme Court.

Conviction in this case was based on the finding that the defendant's knowledge that the parcel contained drugs had been proved. Different circumstantial evidence was given for this: the parcel had been sent to the address of a business under her management, her surname was wrongly spelt in such a way as to indicate its oral transmission and she had refused to make a statement and co-operate with the police.

The Constitutional Court rejected the defendant's claim to the protection of the constitution. The Court rejected all charges that the appellant's right to remain silent and her right to the presumption of innocence had been violated. It did this despite the fact that her silence in the presence of the police had been used as evidence against her.

In accordance with the case-law of the European Court of Human Rights, there was no violation of the right to remain silent, which is acknowledged in Article 17.3 of the Constitution, on the grounds that the arresting officers had duly respected the defendant's refusal to speak. Evidence for this lay in the fact that the appellant's complaint, namely that the court decision against her found that there was proof of her complicity in the crime, related to a later time. Accordingly, the fundamental right at issue in this case was that of the presumption of innocence (Article 24.2 of the Constitution).

Having given a detailed explanation of its doctrine in this area, and in light of the external controls which it has to carry out, the Constitutional Court ruled that the criminal court decision was substantiated and neither unreasonable nor arbitrary. With regard to the circumstantial evidence of guilt brought by the prosecution, the courts were able to use the absence of any explanation concerning the defendant's conduct, although this was based on the legitimate right to

remain silent, as grounds for conviction. In the present case, the circumstantial evidence supplemented other evidence, was substantiated and in no way arbitrary and did not rely solely on the fact that the appellant had chosen to remain silent. Her fundamental right had therefore been duly respected.

#### Cross-references:

Close connection between the right to remain silent and the right to the presumption of innocence:

- no. 127/2000.

Principle of ascertaining the sufficient and reasonable nature of grounds used in connection with the presumption of innocence:

- no. 220/1998.

In this field, the case-law of the European Court of Human Rights is crucial:

- *Funke v. France*, 25.02.1993, *Special Bulletin – Leading cases ECHR* [ECH-1993-S-001];
- *John Murray v. the United Kingdom*, 08.02.1996, *Bulletin 1996/1* [ECH-1996-1-001];
- *Saunders v. the United Kingdom*, 17.12.1996, *Bulletin 1997/1* [ECH-1997-1-001].

#### Languages:

Spanish.



**Identification:** ESP-2000-3-031

- a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 15.11.2000 / **e)** 273/2000 / **f)** Retroactive waste disposal charges / **g)** *Boletín oficial del Estado* (Official Gazette), 299, 14.12.2000, 39-48 / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

- 3.10 General Principles – **Certainty of the law**.  
 3.22 General Principles – **Prohibition of arbitrariness**.  
 4.6.6 Institutions – Executive bodies – **Relations with judicial bodies**.  
 4.10.7.1 Institutions – Public finances – Taxation – **Principles**.

#### 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

##### 5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law**.

#### Keywords of the alphabetical index:

Retroactivity, laws and other normative acts / Regulation, retroactive effect / Water, treatment, charge / Regulation, executive, procedural rules.

#### Headnotes:

A retroactive tax provision may be contrary to the principle of legal certainty if it introduces changes which could not reasonably be foreseen. To determine whether it infringes the Constitution, an assessment must be made of the degree of retroactivity and the precise circumstances that arise in each case.

The public authorities have a duty to comply with the basic procedure for framing legal rules, according to the principles of legal certainty and the avoidance of arbitrary conduct.

The rules governing fiscal charges are not provisions which restrict individual rights, and so they are not subject to the prohibition of retroactivity laid down by Article 9.3 of the Constitution.

The Spanish Constitution does not recognise any principle whereby certain matters may be regulated only by regulations: any matter may be regulated by law.

#### Summary:

Law 5/1981 dated 4 June 1981 of the Autonomous Community of Catalonia concerning sewage disposal included a number of provisions for financing sewage disposal and treatment. It provided for an increase in the rates payable by users of the water supply networks and for a waste disposal charge for certain types of water consumption. In 1983, the Executive Council (*Generalidad*) of the Autonomous Community of Catalonia enacted several regulatory provisions under this law, for the purpose of financing and undertaking the relevant works. Some of these provisions formed the subject of appeals by businesses required to pay the above-mentioned charge and were annulled by the courts on procedural grounds, as no mandatory preliminary technical report had been produced.

On 13 July 1987, when the courts had not yet ruled on the appeals, the Parliament of Catalonia adopted Law 17/1987 on water management, which contained a

number of regulations on the increase of rates and the introduction of a waste disposal charge, previously approved by the autonomous government. The Parliament also decided that these regulations would have force of law and would be applied immediately, pending the entry into force of the law. The Supreme Court then referred the 1987 Law to the Constitutional Court, arguing that it infringed the principles of legal certainty and non-retroactivity of provisions restricting individual rights, as protected by Article 9.3 of the Constitution. The Supreme Court contended that a legislative provision cannot confer a higher status and retroactive effect upon regulatory provisions of a fiscal nature, which are void as the corresponding tax assessments would otherwise themselves be void.

The Constitutional Court stated that provisions giving rise to fiscal charges (Article 31.1 of the Constitution) are not, by definition, provisions which restrict individual rights within the meaning of Article 9.3 of the Constitution. Accordingly, fiscal provisions as such are not restricted by the prohibition of retroactivity stipulated in the Constitution.

However, the judgment points out that retroactive fiscal provisions maybe contrary to other constitutional principles, in particular the principle of legal certainty. But this principle is not absolute, as that would result in what the Court calls 'freezing' or 'petrification' of the legal system. Nor is there any citizens' right to the maintenance of a particular tax law system. But the principle of legal certainty protects citizens against rule changes which cannot reasonably be foreseen, it being understood that back-dating fiscal provisions must never be contrary to the prohibition of arbitrary behaviour by the public authorities.

Determining whether a fiscal provision infringes the principle of legal certainty entails assessing, firstly, its degree of retroactivity and, secondly, the specific circumstances which arise in each case. In this instance, the Court found that the retroactivity of the law did not infringe the principle of legal certainty insofar as it was in conformity with the guarantee of certainty of the provision and the foreseeability of its application by the public authorities, the two elements of the principle susceptible of violation.

The Court also stressed that, although the second supplementary provision of Law 17/1987 does not clearly identify the specific regulatory provisions incorporated into the law, that is a defect of legislative technique which, in this particular instance, does not impair the objective aspect of legal certainty or reliability.

Nor did the Court consider that the impugned provision impaired the subjective aspect of legal certainty, i.e. the foreseeability of its effects. The Court emphasised that the requirement to pay the charge had been clearly established since Law 5/1981, having been affected neither by the court decisions annulling the regulations, nor by the fact that Law 17/1987 conferred the status of a Law on the regulations in question. The regulations had not yet been annulled insofar as the Supreme Court had not yet ruled on the appeals; their nullity was based on a procedural defect and not on any substantive infringement. Consequently, conferring a higher legal status on the retroactive provisions had no negative impact on citizens' confidence, as they had been able to adapt to the legislation in force.

The Court also stated that the principle of legal certainty and non-arbitrary behaviour by the public authorities require the latter to comply with the basic procedure for framing legal provisions. But these same constitutional principles do not oblige the public authorities to remain passive when a provision of a nature to serve the public interest is impaired by a procedural defect. In this particular instance, the legislature of the Autonomous Community of Catalonia acted to further a constitutional interest, namely the improvement of environmental water quality (Article 45 of the Constitution), which would have been seriously impaired if the necessary sewage disposal and water treatment works had not been carried out.

The Court also held that the legislative decision to confer a higher status on the retroactive provisions is irreproachable from the point of view of the system of sources. There is no principle laid down in the Spanish Constitution whereby it is mandatory for certain matters to be dealt with by regulatory, and not legislative, provisions. Under the Constitution and subject to the limits it sets, a law may have any content whatsoever.

Finally, it should be noted that the impugned legislative provision had been repealed before the Constitutional Court ruled on its constitutionality. However, this did not render the constitutional proceedings pointless, insofar as repeal of the provision does not prevent its being applied to the dispute in connection with which the question of unconstitutionality was raised, or to other similar cases that might arise.

#### Cross-references:

##### Retroactivity of fiscal provisions:

- nos. 150/1990 of 04.10.1990 (FJ 8); 173/1996 of 31.10.1996 (FJ 3); 182/1997 of 28.10.1997 (FJ 11b), *Bulletin* 1997/3 [ESP-1997-3-022].

Absence in the Spanish Constitution of any principle making certain matters subject to regulatory provisions:

- no. 73/2000 of 14.03.2000 (FJ 15), *Bulletin* 2000/1 [ESP-2000-1-011].

Legislative validation: European Court of Human Rights:

- *National and Provincial Building Society and others v. United Kingdom*, 23.10.1997, §§ 111 and 112;
- *Greek Refineries, Strain and Straitis Andreatis v. Greece*, 09.12.1994, §§ 49-50; *Bulletin* 1994/3 [ECH-1994-3-021];
- *Papageorgiou v. Greece*, 22.10.1997, § 37.

#### *Languages:*

Spanish.



#### *Identification:* ESP-2000-3-032

- a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 16.11.2000 / **e)** 276/2000 / **f)** 50% tax surcharge / **g)** *Boletín oficial del Estado* (Official Gazette), 299, 14.12.2000, 72-88 / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

#### *Keywords of the alphabetical index:*

Tax, surcharge, late payment.

#### *Headnotes:*

The 50% surcharge for late payment of taxes is an administrative sanction covered by the Constitution. As such, it must respect the principle of lawfulness of

sanctions and the procedural guarantees applying to sanctions (Articles 25.1 and 24.2 of the Constitution).

Whatever the legislator calls them, only punitive measures taken by the public authorities may be termed sanctions, and regardless of whether their remunerative function is accompanied by others.

#### *Summary:*

The Administrative Disputes Chamber of the Supreme Court of Catalonia applied to the Constitutional Court for a ruling that the General Tax Law was unconstitutional, arguing that Section 61.2 of the law, as drafted under law 18/1991, was incompatible with Articles 24 and 25.1 of the Constitution, and thus with Article 9.3 of the Constitution. The contested provision introduced a 50% surcharge for non-payment within the stated time of sums due on tax returns and assessments, unless the taxpayer had previously informed the tax authorities that the payment would be late.

The referring Chamber argued that the surcharge actually constituted an administrative sanction, which was not provided for as such in law, and was not attended by the guarantees applying to the sanctions procedure.

The Constitutional Court declared the said provision unconstitutional and void. Two judges delivered concurring opinions.

This judgment was based on the assumption that only measures which are genuinely punitive, i.e. which are covered by the state's right to punish, are subject to the constitutional guarantees applying to measures which have the characteristics of a sanction. The Court accordingly started by trying to establish whether, regardless of its legal title, the contested surcharge was an administrative sanction or mere compensation for delay, as argued by the State Counsel.

For this purpose, the Court first examined the way in which the legislature regulated this surcharge. It concluded that the legal regime can be deduced from the firm intention not to treat the surcharge as a sanction, since at no point is the surcharge termed a sanction, and no express provision is made for its application under the sanctions procedure. Moreover, it is provided that application of the surcharge excludes the application of any sanction. It nonetheless points out that tax surcharges may have the external characteristics of a sanction, since they are imposed on persons guilty, under the established legal system, of tax fraud (under Section 79 of the law, any failure to pay all or part of a tax debt before expiry of the statutory time limit constitutes a serious offence). This is, in other words, a measure which produces negative effects on the assets of the tax-payers to whom it is applied, and

which involves restriction of a right; the amount of the surcharge is determined with reference to the nature of the fraudulent activities (it depends on the sum which has not been paid in time, and on the extent of the delay).

That said, as the Constitutional Court stated in its judgment, the legal name assigned to this restrictive measure, and the legislator's intention not to treat it as a sanction, are by no means sufficient to justify the conclusion that the tax surcharge is not subject to the restrictions imposed on sanctions by the Constitution. Nor, on the other hand, is it sufficient to find that the contested surcharge has the characteristics of a sanction. In fact, as the Constitutional Court pointed out, a measure of this kind constitutes a sanction only if it serves a punitive function. To determine its legal nature, the Court accordingly set out to establish whether it was in fact a punitive measure or served other functions.

It concluded that the surcharge was primarily intended as a coercive, dissuasive and incentive measure, and also served a compensatory function; in addition, however, it served a punitive function, since the difference between the amount of the surcharge and that of fiscal sanctions was a small one, and since it was a measure which restricted certain rights, and was imposed for violation of the law. The Court accordingly ruled that the contested surcharge did serve a punitive function, and was subject to the substantive and judicial guarantees provided by Articles 25.1 and 24.2 of the Constitution.

In its judgment, the Constitutional Court finally emphasised that the surcharge in question was introduced by a legal rule having force of law and was consistent with the guarantees of certainty derived from the principle of legality, enshrined in Article 25.1 of the Constitution. However, it violated Article 24.2 of the Constitution, since it was imposed directly without a prior hearing, and without the tax-payer's being able to exercise his defence rights in the proceedings. The legal provision introducing the surcharge must therefore be declared void.

#### *Supplementary information:*

Section 61.2 of the law, as drafted under Law 18/1991, provides as follows:

"Any delay in the payment of sums due on tax returns and assessments shall give rise, unless the tax-payer has previously informed the tax authorities of the delay, to payment of a single 50% tax surcharge, and shall exclude the payment of interest for delay, and any other applicable penalty. Notwithstanding the above, if payment is made within three months of expiry of the

time limit for presentation of the said returns and assessments, and for settlement of the sum due, the surcharge shall be fixed at 10%.

A tax-payer who fails to pay taxes when the corresponding tax returns and assessments are presented late, and who has not expressly applied to postpone payment or pay in instalments, shall be required to pay a 100% surcharge".

The Court thus ruled in this judgment that the subsection covering the 50% tax surcharge was void. However, the 10% surcharge had already been declared constitutional (Constitutional Court Judgment no. 164/1995 and Constitutional Court decisions 57/1998 of 3 March 1998 (FJ 4) and 237/1998 of 10 November 1998 (FJ 4)). As for the 100% surcharge, the Plenary Court held in Judgment no. 291/2000 of 30 November 2000 that this has the characteristics of a sanction, and annulled the surcharge imposed on the applicant by the tax authority. This same judgment also raised an internal question concerning the constitutional validity of the second paragraph of Section 61.2 of the law.

#### *Cross-references:*

- nos. 164/1995, *Bulletin* 1995/3 [ESP-1995-3-030] and 291/2000;

#### *European Court of Human Rights:*

- *Bendenoun v. France*, 24.02.1994; *Bulletin* 1994/1 [ECH-1994-1-004].

#### *Languages:*

Spanish.



#### *Identification:* ESP-2011-2-005

- a)** Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 28.02.2011 / **e)** 15/2011 / **f)** Antonio Larumbe Domingo / **g)** Boletín oficial del Estado (Official Gazette), 75, 29.03.2011; [www.boe.es/boe/dias/2011/03/29/pdfs/BOE-A-2011-5701.pdf](http://www.boe.es/boe/dias/2011/03/29/pdfs/BOE-A-2011-5701.pdf); [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9856](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9856) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence**.

*Keywords of the alphabetical index:*

Prisoner, correspondence.

*Headnotes:*

The prison administration is not entitled to monitor the communications of convicted persons with the courts and has no authority under the Constitution or other national legislation to restrict the right of inmates to communicate with the courts. In particular, inmates must not be placed under an obligation to state the issue of any specific communication.

*Summary:*

I. The General Penitentiary Act allows inmates to appeal to the Penitentiary Surveillance Courts against decisions by the prison administration. They may transmit their appeals through the prison authorities, which should deal with the applications without imposing any restriction.

The authorities of “La Moraleja” prison in Palencia (Autonomous Community of Castile y León) passed a new internal regulation covering the communication of inmates with prison authorities, including the Penitentiary Surveillance Courts. The new regulation stipulated that letters should be sent in a sealed envelope with an attached document indicating the issue of the communication.

An application which an inmate tried to send to the Penitentiary Surveillance Court was rejected by the prison authorities for failure to comply with the new rules. The inmate appealed against this decision, arguing that it infringed his right to respect for correspondence. Both the Penitentiary Surveillance Court and the Provincial Court rejected his appeal.

II. The Constitutional Court began by recalling the jurisprudence of the European Court of Human Rights about the universal right to respect for correspondence, recognised in Article 8.1 ECHR. According to this case-law (*inter alia*, *Golder v. United Kingdom*, Plenary Judgment, 21 February 1975), impeding someone from even initiating correspondence constitutes the most far-

reaching form of interference’(Article 8.2 ECHR) with the exercise of the right to respect for correspondence’; it is inconceivable that that should fall outside the scope of Article 8 ECHR while mere supervision indisputably falls within it.

Although Article 18.3 of the Constitution only declares a fundamental right to secrecy of communications (“the secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary”), with no express reference to freedom of correspondence, the Constitutional Court has interpreted this Article in the same way (Judgment STC no. 114/1984, 29 November 1984).

The content of the right to respect for correspondence of prison inmates is not only fixed by Article 18.3 of the Constitution. Another provision of the Constitution (the second sentence of Article 25.2 of the Constitution) deals with the rights of convicts (“any person sentenced to prison shall enjoy during imprisonment the fundamental rights contained in this Chapter except those expressly limited by the terms of the sentence, the purpose of the punishment and the penal law”). Combined reading of both dispositions leads to the conclusion that any restriction on the right of convicted persons to respect for their correspondence should be done within the constitutional framework.

The Constitutional Court concluded that the right to respect for correspondence had been infringed, as the restriction of the inmate’s communications was not provided for by the General Penitentiary Act. This Act excludes any restriction in the processing of the appeals of convicted persons.

*Cross-references:*

European Court of Human Rights:

- *Golder v. United Kingdom*, 21.02.1975, Plenary Judgment, Vol. 18, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1975-S-001].

*Languages:*

Spanish.



# Sweden

## Supreme Administrative Court

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### Important decisions

*Identification:* SWE-2005-1-001

**a)** Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 04.02.2005 / **e)** 3841-04 / **f)** / **g)** Regeringsrättens Årsbok / **h)** CODICES (Swedish).

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

*Keywords of the alphabetical index:*

Judge, participation in a law-making procedure.

*Headnotes:*

A prior responsibility for producing a legislative proposal based on political considerations cannot be considered to cast doubt on the judicial impartiality of a person called on to determine a dispute over the application of the same legislation.

*Summary:*

Company L filed an application, concerning a gambling licence, with the Government and maintained that the Swedish legislation on lottery with its ban on promotion of gambling organised abroad was incompatible with Community Law. The application was however rejected.

The case was then brought to the Supreme Administrative Court (*Regeringsrätten*) where the company requested an oral hearing. The Court, composed of five judges, decided that the case should be handled without an oral hearing.

The company then voiced doubts as to the impartiality of the Court and argued that three of its five members, namely Justices X, Y and Z, had previously been involved in the subject of the dispute in their former positions at the Ministry of Finance and at the Court of Justice of the European Communities and were therefore biased in that respect. The company also referred to Article 6 ECHR.

The complaint of the lack of impartiality was then handled by the Court with another set of judges, who stated essentially as follows. Objective impartiality within the meaning of the Convention implies that an objective observer has no reasonable doubts as to the impartiality of the Court. However, it is not easy to draw definite conclusions from the case-law of the European Court of Human Rights in this respect. What one might gather from the case-law is that where a judge has previously been involved in the subject of the dispute, the question of impartiality must be assessed in view of his position and function at that time (see the Judgments of the European Court of Human Rights, *Procola v. Luxemburg* and *Kleyn and others v. the Netherlands*).

Justice X was a former Director-General for Legal and Administrative Affairs at the Ministry of Finance. During his employment, the Government laid a government bill containing proposals for amending the legislation on lotteries. The Government found that the proposals met the conditions set by Community Law. Decisions on government bills are to be taken by the Government. The Government Offices process government business and assist the Government and the ministers. The ministers head the work of ministries. Directors-General for Legal Affairs at the ministries have special responsibility for the drafting of proposals for laws and regulations and ensuring that the principles of legality, consistency and uniformity are observed in the conduct of government business. They are also responsible for the final examination of the proposals.

The Court pointed out that the Government decisions on government bills are political decisions. A Director-General for Legal Affairs, who is not a political appointee, thus has no vital influence on the content of bills. Therefore, bills do not reflect his personal opinions. The Court held that the responsibility for producing government bills based on political considerations is not sufficient to cast doubt on judicial impartiality when determining a dispute over the application of that legislation.

Consequently, the Court considered that Justice X was not biased with respect to the subject of the present dispute. Furthermore, the Court found that there were no indications that Justices Y and Z were biased. The

Court thus rejected the arguments regarding lack of impartiality.

#### *Cross-references:*

##### *European Court of Human Rights:*

- *Procola v. Luxembourg*, 28.09.1995, Series A, no. 326;
- *Kleyn and others v. the Netherlands*, nos. 39343/98, 39651/98, 43147/98, 46664/99, 06.05.2003, *Reports of Judgments and Decisions* 2003-VI; *Bulletin* 2003/2 [ECH-2003-2-005].

#### *Languages:*

Swedish.



#### *Identification:* SWE-2006-3-002

- a)** Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 17.11.2006 / **e)** 3985-06 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

#### *Keywords of the systematic thesaurus:*

- 1.3.5.10 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive**.  
 4.6.9 Institutions – Executive bodies – **The civil service**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

#### *Keywords of the alphabetical index:*

Civil servant, recruitment / Civil right, employment in civil service.

#### *Headnotes:*

A government decision on an employment matter has a bearing on civil rights, because of the nature of the employee's duties and responsibilities, for the purposes of Article 6.1 ECHR.

#### *Summary:*

I. A decision made by the Swedish Government is final. In certain cases, when a decision has a bearing on "civil rights" for the purpose of Article 6.1 ECHR, a decision may be the subject of a special review with the Supreme Administrative Court.

The applicant applied – unsuccessfully – for a position as "team leader" at the Swedish Social Insurance Agency. He appealed to the Government (specifically to the Ministry of Health and Social Affairs) and claimed that his references were better than those of the person they had employed. The government rejected his appeal. He then appealed to the Supreme Administrative Court for a ruling.

II. The Supreme Administrative Court referred to a leading case from the European Court of Human Rights – the *Pellegrin* case of 8 December 1999 (*Pellegrin v. France*, no. 28541/95, *Reports of Judgments and Decisions* 1999-VIII; *Bulletin* 1999/3 [ECH-1999-3-009]) concerning the applicability of Article 6.1 ECHR to public servants. The European Court of Human Rights decided in *Pellegrin* that the only disputes excluded from the scope of Article 6.1 ECHR are those raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. One obvious example of such activities is provided by the armed forces and the police.

The Supreme Administrative Court began by considering whether the position as team leader at the Swedish Social Insurance Agency at issue here entailed participation in activities designed to safeguard national interests, on account of the nature of the duties and the level of the responsibilities (see *Pellegrin*). The team leader position was described as "involving responsibility for staff and results". Due to the description of the position, the Supreme Administrative Court ruled that the Government's decision had a bearing on "civil rights" for the purpose of Article 6.1 ECHR and the decision was therefore subject to judicial review. The Supreme Administrative Court found no reason to overturn the government's decision.

#### *Languages:*

Swedish.





# Switzerland

## Federal Court

### Important decisions

*Identification:* SUI-1973-C-001

**a)** Switzerland / **b)** Federal Court / **c)** Administrative Law Chamber / **d)** 02.03.1973 / **e)** A.227/1972 / **f)** Schubert v. Ticino Cantonal Appeals Board for the application of the Federal Order of 23 March 1961 on purchase of real estate by persons resident abroad / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 99 Ib 39 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

*Keywords of the alphabetical index:*

International law, pre-eminence / International law, domestic law, relationship / International law, observance.

*Headnotes:*

Austro-Swiss Treaty of 7 December 1875; Federal Order of 1961/1970 concerning the purchase of real estate by persons resident abroad. Relationship between international law and domestic law.

It is to be presumed that the federal legislator intended to abide by the provisions of the duly concluded international treaties, unless it decided advisedly to issue a rule of domestic law contrary to international law. Where there is doubt, domestic law should be interpreted in accordance with international law (confirmation of case-law; recital 3).

The legislator was aware that the Federal Order of 1961/1970 could be at variance with international law. This order was consequently binding on the Federal Court, in pursuance of Article 113.3 of the Federal Constitution (recital 4).

*Languages:*

Italian.

*Identification:* SUI-1997-3-010

**a)** Switzerland / **b)** Federal Court / **c)** Second public law Chamber / **d)** 12.11.1997 / **e)** 2P.419/1996 / **f)** X v. Council of state of the Canton of Geneva / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 123 I 296 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

3.13 General Principles – **Legality.**

3.16 General Principles – **Proportionality.**

3.17 General Principles – **Weighing of interests.**

3.18 General Principles – **General interest.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

*Keywords of the alphabetical index:*

School, state, compulsory / Education, neutrality / Veil, use in school by a teacher / Public authority, special legal relationship.

*Headnotes:*

Articles 27.3 and 49 of the Constitution; Article 9 ECHR; religious neutrality of school system, freedom of conscience and religion of a woman teacher.

The right to wear specific clothing on religious grounds is safeguarded by freedom of conscience and religion. Personal freedom, in the alternative, did not apply. Inviolable core of freedom of conscience and religion (recital 2).

In the case under consideration there was sufficient legal basis for banning a woman teacher in a state school from wearing a veil within the establishment, which she regarded as a requirement of the Koran (recital 3).

The ban served an important public interest (religious neutrality and peace in schools) and complied with the proportionality requirement (recital 4).

#### *Summary:*

Ms X, a Swiss national, had been appointed as a lower-primary level teacher by the Conseil d'Etat of the Canton of Geneva. She had been teaching since 1989 and had been in charge of a class since the beginning of the 1995 school year.

In 1991 she converted from Catholicism to Islam and shortly afterwards married an Algerian national. Wishing to comply with the dictates of the Koran, she then began to wear a veil, or scarf, covering her neck and hair.

The Deputy Under-Secretary for Primary Education informed that wearing an Islamic veil at school was a breach of the legislation on the state education system, and in August 1996 issued an order banning her from wearing one within the school. She appealed to the Conseil d'Etat (government) of the Canton of Geneva, which dismissed her appeal in a decision of 16 October 1996, pursuant *inter alia* to Article 27 of the Constitution and Sections 6 and 120.2 of the Cantonal State Education Act.

X then lodged a public-law appeal with the Federal Court, asking it to quash the decision of the Conseil d'Etat. She relied, *inter alia*, on Article 49 of the Federal Constitution and Article 9 ECHR. The Federal Court dismissed her appeal on the following grounds.

The Court pointed out that wearing such a veil was a sign of membership of a given religion and of a desire to comply with the dictates thereof. It noted that she had not been made subject to any restriction on the clothing she wore outside school and that the ban on wearing a veil solely concerned her teaching activities. Freedom of conscience and religion, guaranteed by Article 49 of the Constitution, Article 9 ECHR and Article 18 of the International Covenant on Civil and Political Rights, safeguarded members of the public against all forms of state interference such as to impinge on their religious beliefs. However, the right to express religious convictions, to profess them and to practise them through acts of worship was not afforded absolute protection; freedom of religion could therefore be limited on condition that there was sufficient legal basis for the restriction, that it served an overriding interest and that the principle of proportionality was upheld.

In view of the specific nature of the matter in issue and of teachers' special hierarchical relationship with the public authorities, the court deemed that there was

sufficient legal basis for preventing from wearing a veil within the school. It found that the state education system must guarantee respect for the political and religious beliefs of pupils and parents, that the public officials staffing the education system must be non-sectarian and that at cantonal level there was a clear separation between church and state, in that the latter was secular.

The impugned decision was entirely consistent with the principle of the school system's religious neutrality, the purpose of which was not only to protect the religious beliefs of pupils and parents, but also to ensure religious peace. There was therefore a strong public interest in prohibiting the appellant from wearing an Islamic veil.

From the point of view of proportionality, the appellant's freedom of conscience and religion must be weighed against the public interest in there being religious neutrality in state schools. State neutrality in the sphere of education was intended to ensure that all existing beliefs were taken into account without bias and thereby to prevent schools from becoming places where advocates of different beliefs confronted one another. In this connection, the attitude of teachers, who were vested with part of the school's authority and represented the state, was of vital importance. The reserve required of a teacher depended on the particular circumstances. With regard to the wearing of a veil, consideration must be given to the visibility and evocativeness of that symbol. Veils could be regarded as clearly visible religious insignia, which raised questions in the children's minds. Account must be taken of the fact that attendance at the school was compulsory and X's pupils were of a young age and particularly impressionable. Wearing an Islamic veil was comparable with wearing a cassock or a kippa. It would be inconceivable that the Federal Court, which had forbidden the display of a crucifix in a state school, should subsequently allow teachers themselves to wear strong symbols. Although the ban on wearing the veil confronted X with a difficult choice, that of disobeying a precept of her religion or running the risk of no longer being able to teach in a state school, the decision taken at the cantonal level did not breach Article 49 of the Constitution or Article 9 ECHR.

#### *Languages:*

French.



### ***Identification: SUI-1998-2-006***

**a)** Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 05.06.1998 / **e)** 1P.132/1998 / **f)** E. v. Head of the Department of Justice, the Police and Military Affairs of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 124 I 231 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.2 Sources – Categories – Written rules – International instruments – **Universal Declaration of Human Rights of 1948.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees.**

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

#### *Keywords of the alphabetical index:*

Penalty, disciplinary / Penalty, enforcement, conditions of detention / Medical treatment.

#### *Headnotes:*

Article 3 ECHR. Treatment of a prisoner subject to a disciplinary penalty.

Minimum rules applicable to prisoners subject to a disciplinary measure. Ratification in 1988 by Switzerland, in particular, of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment instituting a European Committee empowered to examine the treatment of prisoners in the Contracting States (recital 2a/b).

In the case in point, the appellant had received adequate medical attention; the defective ventilation of his cell and the conditions of hygiene imposed on him could not be likened to inhuman or degrading treatment (recital 2c).

#### *Summary:*

While serving a sentence in the Orbe Plain prisons (Canton of Vaud), E. was ordered by the prison governor to undergo a five-day punishment, without

work, for having smoked cannabis. He did not contest the imposition of the punishment.

Several days later E. complained to the Head of the Department of Justice, the Police and Military Affairs of the Canton of Vaud about the conditions in his punishment cell: there had been only one, sealed opaque-glass window and the ventilation had been inadequate. He also reported that he had had to wash his dishes in water running into a seatless lavatory.

When the Head of the Department rejected his complaint, E. made a public-law appeal to the Federal Court to have that decision overturned.

The Federal Court rejected the appeal. In terms of procedure, it acknowledged that E. had a real, practical interest in having his appeal accepted even though his punishment had already been carried out.

In terms of the substance of the case, the Federal Court referred to Article 3 ECHR, Article 7 of the International Covenant on Civil and Political Rights, the 1984 UN Convention against Torture and the 1987 European Convention for the Prevention of Torture. It also took account of the European Prison Rules adopted by the Committee of Ministers of the Council of Europe in 1987. The main purpose of these Rules is to lay down conditions for normal places of detention. However, it is accepted that conditions under punishment regimes imposed on prisoners for limited periods of time may be somewhat harsher. Nonetheless, in such cases, the prison authority may not overstep the line beyond which the treatment must be regarded as inhuman or degrading. In assessing a particular case, all the circumstances must be taken into account.

E. did not claim that there was insufficient light in the cell, although it had only one opaque-glass window. He did, however, complain of inadequate ventilation and said he had suffered feelings of asphyxiation and anxiety, headaches, breathing difficulties, dizziness and giddiness. The prison management pointed out to the Federal Court that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had visited the prison in 1996 and had noted the progress made since its previous visit. However, this general observation did not amount to grounds for rejecting the appeal.

When a prisoner occupies a room virtually continuously over several days, as happened in this case, the room must be properly ventilated. Although the ventilation system in the applicant's cell had been partially defective, it had not endangered his health. The ailments he complained of appeared to have been caused more by his being confined and by the cigarettes he had smoked than by a lack of air.

Moreover, and of crucial importance, E. had received proper medical supervision. The prison medical service had been notified that he was to be placed on a punishment regime. A doctor had seen him and confirmed that he was physically and psychologically capable of withstanding the punishment. In fact, the applicant had never requested medical attention for his ailments. In these circumstances, the treatment could not be held to have endangered his health.

With regard to sanitation in the cell, it should be noted that prisoners on punishment regime can take a shower once a day in an area separate from the cell and can wash their plastic dishes in a room with a sink and hot water. The applicant was not, therefore, subjected to inhuman or degrading treatment.

#### *Languages:*

French.



#### *Identification:* SUI-2000-1-003

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.02.2000 / **e)** 1P.774/1999 / **f)** X. v. Canton of Neuchâtel Administrative Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 33 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

4.6.9 Institutions – Executive bodies – **The civil service.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

#### *Keywords of the alphabetical index:*

ECHR, applicability / Civil right / Civil servant, dismissal / Police, officer, dismissal.

#### *Headnotes:*

Article 6.1 ECHR; dismissal of a police officer.

The appellant held an important position in the public service, and played a part in exercising public authority; the economic, social and personal factors cited are secondary to the principal claim, which relates solely to dismissal from the cantonal public service. Article 6 ECHR therefore does not apply (recital 2).

#### *Summary:*

The State Council of the Canton of Neuchâtel dismissed X., an assistant chief inspector of police, because his superiors had lost confidence in him. The cantonal Administrative Court upheld this decision.

X. brought a public-law appeal, requesting the Federal Court to set this decision aside. In particular, he complained that Article 6 ECHR had been violated on two counts: the State Council's decision was not a decision taken by a tribunal, and the Administrative Court had not reviewed all the factual and legal aspects of the case. The Federal Court rejected the appeal.

There was no need in this case to establish whether the review carried out by the Administrative Court was sufficient in terms of Article 6 ECHR. Disputes concerning the recruitment, careers and dismissal of public officials do not involve the determination of civil rights and obligations, unless purely economic rights are at stake. In its recent case-law, the European Court of Human Rights (the *Pellegrin v. France* Judgment of 8 December 1999, *Bulletin* 1999/3 [ECH-1999-3-009]) has tended to replace the economic criterion with a "functional" criterion, based on the nature of the duties performed by public officials, regardless of the status of the legal relationship in domestic law. In this case, whichever criterion was used, the termination of X.'s services was not covered by Article 6.1 ECHR; accordingly, the appellant could not rely on this provision.

#### *Languages:*

French.



### *Identification:* SUI-2005-C-001

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.04.2005 / **e)** 2A.410/2004 / **f)** A. v. Federal Justice and Police Department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 II 352 / **h)**.

### *Keywords of the systematic thesaurus:*

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

### *Keywords of the alphabetical index:*

International law, pre-eminence / International law, domestic law, relationship / International law, observance.

### *Headnotes:*

Law of aliens. Refusal of entry. Admissibility of the appeal before the Federal Court. Article 13.1 of the law on residence and settlement of aliens of 26 March 1931 (LSEE). Article 11 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 21 June 1999 (hereinafter, the "ALCP") providing for a dual level of jurisdiction. Article 5 Annex I ALCP.

Although Article 100.1.b.1 of the Law on the judicial system (hereinafter, "OJ") rules out administrative law appeal in respect of refusal of entry, this legal avenue is nevertheless open to Community citizens under Article 11.1 and 11.3 ALCP, which provides for a twofold appeal body of which the second at least must be a judicial authority (recital 1).

### *Summary:*

Under Article 191 of the Federal Constitution, the Federal Court is required to apply the federal laws and international law. In principle, international law takes precedence over domestic law. This rule is valid in particular where the international provision is the more recent. This is the case with the ALCP, which contains rules derogating from those in Article 100.1.b OJ, or in other words a *lex specialis*, applicable to nationals of EU countries and not to all foreigners. This rule of legal protection, like Article 6.1 ECHR, is directly applicable. However, it should not be inferred from it that the ALCP provisions generally prevail over conflicting provisions of the federal laws. It follows that, in order to comply

with the procedural guarantee inferred from Article 11 ALCP, the Federal Court must entertain an appeal brought by a Community citizen to whom a refusal of entry to Switzerland has been notified (recital 1).

### *Languages:*

Italian.



### *Identification:* SUI-2007-C-001

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.11.2007 / **e)** 1A.45/2007 / **f)** Nada v. Secretariat of State for the Economy and Federal Department of the Economy / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 133 II 450 / **h)**.

### *Keywords of the systematic thesaurus:*

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

2.3.7 Sources – Techniques of review – **Literal interpretation.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**

### *Keywords of the alphabetical index:*

Security Council / Constitution, interpretation / Compatible interpretation / Measure of constraint, public safety / Public order / Foreign policy / Terrorism.

### *Headnotes:*

Order introducing measures against persons and entities linked with Osama bin Laden, with the "Al-Qaeda" group or with the Taliban (order on the Taliban).

Switzerland is bound by the decisions on sanctions taken by the United Nations Security Council (recitals 3-6), provided that they do not infringe, as in the case in point, the peremptory norms of international law (*ius cogens*; recital 7).

Consequently Switzerland is not authorised, on its own initiative, to strike an appellant off the list under Annex 2 of the Order on the Taliban; a special delisting procedure is prescribed for this purpose by the Sanctions Committee of the United Nations Security Council (recital 8). Switzerland must support the appellant in this procedure (recital 9).

Interpretation compatible with the Constitution of the prohibition of entry to and transit through Switzerland within the meaning of Article 4a of the Order on the Taliban and of the exceptions to this prohibition (recital 10).

Refusal of entry has been declared contrary to human rights by the European Court of Human Rights (Judgment 10593/08 of 12 September 2012).

#### *Summary:*

In 1999, the UN Security Council adopted Resolution 1267 on sanctions against the Taliban and in 2000 extended the sanctions to Osama bin Laden and to the "Al-Qaeda" group. The UN published a list of persons and entities close to those concerned. In 2000 the Federal Council adopted an order on the Taliban under whose terms the assets and economic resources belonging to or controlled by the persons, groups or entities mentioned in Annex 2 of the order were frozen. The natural persons mentioned in Annex 2 to the order are furthermore forbidden to enter Switzerland and to transit through it.

In 2001, Youssef Nada and groups linked with him were placed by the UN on the list of persons and entities close to "Al-Qaeda". In 2002 the Federal Council transcribed these names into Annex 2 of its order. In 2005 Nada asked the Federal Council to remove his name from Annex 2 on the ground that the investigation opened against him had been discontinued. The Secretariat of State for the Economy refused his request on the ground that Switzerland was not entitled to remove a name from the list established by the UN. Nadas appeal was dismissed by the Federal Department of the Economy then by the Federal Court.

Under Article 4a.1 of the order, the persons referred to in Annex 2 are forbidden to enter Switzerland and to transit through it. Article 4a.2 provides that the Federal Office of Migration (hereinafter, the "ODM") may grant derogations in accordance with the decisions of the UN Security Council or for the protection of Swiss interests. According to the UN resolution, the prohibition on travelling only admits of exceptions which are to be restrictively interpreted. Article 4a.1 of the order is framed as an optional provision and seems to allow the authority some discretion. It must nevertheless be interpreted in a manner compatible with the

Constitution, in the sense that a derogation must be granted whenever permitted by the UN regime of sanctions: a more severe restriction of the appellants freedom of movement could not be founded on the Security Council resolutions, would not be in the public interest, and would also be excessive having regard to the appellants particular situation.

He is resident in Campione, an Italian enclave in Ticino with an area of only 1.6 km<sup>2</sup>. The prohibition of entry to and transit though Switzerland in practice resembles restricted residence and thus constitutes a serious restriction on the appellants personal freedom.

The ODM consequently has no discretion. On the contrary, it must determine whether the conditions for granting a derogation are met. If the request is incompatible with a general derogation prescribed by the Security Council, it must be submitted for approval to the Sanctions Committee. The Federal Court nevertheless need not determine whether these obligations have been fulfilled in the case in point, since no decision of the ODM has been challenged before the Federal Court.

#### *Languages:*

German.



#### *Identification:* SUI-2010-C-001

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 05.01.2010 / **e)** 2C269/2009 / **f)** A. and associates v. Directorate of Security and Council of State of Zurich Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 II 65 / **h)**.

#### *Keywords of the systematic thesaurus:*

2.1.1.3 Sources – Categories – Written rules – **Community law.**

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities.**

#### *Keywords of the alphabetical index:*

Free movement of persons / Family reunion, right.

**Headnotes:**

Article 7.d of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 21 June 1999 (hereinafter, the "ALCP") and Articles 3 and 5, Annex 1 ALCP; reunion of children, having the nationality of a third state, of the spouse of the national of a contracting state (stepchildren having the nationality of a third state).

The right to family reunion deriving from free movement does not depend on prior lawful residence in a Member State of the close relative on whose behalf reunion is requested (recital 2).

The right to family reunion also extends to stepchildren having the nationality of a third state, in order to ensure a parallel legal position between European Community Member States and between them and Switzerland, particularly by analogy with the case-law of the CJEC (*Baumbast Judgment*) and because of the systematic correlations (recitals 3 and 4).

Conditions under which this right to reunion may be asserted (recital 5).

**Summary:**

According to Article 3.2.a of Annex 1 ALCP, the spouse of a national of a contracting party to the ALCP and their relatives in the descending line under 21 years of age or dependent are regarded as family members entitled to settle with the national. The question whether the terms "their relatives in the descending line" also take in the children with the nationality of a third state born of a first marriage of the reunited spouse was not finally settled by the Federal Court. In order to ensure a parallel legal position between European Community Member States and between them and Switzerland, the Federal Court is guided by the analogous Community law and in particular by the case-law of the CJEC (especially the *Baumbast Judgment*, C-413/1999). In consequence, the right to family reunion extends to children of both spouses as well as of the parent who is an EU/EFTA national and the parent who is a national of a third state. There is no cogent reason for Switzerland to follow a different practice in that respect than does Community law. Besides, a systematic approach to the law of the ALCP results in the same interpretation, moreover supported by authoritative legal opinion. Thus the right to family reunion contained in Article 3.2.a of Annex 1 ALCP also extends to stepchildren with the nationality of a third state. However, this right to reunion may not be unreservedly exercised.

**Languages:**

German.

**Identification:** SUI-2010-C-002

**a)** Switzerland / **b)** Federal Court / **c)** First Social Law Chamber / **d)** 31.08.2010 / **e)** 8C133/2010 / **f)** D. v. Zug Canton Compensation Fund / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 I 297 / **h)**.

**Keywords of the systematic thesaurus:**

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989**.

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.

**Keywords of the alphabetical index:**

Family benefit, conditions of award / Family benefit, child's residence abroad.

**Headnotes:**

Section 4.3 of the law on family benefits (LAFam; children eligible for family benefits); Article 7.1 of the Order on family benefits (OAFam; children abroad); Article 8.1 and 8.2 of the Federal Constitution (equal treatment); Article 3.1 and Article 26 of the Convention of 20 November 1989 on the Rights of the Child (hereinafter, the "CRC").

In making the award of family benefits in respect of children resident in a foreign state subject to the condition that the latter has concluded a social security agreement with Switzerland in this matter, Article 7.1 OAFam remains within the limits of Article 4.3 LAFam (recital 4) and infringes neither Article 8.1 and 8.2 of the Federal Constitution (recitals 6 and 7) nor Articles 3.1 and 26 CRC (recital 8).

### *Summary:*

Article 3.1 CRC makes the child's interest a primary consideration, which the state authorities must take into account. It is a guiding idea, a maxim of interpretation to be taken into consideration in promulgating and interpreting laws. Article 3.1 CRC, moreover, does not make the child's interest an exclusive criterion but rather a factor in the assessment. The interests of those holding parental authority and of the state must also be taken into account.

### *Languages:*

German.



### *Identification:* SUI-2012-1-001

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.09.2011 / **e)** 1C105/2011 / **f)** X. v. Vaud Canton Automobile and Navigation Department / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 137 I 363 / **h)** CODICES (French).

### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem.**

### *Keywords of the alphabetical index:*

Road traffic, offence / Driving licence, cautionary cancellation.

### *Headnotes:*

Cancellation of driving licence, “*non bis in idem*” principle. Article 4.1 of Additional Protocol no. 7 ECHR, Article 14.7 UN Covenant II, Article 11.1 of the Swiss Code of Criminal Procedure (CPP; prohibition of dual prosecution), Articles 16 ff. and 90 ff. of the Law on road traffic (hereinafter, the “LCR”).

Conformity of the dual criminal and administrative prosecution laid down in the LCR with the interpretation of Article 4.1 of Additional Protocol no. 7 ECHR, as set

out in the Judgment of the European Court of Human Rights in the case of *Zolotukhin v. Russia*, 10 February 2009. There are no grounds for varying from the prevailing case-law to the effect that the coexistence of these procedures does not violate the “*non bis in idem*” principle (recital 2).

### *Summary:*

X. drove his motor vehicle along the motorway between Lausanne and Geneva at a speed of 132 km/h, although the speed-limit was 100 km/h. By a decision of July 2010, the Geneva Canton Traffic Offences Department fined him CHF 600 for infringement of various provisions of the Law on road traffic. When this decision became enforceable, X. paid the fine.

In September 2010, the Vaud Canton Automobile and Navigation Department (hereinafter, the “SAN”) ordered X.’s driving licence to be withdrawn for one month, in connection with an offence classified as “moderately serious”. The SAN rejected X.’s complaint, and the Vaud Cantonal Court rejected his appeal.

X. lodged a public law appeal inviting the Federal Court to set aside this judgment and the SAN decision. The Federal Court rejected this appeal.

Drawing on Article 4.1 of Additional Protocol no. 7 ECHR, the appellant argues that the administrative measure ordered on the basis of the same facts as the criminal penalty infringes the *non bis in idem* principle. He refers to the interpretation of this Article in the Judgment of the European Court of Human Rights in the case of *Zolotukhin v. Russia*, 10 February 2009 (no. 14939/03).

The *non bis in idem* principle states that no one may be prosecuted or penalised by the courts of one State for an offence of which they have already been acquitted or convicted under a final judicial decision in accordance with the law and criminal procedure of this State. This right is secured by Additional Protocol no. 7 ECHR and the International Covenant on Civil and Political Rights. Furthermore, the rule is implicit in the Federal Constitution and the Swiss Code of Criminal Procedure.

In the *Zolotukhin* case, the applicant had first of all been sentenced to three days’ administrative detention and then found guilty of a violation of the Russian Penal Code. In its judgment, the European Court decided to harmonise the interpretation of the “same offence” concept the *idem* part of the *non bis in idem* principle for the purposes of Article 4.1 Protocol 7. It explained that Article 4.1 Protocol 7 should be understood as banning the prosecution or trial of a person for a second “offence” where the latter originated in the same

facts, or in facts which were substantially the same. This shows the need for an approach based strictly on the "sameness" of the material facts, avoiding adopting the legal classification of these facts as a relevant criterion.

The *Zolotukhin* Judgment prompted different reactions in Swiss doctrine vis-à-vis dual criminal and administrative procedure in cases of road traffic offences. According to the established case-law of the Federal Court, such dual procedure does not infringe the "*non bis in idem*" principle. Its implementation presupposes that the judge in the first procedure has been put in a position to appraise all the legal aspects of the circumstances; this precondition is lacking in the instant case because of the limited decision-making powers of each of the competent authorities. The Federal Court has also stipulated that an administrative authority decision to withdraw a driving licence may not, in principle, vary from the *de facto* findings of a criminal-law decision which has come into force.

In matters of infringement of road traffic regulations, the European Court of Human Rights has already pronounced on dual administrative and criminal procedures. Having noted that the withdrawal of a driving licence is serious enough to be considered as a punitive, deterrent measure and is analogous to a criminal sanction, it ruled that withdrawal of a driving licence ordered by an administrative authority following a criminal conviction for the same facts does not constitute a violation of Article 4.1 Protocol 7 where the administrative measure derives directly and foreseeably from the conviction (cf. the Judgment in the case of *Nilsson v. Sweden* of 13 December 2005, no. 73661/01). The close connection between both sanctions has led the European Court to conclude that the administrative measure is analogous to a penalty complementing the criminal conviction, and is an integral part of it (Judgment *Mazni v. Romania* of 21 September 2006, no. 59892/00).

The *Zolotukhin* Judgment did not go into dual administrative and criminal procedures in matters of road traffic offences. This field has a number of specific features. Despite its criminal aspect, the withdrawal of driving licences is an administrative sanction separate from the penal sanction and serves a primarily preventive and educational purpose. Moreover, the dual system laid down in the LCR means that only by ensuring the involvement of both authorities can the circumstances at issue be considered from the angle of all the relevant legal rules. Since not all the consequences of the criminal act could be judged concurrently, two authorities with different competences, empowered to order different types of sanction and pursuing different goals are successively called on to decide on the same circumstances under

two separate procedures. This being the case, it cannot be inferred from the *Zolotukhin* Judgment that all dual procedures laid down in legal systems should be proscribed. We must also acknowledge that the Federal legislature has clearly rejected the proposal to transfer responsibility for withdrawing licences to the criminal courts. There is consequently no reason to vary from the prevailing case-law, especially since Federal criminal procedure and the Cantonal administrative procedures provide all the safeguards laid down in the Federal Constitution and the European Convention on Human Rights.

#### *Languages:*

French.



#### *Identification:* SUI-2012-C-001

- a)** Switzerland / **b)** Federal Court / **c)** Second Social Law Chamber / **d)** 15.03.2012 / **e)** 9C540/2011 / **f)** R. v. Geneva Cantonal Invalidity Insurance Office / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 138 I 205 / **h)**.

#### *Keywords of the systematic thesaurus:*

- 2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.
- 2.1.1.4.16 Sources – Categories – Written rules – International instruments – **Framework Convention for the Protection of National Minorities of 1995**.
- 5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.

#### *Keywords of the alphabetical index:*

Travellers / Invalidity, evaluation.

#### *Headnotes:*

Section 16 of the Act on the general part of social insurance law (LPGA); Article 27 UN Covenant II; Articles 4.1 and 5.1 of the Framework Convention for the Protection of National Minorities; Article 8.1 ECHR; Article 8.2 of the Federal Constitution; evaluation of the invalidity of a person belonging to the traveller community.

Use of economic statistical data to assess the invalidity allowance of a person belonging to the traveller community, in so far as contributing to the persons assimilation with the mainstream population, constitutes indirect discrimination against that community (recital 6.2).

### **Summary:**

According to Article 27 of the International Covenant of 16 December 1966 on Civil and Political Rights (hereinafter, "UN Covenant II"), in states where there are ethnic, religious or linguistic minorities, persons belonging to those minorities cannot be denied the right to have, in common with the other members of their group, their own cultural life, to profess and practice their own religion, or to use their own language. Article 27 of UN Covenant II secures no collective right to minorities whether ethnic, religious or linguistic as groups, but solely an individual right which can be directly invoked before the Swiss courts held by the members of these groups, to have their minority characteristics respected and promoted. The Federal Court held that Article 27 of UN Covenant II did not offer any more extensive guarantees than the protection of private and family life secured by Article 8 ECHR, in so far as this provision protects the Gypsy lifestyle.

In acceding to the Framework Convention of 1 February 1995 for the Protection of National Minorities, Switzerland undertook firstly to secure to any person belonging to a national minority the right to equality before the law and to the laws equal protection and to prohibit all discrimination founded on membership of a national minority (Article 4.1). It undertook secondly to promote suitable conditions for enabling persons belonging to national minorities to retain and develop their culture and to preserve the essential features of their identity which are their religion, language, traditions and cultural heritage (Article 5.1). On ratifying the Framework Convention, Switzerland made the following declaration:

"Switzerland declares that in Switzerland national minorities in the sense of the framework Convention are groups of individuals numerically inferior to the rest of the population of the country or of a canton, whose members are Swiss nationals, have long-standing, firm and lasting ties with Switzerland and are guided by the will to safeguard together what constitutes their common identity, in particular their culture, their traditions, their religion or their language."

In its message of 19 November 1997, the Federal Council explicitly stated in this connection that the Framework Convention could be applied in Switzerland to national linguistic minorities but also to other minority

groups of the Swiss population, such as the members of the traveller community (...). However, the Convention contains no directly applicable provision, but requires member states to adopt measures, particularly of a legislative kind, aimed at safeguarding the existence of national minorities.

### **Languages:**

French.



### **Identification:** SUI-2012-C-002

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 22.06.2012 / **e)** 2C1022/2011 / **f)** X. v. Infrastructures Department of Vaud Canton / **g)** Arrêts du Tribunal fédéral (Official Digest), 138 I 367 / **h)**.

### **Keywords of the systematic thesaurus:**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

3.9 General Principles – **Rule of law**.

3.13 General Principles – **Legality**.

3.14 General Principles – **Nullum crimen, nulla poena sine lege**.

### **Keywords of the alphabetical index:**

Public contract, penalty, retrospective effect.

### **Headnotes:**

Article 7 ECHR. Article 5 of the Federal Constitution (principle of the activity of the law-based state). Principle of legality. Violation of the rules governing public contracts.

### **Summary:**

Under the terms of Article 7 ECHR, nobody may be convicted of an act or omission which at the time of commission did not constitute an offence in national or international law.

Article 7 ECHR concerns criminal charges as described by Article 6.1 ECHR. Indeed, the wording of the second sentence of Article 7.1 ECHR indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for an offence. According to the European Court of Human Rights, relevant factors in this connection are the nature and purpose of the measure in question, its characterisation under national law, the procedures involved in the making and implementation of the measure and its severity (European Court of Human Rights Judgment of 17 September 2009, *Scoppola v. Italy* (no. 2), no. 10249/03, § 97; European Court of Human Rights Judgment of 9 February 1995, *Welch v. United Kingdom*, no. 17440/90, § 28).

The European Court of Human Rights accordingly held that a fine of 500,000 Greek drachmas imposed on a transport company for infringing the rules applicable to international trade in importing goods with a total value of 15,050 deutschmarks constituted a criminal offence within the meaning of Article 6 ECHR, because of what was at stake for the company which was liable to a maximum fine equivalent to the value of the goods, i.e. triple the fine imposed (European Court of Human Rights Judgment of 24 September 1997, *Garyfallou Aebe v. Greece*, no. 18996/91, §§ 32 and 33).

In the case in point, the magnitude of the fine imposed on the appellant, 61,219 Swiss francs, whose maximum amount could have been 1,137,899 Swiss francs, is a justification for the offence defined by the Vaud law on public contracts to be classified as criminal within the meaning of Articles 6 and 7 ECHR. The complaint of violation of Article 7 ECHR, moreover properly reasoned, is consequently admissible.

Article 7.1 ECHR goes beyond prohibiting the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. Article 7 ECHR cannot be interpreted as proscribing the gradual clarification of the rules of criminal liability by judicial interpretation from one case to the next, on condition that the outcome is consistent with the substance of the offence and

reasonably foreseeable. Knowing how far the penalty should be foreseeable largely depends on the content of the statute in question, on the field which it covers, and on the number and the status of those to whom it applies. A law may still satisfy the requirement of foreseeability where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (aforementioned *Scoppola* Judgment, § 93 ff. and the numerous references to the case-law of the European Court of Human Rights).

#### *Languages:*

French.




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# "The former Yugoslav Republic of Macedonia" Constitutional Court

## Important decisions

*Identification:* MKD-2006-3-004

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 13.09.2006 / e) U.br.35/2006 / f) / g) / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

4.7.2 Institutions – Judicial bodies – **Procedure.**

4.7.3 Institutions – Judicial bodies – **Decisions.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

*Keywords of the alphabetical index:*

Civil procedure / European Court of Human Rights, judgment, national law, effects / Judgment, review.

*Headnotes:*

The case concerned the impact on the right to appeal, when a legal provision is adopted which rules out the possibility of a special appeal against a court's decision to reject the plaintiff's request for judgment in default.

It is not unconstitutional for a legislator to provide the possibility for parties to apply for revisions to a judgment by the second instance court, irrespective of the value of the dispute, where this is in the interests of the party with a view to a uniform implementation of the law and it is relevant to overall decision-making in the dispute in point.

Where breaches of human rights or fundamental freedoms are identified in the Court's judgment, the proceedings do not have to be repeated in every instance, irrespective of whether or not the litigant has addressed petitions to the European Court of Human Rights in Strasbourg.

*Summary:*

An individual petitioned the Court to assess the constitutionality of three articles of the Law on Contentious Proceedings.

The Court examined the constitutional provisions guaranteeing the right to an appeal as well as the Law on Contentious Proceedings. It also scrutinised the provision preventing a special appeal against a decision rejecting the plaintiff's request for the entry of judgment in default. The suggestion was made that this provision was in contravention of the right to appeal. The Court did not agree. The exercise of the right to an appeal is postponed until the moment the Court makes its final decision, so that the case can be conducted without delay, costs are kept to a minimum, and the rights of the parties to the proceedings are safeguarded.

It went on to examine Article 372.4 of the Law, which sets out the general rule for filing for a revision as an extraordinary legal remedy. This provision allows for revisions against second instance judgments, even where the sum in dispute is less than 500,000 denars, if the dispute to be decided hinges on a material point of law, and in order to ensure uniform implementation of the law and harmonisation of case-law. The Court held that the legislator could provide for extraordinary legal remedies, in addition to appeal. It could therefore allow parties to apply for revision where certain pre-conditions were met.

In the Court's view, Article 372.4 of the Law on Contentious Proceedings could not be described as unconstitutional. The Supreme Court of the Republic of Macedonia is the highest court in the Republic and it ensures uniform implementation of law. The ability of parties to file for revision of judgments from the Second Instance Court, irrespective of the amount in dispute, is in the interest of litigants, with a view to uniform implementation of the law and resolution of material point of law. It guarantees the highest possible protection of the freedoms and rights of individuals and citizens, as fundamental values of the constitutional order.

The Constitutional Court examined Article 400 of the Law on Contentious Proceedings. The subtitle "Repetition of proceedings following a final decision by the European Court of Human Rights in Strasbourg" provides that where the Strasbourg Court has established a breach of one of the human rights or

fundamental freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Additional Protocols to the Convention, which the Republic of Macedonia has ratified, a party may, within 30 days from the date the judgment of the European Court of Human Rights became final, file a request with the Court in the Republic of Macedonia which presided over the first instance proceedings where the disputed decision was made, with a view to changing that decision. In such repeated proceedings, the courts must observe the legal standpoint expressed in the final judgment of the European Court of Human Rights which found that a right or freedom had been breached.

A review of constitutional articles and articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto showed that the judgment of the European Court of Human Rights does not alter the domestic judgment, it does not require the case to be reopened, nor does it impose an obligation on the state which has breached certain rights to stop doing so.

The rationale behind the introduction of this extraordinary remedy is that parties to proceedings should not have to suffer consequences because of a violation of Convention provisions. The Court accordingly ruled that Article 400 of the Law on Contentious Proceedings was not unconstitutional, especially when viewed in the context of Article 9 of the Constitution.

This is because the provision in question refers to citizens in an equal legal position, that is to say, those whose applications to the European Court of Human Rights have resulted in judgments to the effect that human rights or fundamental freedoms have been violated, which are grounds for the proceedings to be repeated. It does not apply to all citizens, irrespective of whether they have applied to the Court in Strasbourg. Also, the petitioner had suggested that judgments of the European Court of Human Rights should be transposed straight into the domestic legal order, without the need to repeat the proceedings before a domestic court. He or she had also argued that the judgment of the European Court of Human Rights should be the source of law, applicable to all cases stemming from the same set of facts. The Court did not accept these arguments. Courts dispense justice based on the Constitution, national legislation and international agreements ratified in accordance with the Constitution. For this reason as well, Article 400 could not be described as unconstitutional.

With regard to Article 372.4 the Court passed its resolution by majority vote.

### *Languages:*

Macedonian, English.



### *Identification:* MKD-2008-2-004

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 23.04.2008 / **e)** U.br.28/2008 / **f)** / **g)** Sluzben vesnik na Republika Makedonija (Official Gazette), 64/2008, 22.05.2008 / **h)** CODICES (Macedonian, English).

### *Keywords of the systematic thesaurus:*

- 3.9 General Principles – **Rule of law**.
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.
- 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
- 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.
- 5.3.5.1.4 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Conditional release**.

### *Keywords of the alphabetical index:*

Life imprisonment / Prisoner, release, application / Offender, rehabilitation.

### *Headnotes:*

The principle of respect for human dignity is a fundamental value of the individual that enjoys universal protection. Thus, the legislature must provide for mechanisms enabling those sentenced to life imprisonment eventually to regain their freedom.

Under the Criminal Code of the Republic of Macedonia, a life sentence does not necessarily entail a life restriction on liberty. Someone who has been sentenced to life imprisonment and who has already served fifteen years in jail may request release on parole. This means that a person sentenced to life imprisonment may at some point be released from prison.

### **Summary:**

I. The petitioner asked the Court to assess the constitutionality of several provisions of the Criminal Code relating to life imprisonment (see Official Gazette of the Republic of Macedonia, nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006 and 7/2008).

He argued that a sentence of life imprisonment deprived the perpetrator of a criminal offence of his liberty until the end of his life. He conceded that the Constitution allowed certain restrictions of human freedoms, but pointed out that such restrictions had to be temporary and the same for everybody. The determination that freedom is restricted for life would result in different offenders having different lengths of restriction of freedom, in cases of sentences of life imprisonment. He argued that freedom was inviolable, and could not be excluded until the end of somebody's life. Because a life sentence excluded the possibility for the individual to regain his or her freedom, it was in breach of the Constitution.

II. The Court took account of the provisions of Articles 8.1.1, 3, 10, 11, 12.1 and 14.1 of the Constitution, together with relevant provisions of the Criminal Code and the Law on the Execution of Sanctions (see Official Gazette of the Republic of Macedonia, no. 2/2006). The Court also took note of the relevant provisions of international law, the jurisprudence of the European Court of Human Rights and some national jurisdictions.

In its reasoning, the Constitutional Court began by observing that human dignity is one of the subjective rights guaranteed by Article 11 of the Constitution, and a fundamental value of a democratic society. As such, it enjoys universal protection. Respect for the moral integrity and dignity of the citizen is part of the role of the state and particularly significant when these values are under threat. The Court noted that this role of the state is especially important in the field of criminal justice and in the system of execution of prison sentences. The state imprisons citizens on the one hand, but on the other hand is obliged to bring the perpetrators of crimes back into society, by appropriate treatment.

The Law on the Execution of Sanctions contains provisions that help to guarantee the respect of the values described above. This legislation proclaims humane treatment for those serving prison sentences, and respect for their personality and dignity. It does not draw a distinction between those sentenced to a prison term and those sentenced to life imprisonment in terms of enjoyment of rights and privileges.

The Constitutional Court observed that, when assessing the constitutionality of life sentences, one should start from the premise that, under the Macedonian Criminal Code, these are not unrestricted. There is, in fact, no life restriction of liberty, as the petitioner suggested. The Criminal Code contains specific provisions under which somebody serving a life sentence may ask for release on parole, once he or she has served fifteen years in prison. It follows that someone sentenced to life imprisonment is not deprived altogether of the possibility of future release. The long-term continued loss of liberty is an extraordinary physical and psychological burden that may result in significant disturbance to the personality of the person undergoing the sentence. This is one of the reasons behind the possibility of release on parole. A life sentence cannot be described as "humane" if the person sentenced never has the chance of securing his liberty at a future date. Statements in the petition link life sentences with incarceration for the term of a prisoner's natural life. This would result in negation of one of the aims of punishment – preparing the offender for reintegration into society by correction and preparation for socially acceptable conduct when set free.

The Court accordingly held that there were no grounds to challenge the conformity of the provisions in the Criminal Code relating to life sentences with the provisions of the Constitution.

### **Cross-references:**

European Court of Human Rights:

- *Leger v. France [GC]*, no. 19324/02, 11.04.2006;
- *Kafkaris v. Cyprus*, no. 21906/04, 12.02.2008.

### **Languages:**

Macedonian.



**Identification:** MKD-2010-3-005

- a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 15.12.2010 / **e)** U.br.139/2010 / **f)** / **g)** / **h)** CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

- 5.3.32.1 Fundamental Rights – Civil and political rights  
– Right to private life – **Protection of personal data.**
- 5.3.36.1 Fundamental Rights – Civil and political rights  
– Inviolability of communications – **Correspondence.**
- 5.3.36.2 Fundamental Rights – Civil and political rights  
– Inviolability of communications – **Telephonic communications.**
- 5.3.36.3 Fundamental Rights – Civil and political rights  
– Inviolability of communications – **Electronic communications.**

*Keywords of the alphabetical index:*

Communication, eavesdropping, electronic.

*Headnotes:*

Legal provisions of the Law on Electronic Communications that authorise the Ministry of the Interior to intercept communications without a court order (as provided by the Criminal Procedure Law and Law on Interception of Communications) are unconstitutional. They do not contain sufficient guarantees against possible misuse by the body authorised to use technical means for the continuous and independent interception of communications, as well as for storing data collected from these intercepted communications. Legal regulations for the use of measures that intercept communications should contain clear rules regarding circumstances and conditions under which the state bodies may use them, the type of interception, the circumstances justifying it and the body responsible for ordering the interception of communications.

In addition, the disputed provisions on the interception of communications that limit the constitutional guarantee of the inviolability of all forms of communications should be subject to a law adopted by a 2/3 majority of the members of the parliament.

*Summary:*

Several individuals, NGOs and foundations petitioned the Constitutional Court to initiate proceedings for the constitutional review of several provisions of the Electronic Communications Law. The contested articles of the Law set out the Ministry of the Interior as the body authorised to intercept communications and provided it with constant and direct access to the communication network and services. These articles also authorised the Ministry of the Interior to independently take over data on traffic, as well as independently establish the current geographic, physical and location of the technical equipment of the

subscribers, i.e. users, irrespective of their telecommunication activity. The contested articles of the Law regulated the communication of data on traffic, the position and location and the technical equipment upon the request of the competent state authorities (no court order is needed).

The Court departed from Articles 8.1.1.3, 15, 18, 25 and 26, as well as amendments XIX, XXI and XXV of the Constitution. It found the allegations of the petitioners to be founded.

The Court held that the contested articles of the Law regulated the interception of communications in a manner that differs from the one in other laws (the Criminal Procedure Code and the Law on Interception of Communications, both of which were adopted by a 2/3 majority of the members of parliament). In the Court's opinion, the concept of the basic text of the Law (which essentially contained technical provisions) has been changed by adding the contested articles which, by their nature, are provisions regulating grounds for exceptions to the rights of inviolability of letters and of all other forms of communication. As such, the contested articles created an original, direct and normative authorisation for the Ministry of the Interior to intercept communications, by ignoring or not having to directly call upon previous regulations of the procedure and the rules for the interception of communications by the Criminal Procedure Code and the Law on the Interception of Communications, under which the interception of communications of any kind may not take place without a court order.

By not regulating the way in which measures for the interception of communications should be implemented, which body should issue the order, the length of time of the measure taken, the cases in which it is constitutionally allowed for the public authorities to interfere with the privacy of citizens, the disputed provisions open the door to unconstitutional and unauthorised intrusions into privacy, in particular in cases where they are based on legal provisions that are not clear, subject to improvisation or interpretation, and provide direct power to the authorised bodies to implement the measure of interception of communications without placing their authorisation within a strict legal framework, such as in the present case.

Therefore, data stored as a result of the interception of communications or records of the contents of communications, according to the case-law of the European Court of Human Rights, are an unauthorised interference into the privacy of communications when the implementation of the interception of communications measure is not based on a law that is sufficiently clear in its terms and there is no difference with respect to

whether the interception device records the communications or only makes an entry, which it controls. This is the position of the Court in, *inter alia*, the case of *Valenzuela Contreras v. Spain* (1998).

Although the methods and techniques used for the interception of communications are secret and aimed at the detection of the content of communications in order to prevent or detect criminal offences, conduct criminal proceedings, or when the interests of the security and defence of the Republic are at stake. The Court found that the challenged provisions of the Law do not contain sufficient guarantees against a possible misuse by the authorised authority given the technical means available for the continued and independent interception of communications, as well as in the storing of data collected from intercepted communications. Also, the provisions governing the interception of communications must be sufficiently clear and predictable and not be subject to improvisation nor interpretation in order not to interfere unconstitutionally and illegally with citizens' right to correspondence and their freedom of communication. Or, more specifically, the legal regulation that refers to the application of the measures for the interception of communications should contain a very clear definition of the circumstances and conditions under which the public authority is authorised to resort to the use of such measures, the manner in which the interception is to be carried out, the cases in which the interception of communications is justified and define the body that issues the order for the interception of communications. Anything else will lead to unlimited power and will breach the principle of the rule of law.

The Court further noted that the interpretation of the relevant constitutional provisions should be based on the general legal principles contained in the European Convention on Human Rights as interpreted by the European Court of Human Rights' case-law and it referred to the case *Iordachi and Others v. Moldova*, in which the European Court of Human Rights confirmed its previous position made in the decision on the admissibility of the case of *Weber and Saravia v. Germany* and once again summarised its case-law on the requirement for legal predictability as follows: "In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed".

Hence, the contested articles of the Law, due to their imprecision, the lack of further regulation with regard to the conditions and procedure in which there may be an exception to the guaranteed constitutional right of privacy, according to the assessment of the Court, pose a real threat of a self-determined and arbitrary interference by the state bodies in the private life and correspondence of citizens which may have a negative impact on the honour and reputation of citizens without having a real basis in the Constitution nor in the law. As a result of this situation, the contested articles may not be interpreted as provisions guaranteeing the fundamental freedoms and rights of the individual and citizen recognised under international law and defined by the Constitution as a fundamental value of the constitutional order of the Republic of Macedonia.

Finally the Court noted that since the contested provisions govern issues related to the interception of communications, as an exception from the constitutional guarantee for inviolability of letters and all other forms of communication, those provisions, but not the entire Law, should be the subject-matter of a law that is adopted by a 2/3 majority vote of the total number of members of parliament. It therefore found defects in the procedure of the adoption of the contested articles in addition to the material unconstitutionality of the contested articles, and annulled the disputed articles of the Law.

#### Cross-references:

European Court of Human Rights:

- *Lordachi and Others v. Moldova*, no. 25198/02, 14.09.2009.

#### Languages:

Macedonian, English.



**Identification:** MKD-2011-1-002

- a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 16.02.2011 / **e)** U.br.107/2010 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 38/2011, 25.03.2011 / **h)** CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.16 General Principles – **Proportionality.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

*Keywords of the alphabetical index:*

Lawyer, freedom of expression, libel.

*Headnotes:*

Offensive criticism which exceeded the limits of acceptable and tolerable criticism and even harsh criticism, and which represented personal disparagement and offence by the applicant, was not justifiable; it violated the rights to honour and reputation of those at whom it was directed. A decision that the applicant had committed the criminal offence of libel did not constitute violation of the right to freedom of expression.

*Summary:*

I. A lawyer from Skopje filed an individual complaint, claiming that his freedom of public expression as lawyer had been violated by court decisions (at first instance and the Skopje Court of Appeal) finding him guilty of the criminal offence of libel and imposing a sentence. He argued that through these decisions, he had been found guilty of an opinion expressed in the course of rendering legal assistance, which was contrary to Articles 8.1, 16.1.2, 53 and 54 of the Constitution, Article 19 of the International Covenant on Civil and Political Rights and Article 10.1 ECHR. He contended that these judgments were in breach of Article 21.1.2. of the Law of the Bar, which state that lawyers cannot be held answerable for opinions expressed in the course of rendering legal assistance and performing public mandates, and that they enjoy immunity in the performance of their activities as attorneys. He also complained that he had not been able to prove that the views in the incriminating statements were true, as the courts declined to hear the witness and other evidence he had put forward.

The incriminating statements were contained in the written reply to the request for the protection of legality filed by the Public Prosecutor of the Republic of Macedonia and were directed against two other lawyers, former legal representatives of a company that had engaged the applicant as its legal representative.

II. The Constitutional Court held a public hearing, during which it determined the relevant facts of the case, which are elaborated in detail in the full text of the decision. It based its legal opinion on Articles 8.1.1.3 and 11, 16.1, 54 of the Constitution, Article 19 of the International Covenant on Civil and Political Rights, Article 10 ECHR and the case-law of the European Court of Human Rights (including *Nikula v. Finland*), UN Basic Principles on the Role of Lawyers, Recommendation no. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer and relevant articles of the Law on Attorneyship.

In its view, the ordinary courts did not violate the applicant's freedom of public expression of thought when they sentenced him for the criminal offence of libel. In this particular case, stances were taken and criticism levelled which were defamatory in nature. The threshold of tolerance for restriction of the freedom of expression was, in the Constitutional Court's view, justifiably lower. The applicant could not justify the expression of offensive criticism which went beyond harsh criticism and which represented personal disparagement and offence by invoking his strong belief that he did not intend to undermine the honour and reputation of the other lawyers.

The Constitutional Court acknowledged that the statements and stances which damaged the honour and reputation of the lawyers might be acceptable in certain circumstances, for instance if the lawyer had been defending a client against serious criminal charges which could have resulted in a prison sentence. The tolerance threshold would then have been higher than was the case in these proceedings.

In this case, as the opinions put forward, the position taken and the criticism exceeded the allowable tolerance levels, thereby violating the honour and reputation of the lawyers, and in view of all the legally relevant facts and circumstances, the Constitutional Court found that the first and second instance courts acted within the framework of their judicial competence, and the applicant's right to public expression of thought was not breached. It therefore rejected his complaint to that effect.

III. Judge Igor Spirovski disagreed with the majority, expressing the view in his dissenting opinion that the lawyer's freedom of public expression had been violated. The limitation of this freedom which occurred when the applicant was sentenced for libel was not proportionate to the legitimate aim and was not necessary in a democratic society.

#### *Cross-references:*

European Court of Human Rights:

- *Nikula v. Finland*, no. 31611/96, 21.03.2002, *Reports of Judgments and Decisions* 2002-II.

#### *Languages:*

Macedonian, English (translation by the Court).



## **Ukraine Constitutional Court**

### **Important decisions**

*Identification:* UKR-2001-3-007

- a) Ukraine / b) Constitutional Court / c) / d)** 10.10.2001 / **e)** 13-rp/2001 / **f)** Constitutionality of provisions contained in Articles 7 and 8 of the Law of Ukraine "On the state guarantee of recovering the savings of the citizens of Ukraine" and official interpretation of the provisions of Articles 22, 41 and 64 of the Constitution (case on the savings of the citizens) / **g)** *Ophitsiyny Visnyk Ukrayiny* (Official Gazette), 42/2001 / **h)**.

#### *Keywords of the systematic thesaurus:*

- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**  
5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

#### *Keywords of the alphabetical index:*

Property, control and use / Property, reduced value / Savings, indexing / Deposit, devaluation, compensation.

#### *Headnotes:*

According to Article 41.1 of the Constitution everyone has the right to possess, to use and to manage his own property. Money is an object of title, and constitutes private property (Article 13 of the Law "On Property"). Article 41.4 of the Constitution ensures that no one shall be unlawfully deprived of the right to property.

Article 1 Protocol 1 ECHR guarantees the right to peaceful enjoyment of possessions. However, a state may enforce such laws as it deems necessary to control the use of property in accordance with the general interest.

The mechanism established by Article 7 of the Law on the State Guarantee of Recovery of the Savings of Ukrainian Citizens ("the Law"), according to which the savings shall be returned "gradually, depending on the age of the depositor, the amount of the deposit, and on other circumstances, within the limits of the funds,

which have been stipulated in the state budget of Ukraine for the current year" risks to reduce the possibility of the depositors to dispose of their property to such an extent that, in practical terms, it violates their constitutionally guaranteed right to peaceful enjoyment of possessions.

The provisions of Articles 22, 41 and 64 of the Constitution are to be understood as covering deposits in Ukrainian savings banks, where such deposits are renewed and indexed in conformity with the law.

### *Summary:*

A group of citizens residing in Kharkiv region appealed to the Constitutional Court calling it to give an official interpretation of Articles 22, 41 and 64 of the Constitution.

Citizens may save funds in the national savings bank and other credit institutions, manage deposits, and receive income on deposits in the form of interest or bonuses, to effect documentary payments according to the statutes of the specified institutions and issued subject to the specified procedural rules (Article 384 of the Civil Code of the former Soviet Republic of Ukraine, "the Civil Code"). The state guarantees the secrecy of deposits, as well as their preservation and payment at the first request of the depositor (Article 384.2 of the Civil Code).

One of the methods to ensure the protection of the depositor's title is the ability to reinstate the situation to that which existed prior to the infringement of this right (Article 6.1 of the Civil Code).

Subject to the Constitution, the right to private property is inviolable (Article 41.4 of the Constitution).

The right of the state to limit the possession, use and management of property is determined also by Protocol no. 1 ECHR. Each and every person or entity shall have the right peacefully own his or her property. Nevertheless, the state shall have the right "to ratify such acts, which, in the opinion of the state, are required in order to provide controls on the use of property according to the common interest..." (Article 1 Protocol 1 ECHR).

Budgetary shortfalls, the depositors' age, and other eventualities may result in the complete loss by the citizens of their deposits, which would result in a violation of their constitutional title. Such a view was stated the case *James et al. v. the United Kingdom* of the European Court of Human Rights, dated 21 February 1986.

The Constitutional Court concluded that making returning the savings of Ukrainian citizens, aliens, and stateless persons dependant on the age of the depositor and on "other circumstances" violates the right to private property guaranteed by Article 41.1 of the Constitution.

As is specified in the Constitution, the right to private property, the use and management of property and any limitation on this right by the state shall be the same for all citizens. Successors have the right of succession of deposits on a general basis.

Article 8 of the Law does not deprive successors of the right to succession of the deposits on a general basis and acquiring the title to such deposits.

### *Cross-references:*

European Court of Human Rights:

- *James et al. v. the United Kingdom*, 21.02.1986, Vol. 98, A-Series of the decisions of the Court.

### *Languages:*

Ukrainian.



*Identification:* UKR-2007-2-002

- a) Ukraine / b) Constitutional Court / c) / d) 12.06.2007 / e) 2-rp/2007 / f) On conformity with the Constitution (constitutionality) of provisions of Articles 10.1, 11.2.3, 11.5, 11.6, 15, 17.1, 24 and Chapter VI.3 "Final Provisions" of the Law "On political parties" (case on establishing political parties) / g) Ophitsiynyi Visnyk Ukrainy (Official Gazette), 54/2007 / h) CODICES (Ukrainian).**

### *Keywords of the systematic thesaurus:*

- 4.5.10.1 Institutions – Legislative bodies – Political parties – **Creation**.
- 4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.
- 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
- 5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity**.

***Keywords of the alphabetical index:***

Political party, registration / Political party, contributions, mandate.

***Headnotes:***

The legislator has the right, based on the Constitution and international legal acts which the Ukraine has ratified, to regulate the legal status of political parties. This can take the form of provisions for their establishment, state registration and state control over their activities. Such norms must not hamper the constitutional right to freedom of association in political parties or invalidate the universal right to participate in political activity.

Article 10.1 of the Law on Political Parties, insofar as it distinguishes the Autonomous Republic of Crimea from the other subjects within the system, violates the constitutional principle of equality of all citizens depending on the place of their residence.

***Summary:***

The case was concerned with the compliance with the Constitution of certain provisions of the Law on Political Parties, and the situation of political parties in the Autonomous Republic of Crimea.

Seventy People's Deputies submitted a petition to the Court, regarding various provisions of Articles 10.1, 11.2.3, 11.5, 11.6, 15, 17.1, 24 and Chapter VI.3 "Final Provisions" of Law no. 2365-III "On political parties" of 5 April 2001.

Under Article 11.5, the Cabinet of Ministers determines the registration fee. Article 15 prohibits the financing of political parties by state institutions and local authority bodies, state and municipal enterprises, establishments and organisations, and enterprises, establishments and organisations, whose property includes state or municipally owned shares, or which belong to non-residents. It also rules out backing from foreign states and their citizens, charitable and religious associations and organisations, anonymous persons or those using pseudonyms, and those political parties not included in the "electoral block" of political parties. Banks will notify the Ministry of Justice of funds received by political parties from prohibited organisations. The political parties will then have to transfer these funds to the state.

Article 17.1 (wording of 5 April 2001) requires political parties to publish each year in the national mass media a financial report on profits and expenses, as well as their property interests.

Under Article 24, if, within three years of the date of registration, it transpires that a political party has submitted incorrect information in its registration documents, there can be no nominations of its candidates to presidential elections and elections of People's Deputies for ten years. The institution that registered the party would need to appeal to the Supreme Court in order to rectify the position. There are no other grounds for annulment of a registration certificate.

If the Supreme Court decides to annul a political party's registration certificate, this results in the termination of the party's activity and the dissolution of its organisation at local and national level.

Chapter VI ("Final Provisions") stipulate that political parties will need to take steps to implement this Law, to make any necessary changes to documentation and to submit them to the Ministry of Justice. This must be done no later than one year after the next parliamentary elections following the entry into force of this Law.

Under Article 36.1 of the Constitution, citizens have the right to freedom of association in political parties, as well as the realisation and protection of their rights and freedoms and satisfaction of their political, economic, social, cultural and other interests.

Under Article 3.2 of the Law on Political Parties, political parties are established and operate only with "all-Ukrainian status", in conformity with constitutional norms guaranteeing freedom of political activities, provided these are not forbidden by the Constitution and laws (see Article 15.4). Article 21 deals with the inalienability and inviolability of human rights and freedoms. Article 23 establishes the right to freedom of personality, provided that this does not result in a breach of the rights and freedoms of others.

Article 10.1 of the Law on Political Parties stipulates that the signatures of at least ten thousand citizens are needed for the establishment of a political party. The Constitutional Court considered this an important guarantee of a constitutional basis for a public association. It also ensured a truly national status for a political movement as well as a "level playing field" for all political parties.

Article 15 of the Law introduces certain limitations. It rules out the financing of political parties by state institutions and local government authorities (unless there is provision for this in other legislation), state and municipal enterprises, anonymous persons and other subjects. The aim is primarily to set equal pre-conditions for the activity of all political parties, and to ensure the protection of the rights and freedoms of those who do not belong to these particular political parties.

Under Article 133 of the Constitution, the system of administrative-territorial structure consists of the Autonomous Republic of Crimea, twenty-four regions and the cities of Kiev and Sevastopol. The Constitution, in giving special status to the Autonomous Republic of Crimea, simultaneously proclaims it as an “inalienable part” (see Article 134). It does not bestow any preferential treatment as regards the formation or activities of political parties with regard to other subjects of the administrative-territorial system. See Articles 137 and 138.

Article 10.1 of the Law on Political Parties, insofar as it distinguishes the Autonomous Republic of Crimea from the other subjects within the system, violates the constitutional principle of equality of all citizens depending on the place of their residence.

This position is in accordance with Decision no. 2-rp/98 of the Constitutional Court, 3 March 1998 (regarding the association of citizens in the Autonomous Republic Crimea). In that decision, the Court emphasised that the Autonomous Republic of Crimea did not have the power to regulate the establishment and activity of political parties. It also pointed out that the establishment of political parties with All-Crimean status only for residents of the Autonomous Republic of Crimea does not conform with the constitutional principles under which the citizens have equal constitutional rights and freedoms with no privileges or limitations, depending on the place of their residence.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2007-2-005

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.06.2007 / **e)** 5-rp/2007 / **f)** As to the official interpretation of provisions of Article 5.8 of the Law on the Renewal of a Debtor's Capacity to Pay or recognition of his Bankruptcy" (case on creditors of enterprises of municipal ownership) / **g)** *Ophitsiynyi Visnyk Ukrayny* (Official Gazette), 48/2007 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

3.16 General Principles – **Proportionality.**

4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**

4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**

#### *Keywords of the alphabetical index:*

Bankruptcy, enterprise, municipal / Municipality, property right.

#### *Headnotes:*

Local government authorities may, in exceptional cases at plenary sessions take decisions as to the non-applicability of the Law to municipal unitary enterprises in the ownership of the local municipal community, both before bankruptcy proceedings and at any stage of the bankruptcy.

The law envisages that bankruptcy proceedings against municipal enterprises are subject to termination, irrespective of whether the local authority has arrived at a decision that the provisions of the law should not apply, or upon the initiative of a court of general jurisdiction.

Under the principle of proportionality, the limitation of the rights of creditors of economic entities in bankruptcy in the municipal sector should correspond to the legitimate purpose necessary for the society.

#### *Summary:*

The case concerned the Ukrainian law on the Renewal of a Debtor's Capacity to pay, or Recognition of his Bankruptcy. It was held that the term “legal entity – enterprises which are objects of right of municipal ownership” would only apply to municipal unitary enterprises.

Article 214.4 of the Economic Code states that in certain cases, determined in legislation, bankruptcy proceedings do not apply to communal enterprises. Article 5.8 of the Law on the Renewal of a Debtor's Capacity to Pay states that the provisions of the law do not apply to certain legal entities – enterprises owned by a municipality – if a decision is taken to this effect at a plenary session of the relevant local authority.

Articles 140 to 145 of the Constitution set out the foundations for local government, including its institutions and its financial arrangements. Other issues of local government are covered in Article 146.

Law no. 280/97-VP "On local self-government", 21 May 1997, together with various supplements and amendments, covers various other issues of local government. Reference is also made to the Economic Code, which entered into force as of 1 January 2004 and other legislation.

The Law on Local Self-Government safeguards the principles of legal, organisational and financial independence, within the limits of competence. Article 16.5 of the Law no. 280 states that municipal property interests are catered for by the relevant local councils. Further particulars on the rights of ownership are contained in Article 60.

Under Article 140 of the Constitution and Article 2 of Law no. 280, matters of local significance are regulated within the communities, either by the community itself, on an independent basis, or by local government officials. Article 1 of the Law no. 280 defines the term "right of communal ownership" – the right of a community to own and to dispose of its property, in an efficient, economical and expedient way, at its own discretion and in its own interest, both directly and through institutions of local government.

Institutions of local government are not economic entities and they are not allowed to carry out entrepreneurial activities. The correct choice of the organisational and legal form of economic entity is highly significant. Article 24.1 and 24.3 of the Economic Code deal with the management of economic activity in the communal sector of the economy and stipulate that this be carried out by local authority bodies. The form the economic entity takes, depends on the documentation under which they were set up.

If the main task of the economic entity in the municipal sector is the production of vital goods or services for the inhabitants of the community (for example water supply, heating or waste disposal), its organisational and legal form should be a municipal unitary enterprise. These are economic entities which provide the population with necessary services, acting in the interests of the community.

By contrast, the realisation of corporate rights by local authority institutions is geared towards the expedient, economic and effective use of municipal property, rather than the satisfaction of basic needs. Article 24 of the Economic Code accordingly classifies them differently.

Under the principle of proportionality, the limitation of the rights of creditors of economic entities in bankruptcy in the municipal sector should correspond to the legitimate purpose necessary for the society. The Constitutional Court considered that this limitation was proportionate. It was also necessary for the inhabitants of communities who were only able to obtain proper municipal services from such entities.

Whether or not bankruptcy proceedings are available in the case of municipal enterprises should not influence councils in their decision-making as to the applicability of the disputed legislation to the enterprise. Local authorities are not, therefore, obliged to consult creditors of these organisations and other interested parties when making such a decision. Neither are they obliged to suggest measures on prevention of bankruptcy.

The list of grounds for termination of proceedings in a bankruptcy case, set out in Article 40 of the Law, is not complete. This norm does not envisage termination of proceedings in bankruptcy cases, where the circumstances are the same as those in Article 5.8 of the Law. The Constitutional Court took the view that the legislator had a positive duty to fill in the gaps in Article 40 of the Law, so that the courts could apply the provisions properly.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2008-1-001

**a) Ukraine / b) Constitutional Court / c) / d) 10.01.2008 / e) 1-р/2008 / f) On compliance with the Constitution of provisions of Articles 2.7, 2.11, 3, 4.9 and Chapter VIII "Arbitration Self-Government" of the Law on Courts of Arbitration (case on the tasks of an arbitration court) / g) Ophitsiynyi Visnyk Ukrayny (Official Gazette), 28/2008 / h) CODICES (Ukrainian).**

#### *Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law**.  
 4.7.14 Institutions – Judicial bodies – **Arbitration**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

**Keywords of the alphabetical index:**

Arbitration, quality of court.

**Headnotes:**

Arbitration courts do not contravene the constitutional provision that justice is to be dispensed exclusively by courts, as they do not fall within the jurisdiction of the general courts. Their regulatory system also differs from that of courts of general jurisdiction.

**Summary:**

This case dealt with the compliance with the Constitution of certain provisions of the Ukrainian Law on Courts of Arbitration, dealing *inter alia* with the regulation of arbitrators and courts of arbitration.

Fifty-one People's Deputies asked the Constitutional Court to assess the constitutionality of certain provisions of the Law on Courts of Arbitration, over which they had some concerns.

Pursuant to the Constitution, Ukraine is a democratic, social and law-based state; human rights and freedoms and guarantees thereof determine the content and direction of the state's activities; activities aimed to strengthen and ensure human rights and freedoms are the primary responsibility of the state.

By guaranteeing protection in court by the state, the Constitution simultaneously recognises a universal right to resort to any means not prohibited by law to protect one's rights from violation and illegal encroachment. This constitutional right may not be eliminated or restricted.

One method of guaranteeing the right to protect one's rights from violation or illegal encroachment in civil and economic legal relationships is an appeal to court of arbitration (see paragraph 1, section 5, motivation part of a decision by the Constitutional Court on the implementation of arbitration courts' decisions 24 February 2004 no. 3-rp/2004). The current legislation allows a dispute falling under a court of general jurisdiction that concerns legal relationships in civil or economic sphere to be forwarded to a court of arbitration upon consent of both parties to the litigation, except in certain cases envisaged by law (see Article 17 of the Code of Civil Procedure; Article 12 of the Code of Economic Procedure, and Article 6 of the Law. To ensure implementation of the provisions of the above Codes, and in line with Article 85.1.3 of the Constitution, the Verkhovna Rada adopted legislation setting out procedures governing the formation and the activities of arbitration courts.

Other states recognise in their procedural rules the possibility of the state forwarding disputes related to civil and economic relationships for consideration by arbitration courts. General principles of the arbitration examination of such disputes are stipulated in the European Convention on International Commercial Arbitration of 21 April 1961 and recommended to the state parties by the Arbitration Rules of United Nations Commission on International Trade Law (UNCITRAL) on 15 June 1976.

Under case-law from the European Court of Human Rights, petitions by individuals and other legal entities to courts of arbitration are deemed legitimate if refusal of the services of a national court was rejected by free consent of the litigants (Judgment in *Deweerd v. Belgium*, 27 February 1980).

According to Article 124.1 of the Constitution, justice is administered exclusively by courts. In so doing, courts ensure the protection of constitutional human rights and freedoms, rights and legal interests of legal entities, and the interests of society and the state. See subsection 4.1.4 of the motivation part of the Constitutional Court's Decision in a case concerning the imposition of a more lenient sanction (2 November 2004, no. 15-rp/2004). Therefore, in the context of Article 55 of the Constitution, judicial bodies may protect property and non-property rights and legal interests of individuals and/or legal entities in civil and economic legal relationships.

The arbitration of disputes between litigants in civil and economic legal relationships is a type of non-state jurisdiction administered by arbitration courts based on Ukrainian laws through utilising *inter alia* means of arbitration. The protection provided by the arbitration court, as defined in Article 2.7 and 2.3 of the Law, does not mean the administration of justice, but rather the arbitration examination of disputes between litigants in civil and economic legal relationships within the limits provided for in Article 55.5 of the Constitution.

According to Article 124.5 of the Constitution, court decisions are rendered by the courts in the name of the state, and are mandatory for execution on the whole territory. Pursuant to the Law, courts of arbitration make decisions only on their own behalf (Article 46) and such decisions rendered within the framework of effective legislation are binding only upon the litigants. Ensuring the implementation of arbitration courts' decisions exceeds the limits of arbitration examination. This is the responsibility of competent courts and state executive service (see Article 57 of the Law and Article 3.2.1 of the Law on Executive Proceedings).

Consequently, the provisions of the arbitration legislation under dispute do not contradict the norms of Article 124 of the Constitution, to the effect that justice is to be administered exclusively by courts. Arbitration examination is not the same as justice. Decisions by courts of arbitration are purely non-state jurisdictional activities with the aim of resolving disputes between litigants over civil and economic matters.

An analysis of other provisions of the Law shows that courts of arbitration are non-state independent bodies, with the aim of protecting the property and non-property rights and legal interests of individuals and/or legal entities in civil and economic matters. According to Article 7 of the Law, arbitration is carried out by standing courts of arbitration in order to resolve specific disputes.

Hence, courts of arbitration do not administer justice; their decisions are not instruments of justice and they do not belong to the system of courts of general jurisdiction.

One form of public self-government is the system of regulation of arbitration. This was set up to represent and protect the interests of arbitrators of standing arbitration courts, and to guarantee their rights and freedoms. Accordingly, pursuant to Article 92.1.1 of the Constitution, the *Verkhovna Rada* has a right to the legislative regulation thereof.

Arbitration self-government is not identical to judicial self-government, since arbitration courts are not included to the system of general jurisdiction, and arbitrators do not have the status of professional judges. Its purpose is to facilitate the organisation of arbitration courts. Judicial self-government, by contrast, falls within the system of the constitutional order within the state, under Article 130.2 of the Constitution. It is a form of self-organisation of professional judges.

The Constitutional Court drew a distinction between the arbitration regulatory system, which is a form of public self-government, and public organisations that fall into the sphere of voluntary public associations. There are specific, and different, legal provisions on the creation, systems and governance of arbitration courts on the one hand, and public organisations on the other.

The Arbitration Chamber was set up by the All-Ukrainian Congress of Arbitrators. Standing arbitrators are elected from a body of fellow arbitrators. It should not, therefore, be considered as a public organisation and thus subject to the provisions of Article 36 of the Constitution or to legislative restrictions over its name, status and governance. The referral by the petitioners

to the provision of Articles 85.2, 92.1.11 of the Constitution and the legal position of the Constitutional Court as stated in its Opinion of 13 December 2001, no. 18-rp/2001 was unfounded.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2008-1-003

**a) Ukraine / b) Constitutional Court / c) / d) 29.01.2008 / e) 2-rp/2008 / f) On the compliance of the Law on Specific Procedure for Dismissal of Persons Combining Deputy's Mandate with Other Forms of Activities" with the Constitution (constitutionality) and a constitutional petition by 89 People's Deputies concerning the official interpretation of Article 90.2.2 of the Constitution, Article 5 of the Law on Specific Procedure for Dismissal of Persons Combining Deputy's Mandate with Other Forms of Activities" (case on dismissal of People's Deputies from other offices in the event of their combining offices) / g) Ophitsiynyi Visnyk Ukrainy (Official Gazette), 80/2008 / h) CODICES (Ukrainian).**

#### *Keywords of the systematic thesaurus:*

- 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**
- 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**

#### *Keywords of the alphabetical index:*

Parliament, member, incompatibility, other activity / Parliament, member, mandate, termination.

#### *Headnotes:*

Legislation providing for the automatic termination of the mandate of a member of Parliament without providing for the deputy to take adequate measures violates the right to work.

***Summary:***

I. The case concerned the compliance with the Constitution of certain provisions of 2005 legislation on procedures for the dismissal of persons who combined the role of deputy with other professional activities.

Groups consisting of fifty-two People's Deputies and eighty-nine People's Deputies asked the Constitutional Court to assess the constitutional compliance of certain provisions on the Ukrainian legislation on the procedure for the dismissal of persons combining the role of deputy with other activities. They had some concerns about this legislation, and requested an official interpretation of its Article 5, in the light of Article 90.2.2 of the Constitution.

People's Deputies execute their powers and authorities on a permanent basis. However, there is provision for the early termination of authority, over the issue of the incompatibility of a deputy's mandate with other forms of activities. The requirement concerning incompatibility is a component of the status of national deputies and one of the characteristics of their mandates. There is a direct prohibition on the combination of the role of a deputy with other professional activities, and in fact, transgression amounts to a violation of the Constitution.

The early termination of the mandate, which is a consequence of such actions, may only occur as provided for within Article 81.4 of the Constitution, and in line with the procedure set out in legislation. The essence of conflict resolution in this regard is the termination of powers and authorities of a People's Deputy. The introduction of any other mechanism would amount to a breach of the Constitution.

From the perspective of the constitutional petition, the priority of natural human rights is to be considered as one of the fundamental principles of the Constitution.

II. The right to earn one's living cannot be separated from the right to life as such. The latter is guaranteed only insofar as adequate material support is available. The right to work follows from human nature itself. It applies to every individual and is inalienable.

The right to participate in public administration is established by the state. It exists and may be enjoyed in different forms, namely as a right to elect and be elected to government bodies. This right applies only to citizens. It presents citizens with the opportunity to participate in public administration and to form government bodies.

When a citizen takes up as position of People's Deputy, he or she is fulfilling the right to participate in public administration. This right differs from the right to labour, as it has political characteristics and follows from the fact of having Ukrainian citizenship. Execution of a right to be elected to government bodies also differs from the fulfilment of the right to labour because it is not directly dependent on a person's will. Engagement in political activities, including election as a national deputy, is not aimed (and is not immediately justified by the need) to receive remuneration (salary) for such activities.

Under the legislation in question, the positive right of a citizen to be elected to the representative body takes precedence over the natural human right to labour. It also allows for restriction of the right to labour that contradicts provisions of Article 3 of the Constitution, according to which a human being has the highest social value.

Where questions have arisen over the incompatibility of a deputy mandate with other forms of activities, the provisions of Article 81.2.5 and 81.4 of the Constitution are applied. In order to ensure implementation of this constitutional norm, specific laws were adopted to resolve this conflict – namely the elimination of the right to participate in representative bodies by court. This results in the forced termination of the authorities of a national deputy.

The contents of the Law fail to meet the constitutional requirements protecting the constitutional human right to labour. Thus, pursuant to provisions of Article 152 of the Constitution, there are grounds to recognise the whole text as unconstitutional.

The law also violates the norm of Article 78.3 of the Constitution – “requirements concerning incompatibility of a deputy's mandate with other forms of activities are provided for by law”. There is no provision in this norm for the establishment of a procedure for the elimination of acts concerning other professional activities. It is covered to a certain extent in Article 3 of the Law on the Status of a People's Deputy, and, with regard to the mechanism and procedures for the resolution of conflicts – in provisions of Article 5.2 of the same law. See also Articles 17.1.4 and 180 of the Code of Administrative Court Proceedings.

Besides the above conceptual inconsistency, the text of Articles 3, 4 and 5, at the basis of the Law, contradicts the provisions of Articles 78.4 and 81.2.5 of the Constitution. The provisions state that a People's Deputy has to perform certain responsibilities in order to ensure compliance with the requirements prohibiting combination of offices. Timelines for ensuring such compliance are also established.

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If a People's Deputy is appointed to a position not compatible with a deputy's mandate, he/she has to submit a personal application, which will be examined in accordance with the procedure set out in Article 81.4 of the Constitution.

If a People's Deputy complied with this requirement having preferred a right to labour, the provisions of Article 5 of the Law (on cancelling a relevant appointment document *a priori*) present an obstacle for exercising such a right by the person in breach of Article 81.4 of the Constitution. Furthermore, Parliament has already provided another mechanism to exclude the possibility of combining incompatible positions. Article 3.3 of the Law on the Status of a People's Deputy covers the point. If somebody is appointed to a position that is not compatible with the position of deputy, and their authority has not been terminated according to the procedure established by law, they can only carry out their responsibilities in such a position after submission of an application requesting the termination of authority as a People's Deputy.

A People's Deputy in this position must take the above steps within twenty days. However, this obligation corresponds to the right of a People's Deputy to take the steps within twenty days. The provisions of Articles 3 and 4 of the Law that envisage fifteen days for the resolution of issues of incompatibility violate this constitutional norm.

A person may actively prefer the right to labour to the positive right to be elected a member of a representative body. If they then fail to terminate their authorities in accordance with the legislation, a legislator is not entitled to establish a norm under which a document on appointing a People's Deputy is to be recognised null and void immediately after 20 days from the day it was issued. This deprives a person of a right to a free choice.

Article 88.2 of the Constitution enumerates the powers and authorities of the Chairman of the Parliament. It does not envisage a right by this official to restrict the process of execution of constitutional authorities by a People's Deputy pursuant to the procedure provided for in Article 7.3 of the Law. Such measures include the issuing of instructions on the blocking of a personal electronic voting card, suspension of salary and other remuneration connected with the performance of his or her function as deputy. That particular provision of the legislation is therefore in breach of the Constitution.

Because Articles 3, 4, 5, 7.2, 7.3 of the Law are recognised as unconstitutional, the Law is to be recognised null and void as a whole. It may not be

applied as a complete legal instrument. This constitutes grounds for recognising the whole Law as unconstitutional.

As the Constitutional Court pronounced the Law unconstitutional, there was no need for an official interpretation of norms constituting the subject matter of the constitutional petition.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2009-1-003*

**a) Ukraine / b) Constitutional Court / c) / d) 03.02.2009 / e) 3-rp/2009 / f) Concerning conformity with the Constitution of a provision of Article 211.2 of the Family Code (case on age difference between an adoptive parent and a child) / g) Ophitsiynyi Visnyk Ukrayny (Official Gazette), 11/2009 / h) CODICES (Ukrainian).**

#### *Keywords of the systematic thesaurus:*

2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966**.

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989**.

3.19 General Principles – **Margin of appreciation**.

4.5.2 Institutions – Legislative bodies – **Powers**.

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

#### *Keywords of the alphabetical index:*

Adoption, age limit / Adoption, age difference between adoptive parent and child.

#### *Headnotes:*

The establishment of a requirement concerning the age difference between an adoptive parent and an adopted child belongs to the legislative powers of Parliament.

**Summary:**

I. The Authorised Human Rights Representative of Parliament (*Verkhovna Rada*) asked the Constitutional Court to declare the provisions of Article 211.2 of the Family Code to be unconstitutional, as they breached Articles 21, 22, 24 and 51 of the Constitution. The petitioner had particular difficulties with the appending of Article 211.2.1 of the Code with the second sentence reading that the age difference between an adoptive parent and a child may not exceed forty-five years pursuant to the Law on Introducing Amendments to Certain Legislative Acts Concerning Adoption of 10 April 2008 (hereinafter, the "Law"), and suggested that it infringed the constitutional rights of Ukrainian citizens.

The Authorised Human Rights Representative of Parliament argued that this amendment constituted a legal provision discriminatory on the grounds of age, restricting citizens' right to adopt a selected child and the child's right to be adopted. It also violated the constitutional principle of equality of human rights, according to which the needs of all persons without exception are equally important and everyone has equal opportunities.

II. When considering the issue of conformity with the Constitution of Article 211.2 of the Code, the Constitutional Court proceeded from the following:

In Ukraine, childhood is protected by the state (Article 51.3 of the Constitution). The state must provide adequate conditions for education, physical, mental, social, spiritual and intellectual development of children, their social and psychological adaptation and their vital activities, growing up in a family environment in an atmosphere of peace, dignity, mutual respect, freedom and equality (see Article 4 of the Law on Protection of Childhood). The priority for legal regulation of family relationships is to provide family education and opportunities for spiritual and physical development for each child (Article 1.2 of the Code).

The creation of conditions for each child to enjoy the right to family education, facilitating child adoption, establishing a system of incentives and support for adoptive parents, falls within the fundamental principles of state policy on social protection of orphaned children and children deprived of parental care (Article 3 of the Law on Ensuring Organisation and Legal Conditions for Social Protection of Orphaned Children and Children Deprived of Parental Care).

The state is obliged to take care of orphaned children and children deprived of parental care, including support and upbringing (Article 52.3 of the Constitution). The state's duty to ensure protection and

care of a child necessary for his or her wellbeing is in line with the provisions of international legal acts recognised by Ukraine, namely Article 10.3 of the 1966 International Covenant on Economic, Social and Cultural Rights and Article 3 of the Convention on the Rights of the Child of 1989.

Legal relations pertaining to adoption are not subject to direct constitutional regulation. However, in order to ensure implementation of provisions of Articles 51 and 52 of the Constitution and international legal acts the state, in taking care of orphaned children and children deprived of parental care, determines the procedure for adoption. It controls this procedure by adopting norms that regulate the above social relations. According to the provisions of Principle 2 of the 1959 Declaration of the Rights of the Child, when adopting laws in this regard, the best interests of the child shall be of paramount consideration. The European Court of Human Rights also gives special consideration to the priority of the principle of the child's interests when deciding on adoption cases (*Judgment in the case of Pini and Bertani & Manera and Atripaldi v. Romania* dated 22 June 2004, *Reports of Judgments and Decisions* 2004-V).

The fundamental principles of the protection of childhood are determined exclusively by law (Article 92.1.6 of the Constitution). Provisions concerning adoption, including procedure and the legal status of the adopting parent and the adopted child, are provided for in Article 18 of the Code. Analysis of the relevant provisions would indicate that the person's intention to adopt a child means a possibility to adopt. The implementation of such an intention depends on the decision of the authorised body (the court), taking into consideration conditions established by the state and requirements for persons willing to adopt a child when ruling on adoption.

When evincing the arguments for the unconstitutionality of Article 211 of the Code, the petitioner was primarily proceeding from the interests of those seeking to adopt a child without taking heed of the priority of the interests of adopted children and the legal consequences of adoption. Adoption both bestows rights on adoptive parents and imposes responsibility on them, within the same framework as those of parents over their children (Article 232.4 of the Code). It also bestows both rights and responsibilities on adopted children within the same scope as those of children with regard to their parents (Articles 172, 202.1 and 232.5 of the Code). The establishment of a requirement concerning the age difference between an adoptive parent and an adopted child belongs to the legislative powers of Parliament. It is explained by the state's responsibility for the fate of orphaned children and children deprived of parental care according to the

principles of relations between parents and children as provided for in the Constitution (Articles 51 and 52 of the Constitution).

The requirement determined in the Law with regard to the age difference between an adoptive parent and an adopted child is equally binding upon everyone willing to adopt a child and actually refers to a possibility to adopt a child of a certain age. As such, it does not violate the principle of equality of citizens before the law as provided for in Article 24 of the Constitution.

Judges V. Kampo, M. Markush and Yu. Nikitin expressed their dissenting opinion.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2009-3-020

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.09.2009 / **e)** 23-rp/2009 / **f)** Case arising from the constitutional petition of citizen Holovan Ihor Volodymyrovych as to the official interpretation of provisions of Article 59 of the Constitution (case on the right to legal assistance) / **g)** *Ophitsiyny Visnyk Ukrayiny* (Official Gazette), 79/2009 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself**.

5.3.13.23.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to testify against spouse/close family**.

5.3.13.27 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to counsel**.

#### *Keywords of the alphabetical index:*

Legal assistance, right.

#### *Headnotes:*

The constitutional provisions on the universal right to legal assistance should be understood as the possibility, guaranteed by the state, for any person to receive legal assistance freely and without discrimination to the extent and in the form that he or she needs, irrespective of his or her relationship with state bodies, local government authorities, citizens' associations, individuals and legal entities.

#### *Summary:*

Citizen Ihor Holovan asked the Constitutional Court for an official interpretation of Article 59.1 of the Constitution, which states that "everyone has the right to legal assistance" and Article 59.2 of the Constitution, whereby "the advocacy acts to provide legal assistance in deciding cases in courts and other state bodies".

Under the Constitution, the state's main duty is to affirm and safeguard human rights and freedoms (Article 3.2 of the Constitution).

Chapter II of the Constitution not only specifies basic human and citizens' rights and freedoms, but also the respective constitutional and legal guarantees of its observance and protection, in particular the prohibition of the abolition of constitutional rights and freedoms (Article 22.2 of the Constitution), the impossibility of restricting constitutional human and citizens' rights and freedoms, apart from specific restrictions under martial law or in a state of emergency (Article 64 of the Constitution), the universal guarantee of judicial protection of a person's rights and freedoms, including the right to appeal to the court directly on the grounds of the Constitution, and the ability to use any lawful means to protect his or her rights and freedoms from violations and illegal encroachments (Articles 8.3, 55.2 and 55.5 of the Constitution).

The right to legal assistance, which is stipulated in Article 59 of the Constitution, plays an important role in safeguarding human and citizens' rights and freedoms in a democratic and law-based state. This right is one of the basic constitutional, inalienable human rights and has a general character. Article 59.1 of the Constitution states that "everyone has the right to legal assistance". "Everyone" in this context includes all persons without exception; foreigners and citizens alike. Realisation of the right to legal assistance is based on the observance of the principles of equality before the law and non-discrimination based on race, colour of skin, political, religious and other beliefs, social origin, property status, place of residence, linguistic and other characteristics (Articles 21, 24.1, 24.2 of the Constitution).

Furthermore, the realisation of the right to legal assistance may not depend on the status of the person and the nature of his or her legal relationships with other subjects of law. The universal right to legal assistance is, in essence, a guarantee for the execution and safeguard of the rights and freedoms of others, and this explains its social significance. One of its functions in society, which is of special note, is its preventive function. This not only facilitates the lawful realisation of rights and freedoms, but also aims to prevent potential violations or discriminations of human and citizens' rights and freedoms by state bodies, local government authorities and their officials and officers.

Legal assistance is multi-faceted and can have different contents, scope and form. It can include consultations, explanations, drafting claims and appeals, references, petitions, complaints, representation (especially in courts and other state bodies), and protection against accusation, etc. The choice of the form and the subject of such assistance depends on the will of the person seeking to receive it. At the same time, to the extent this is permitted by the relevant legislation, State bodies and their officials and officers are obliged to provide certain categories of person with legal assistance, especially in connection with the protection of the rights and freedoms of children, underage parents and protection against accusation.

The Constitutional Court specifies that the guarantee of the universal right to legal assistance within the context of Articles 3.2 and 59 of the Constitution places the state under the obligation to ensure that everyone has access to appropriate legal assistance. A corollary to such an obligation is the necessity to determine the methods of ensuring legal assistance in laws and other legal acts. However, not all relevant laws, especially procedural codes, contain norms aimed at the implementation of this right. This may lead to the limitation or narrowing of the contents and the scope of the universal right to legal assistance.

Furthermore, by guaranteeing the right to universal legal assistance, the state is not only fulfilling its constitutional and legal duty, but is also observing its obligations under the provisions of the Universal Declaration of Human Rights, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights.

Article 64 of the Constitution rules out any restrictions on the constitutional right to legal assistance. According to the Constitution, the provision "everyone has the right to legal assistance" (Article 59.1 of the Constitution) is a norm of direct effect (Article 8.3 of the Constitution). Even if this right is not envisaged by relevant laws or other legal acts, there can be no restrictions on its implementation. It also relates, in

particular, to the right of a witness to receive legal assistance during cross-examination in a criminal trial and to those providing explanations to state bodies.

Under the Constitution, no adverse consequences should follow from a person's refusal to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law (Article 63.1 of the Constitution). The Constitutional Court considers that every person, especially witnesses under examination in bodies of inquiry or preliminary investigations and those providing explanations to state bodies, should have a real possibility of obtaining legal assistance to prevent the potential violation of the right not to testify or to explain anything about himself or herself, members of his or her family or close relatives which may be used in a criminal trial for the proof of indictment of those mentioned above. The case-law of the European Court of Human Rights also confirms such a conclusion.

Article 59.1 of the Constitution does not contain any restrictions as to the circle of subjects of legal assistance or requirements as to their education. However, Article 59.2 of the Constitution provides that the advocacy acts to ensure the right to a defence against accusation and to provide legal assistance in deciding cases in courts and other state bodies.

Pursuant to the Law on Advocacy, advocacy is a voluntary professional public association which, according to the Constitution, exists to facilitate the protection of rights and freedoms and to represent the lawful interests of citizens, foreigners, stateless persons and legal entities in all bodies, enterprises, establishments and organisations (Articles 1 and 6).

Systematic analysis of Article 59 of the Constitution and the Law on Advocacy would suggest that the provision of Article 59.2, according to what "in Ukraine, the advocacy acts to provide legal assistance in deciding cases in courts and other state bodies", is one of the constitutional guarantees, which gives a witness the right to legal assistance from a lawyer during examination in bodies of inquiry or preliminary investigation or when providing explanations in state bodies. In this way, the state bears the responsibility for guaranteeing qualified legal assistance to persons in their legal relations with state bodies. This does not preclude a person from receiving such assistance from other subjects, except for restrictions provided for by law.

#### *Languages:*

Ukrainian.

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*Identification:* UKR-2010-2-007

**a)** Ukraine / **b)** Constitutional Court / **c) / d)** 29.06.2010 / **e)** 17-rp/2010 / **f)** Concerning the compatibility with the Constitution (constitutionality) of paragraph 8 of Article 11.1.5 of the Law on Police / **g)** *Ophitsiyny Visnyk Ukrayiny* (Official Gazette), 49, 52/2010 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

3.22 General Principles – **Prohibition of arbitrariness.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

*Keywords of the alphabetical index:*

Freedom, deprivation / Detention, lawfulness / Arrest for vagrancy, not an offence.

*Headnotes:*

Arrest shall not be considered justified in any case where the acts a detainee is accused of cannot be qualified as or were not considered by law to be a violation of law at the time those acts were carried out.

*Summary:*

I. The Authorised Human Rights Representative of the Parliament (*Verkhovna Rada*) applied to the Constitutional Court for a declaration that the provisions of paragraph 8 of Article 11.1.5 of the Law on Police (Law no. 565-XII of 20 December 1990, as amended; hereinafter, the “Law”) were unconstitutional in that those provisions permit the police to arrest persons suspected of vagrancy and to detain them in special detention facilities – for a period up to 30 days with a reasoned court decision.

II. Ukraine is a democratic, law-based state; the human being, his or her life and health, honour and dignity, inviolability and security are recognised as the highest social value; human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State, which is answerable to the individual for its activity; affirmation and ensuring of human rights and freedoms is the main duty of the State (Articles 1, 3.1 and 3.2 of the Constitution).

The principle of the rule of law is recognised and effective (Article 8.1 of the Fundamental Law).

One of the elements of the rule of law is the principle of legal certainty, according to which the restriction of fundamental human and citizens rights and implementation of these restrictions are acceptable only on condition of ensuring the foreseeability of the application of the legal rules established by these restrictions. In other words, the restriction of any right should be based on criteria which provide a person with the possibility of distinguishing lawful behaviour from unlawful behaviour and foreseeing the legal consequences of his or her behaviour.

Pursuant to Article 29 of the Constitution, every person has the right to freedom and personal inviolability (Article 29.1); no one shall be arrested or held in custody other than pursuant to a reasoned court decision and only on the grounds and in accordance with a procedure established by law (Article 29.2); in the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours (Article 29.3).

The provisions of Article 29 of the Constitution define detention, arrest and holding a person in custody as measures of enforcement, which restrict the right to freedom and personal inviolability of a person and which may be applied only on the grounds and in accordance with a procedure established by law.

The Constitutional Court holds that the words “only on the grounds and in accordance with a procedure established by law” envisage the obligation of state bodies and their officials to ensure compliance with the rules of both substantive and procedural law during arrest.

The above-mentioned means that a detained person has a right to have a competent court examine not only compliance by state bodies and their officials with rules of procedural law of the grounds for arrest, but also the basis of the suspicion which constituted the grounds for arrest, the lawfulness of its enforcement, and whether it was necessary and justified in the particular circumstances.

Arrest shall not be considered justified in any case where the acts a detainee is accused of cannot be qualified as or were not considered by law to be a violation of law at the time those acts were carried out.

The impugned provision of the Law permits police to arrest persons who are suspected of vagrancy and to detain them in special detention facilities – for a period up to 30 days with a court decision.

This provision means that the objective of such an arrest is to ascertain the involvement of a person in vagrancy, that is to say, of committing a crime or another violation of law. Such an arrest was subject to the condition of criminal responsibility for such acts under the 1960 wording of Article 214 of the Criminal Code. The components of the crime defined by this article were decriminalised by Law no. 2547-XII of 7 July 1992 amending and supplementing the Criminal Code, the Ukrainian SSR Code of Criminal Procedure and the Ukrainian SSR Code on Administrative Offences.

According to Article 92.1.22 of the Constitution, the principles of civil legal liability; acts that are crimes, administrative or disciplinary offences, and liability for them shall be determined exclusively by the laws.

The Criminal Code provides that the criminality of acts, as well as their punishment and other criminal legal consequences are determined exclusively by this code (Article 3.3). An analysis of the provisions of the Code shows that it does not identify vagrancy as an action injurious to the public or provide for responsibility for its perpetration.

Nor does the Code of Administrative Offences or any other law define vagrancy as a violation of law.

The impugned provision of the Law establishes only the grounds for arrest. The Law does not set out the content or signs of vagrancy. Nor does the Law set out sufficiently accessible, clearly-worded procedures for its enforcement, that is to say, procedures which would be capable of preventing the arbitrary arrest of persons on suspicion of vagrancy. This does not conform to the principle of legal certainty.

An analysis of the rules of the Code of Criminal Procedure, in particular, Articles 106, 115, 149 and 165<sup>2</sup>, and the Code of Administrative Offences (Articles 260, 261, 262, etc.) taken together with the consideration that vagrancy is not determined by the laws to be a crime or an administrative offence, gives grounds for concluding that these rules do not envisage procedures for or the consideration by courts of issues concerning the arrest of persons on suspicion of vagrancy.

For the reasons mentioned above, the Constitutional Court considers that the provisions of paragraph 8 of Article 11.1.5 of the Law are not compatible with Articles 8.1, 29.1, 29.2, 29.3, 55.2 and 58.2 of the Fundamental Law.

Pursuant to the Constitution, everyone who is legally present on the territory is guaranteed freedom of movement, free choice of place of residence, and the right to freely leave the territory, with the exception of restrictions established by law (Article 33.1).

The relevant provisions of the Constitution and international legal acts are further developed and specified in Law no. 1382-VI of 11 December 2003 on freedom of movement and free choice of place of residence (hereinafter, "Law no. 1382"). In particular, Article 2 of Law no. 1382 provides for the guarantee of freedom of movement and free choice of place of residence, while Articles 12 and 13 define the persons whose freedom of movement and free choice of place of residence are limited.

The above-mentioned articles of Law no. 1382 do not provide for the restriction of the right to freedom of movement and free choice of place of residence of a person suspected of vagrancy.

Proceeding from foregoing, the Constitutional Court holds that the provisions of paragraph 8 of Article 11.1.5 of the Law are not compatible with Article 33.1 of the Constitution.

Examining the issue raised in the present constitutional petition, the Constitutional Court declares – on the grounds mentioned above – that the provisions of Article 11.1.11 of the Law (which permit the police to photograph, make audio recordings of, film, make video recordings of, and fingerprint persons arrested on suspicion of vagrancy) are incompatible with the Constitution. It is for this reason that that Article is considered unconstitutional under Article 61.3 of the Law on the Constitutional Court.

#### Cross-references:

#### European Court of Human Rights:

- *Yeloyev v. Ukraine*, no. 17283/02, 06.11.2008;
- *Novik v. Ukraine*, no. 48068/06, 18.12.2008;
- *Soldatenko v. Ukraine*, no. 2440/07, 23.10.2008;
- *Nikolay Kucherenko v. Ukraine*, no. 16447/04, 19.02.2009.

#### Languages:

Ukrainian.



**Identification:** UKR-2010-3-009

**a) Ukraine / b) Constitutional Court / c) / d) 09.09.2010 / e) 19-rp/2010 / f) Conformity with the Constitution of the provisions of the Law on Introducing Amendments to Some Legislative Acts Concerning Jurisdiction of Cases on Social Benefits / g) Ophitsiyny Visnyk Ukrayiny (Official Gazette), 72/2010 / h) CODICES (Ukrainian).**

**Keywords of the systematic thesaurus:**

- 4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**
- 4.7.8.1 Institutions – Judicial bodies – Ordinary courts – **Civil courts.**
- 4.7.9 Institutions – Judicial bodies – **Administrative courts.**

**Keywords of the alphabetical index:**

Decision, administrative, judicial review / Protection, judicial, right.

**Headnotes:**

Concerns had been raised over the constitutional compliance of certain provisions of the Law on Introducing Amendments to some Legislative Acts Concerning Jurisdiction of Cases on Social Benefits no. 1691-VI, 18 February 2010, which related to the jurisdiction of the administrative courts. Under these provisions, local courts of general jurisdiction had started to hear legal disputes related to social benefits which had previously fallen within the jurisdiction of the administrative courts. In particular, questions had arisen over the principle of judicial specialisation and the effective protection of judicial rights.

**Summary:**

The Code of Administrative Proceedings (hereinafter, the "CAP") provided that after its entry into force on 1 September 2005 any public legal disputes in which at least one of the parties exercised state authority fell within the jurisdiction of the administrative courts (Articles 2.1.2, 3.1.1.2.7 of the CAP). According to Article 18.2 of the CAP, in the wording of the Law dated 6 July 2005, district administrative courts had jurisdiction over all administrative cases in which one of the parties was a body of state power, another state body, a body of the Autonomous Republic of Crimea or their officials and officers, with the exception of matters arising from their decisions, actions or omissions in cases on administrative offences. The district administrative courts also had jurisdiction over legal disputes related to social benefits if a respondent in the

relevant case fell within one of the categories of bodies or officials mentioned above.

The Law dated 25 December 2008 introduced amendments to the CAP according to which on the grounds of Article 18.1.3 local courts of general jurisdiction began to consider disputes concerning social benefits in the course of administrative proceedings.

The Law on Introducing Amendments to Some Legislative Acts Concerning Jurisdiction of Cases on Social Benefits no. 1691-VI, 18 February 2010 (Law no. 1691) (Chapter I.2) removed Article 18.1.3 of the CAP and redrafted Article 15.1 of the Civil Procedural Code (hereinafter, the "CPC"). Item 2 of the latter article, provides that disputes concerning social benefits should be considered in the course of civil proceedings, irrespective of the status of the respondent (Chapter I.1.4).

The system of courts in Ukraine was established in conformity with the provisions of Articles 6, 124 and 125 of the Constitution and with the application of the principle of specialisation in order to provide the most effective mechanism of human rights and freedoms protection in relevant legal relations.

The Law on the Judiciary and Status of Judges envisages that judicial power is implemented by means of exercise of justice within the frameworks of relevant judicial procedures (Article 1.2); there are specialised courts (Articles 17.2.3, 18) acting within the system of courts of general jurisdiction (Article 3.1) which includes commercial and administrative courts (Articles 21.2.3, 26.3, 31.2). The main criteria of judicial specialisation are the types of legal relations under dispute, and the appropriate procedures for dealing with them. The procedural codes establish different judicial proceedings to deal with different legal relations.

On the basis of the constitutional provisions on judicial specialisation (Article 125.1) and the universal guarantee of the possibility of challenging in court the decisions, actions or omission of bodies of state power, local government offices, officials and officers (Article 55.2), a special system of courts of administrative jurisdiction was established in Ukraine. The protection of individual rights, freedoms and interests in the sphere of public legal relations from violations on the part of subjects of authority is defined as a direct mission of the administrative jurisdiction (Article 2.1 of the CAP). The administrative jurisdiction as a specialised type of judicial activity became the mechanism which enhanced the possibility of exercising the right to judicial protection from unlawful decisions, actions or omissions by subjects of authority.

The division of jurisdictional authority among general and specialist courts is subject to the universal guarantee of the right to effective judicial protection. Thus any public legal disputes where at least one of the parties exercises state authority belong within the administrative jurisdiction and are subject to consideration by the administrative courts. (See Articles 3.1.2.7 and 17.1 of the CAP). Reference is also made to the jurisdiction of disputes concerning social benefits, where the claimant is an individual and the respondent a subject of authority.

The legislator is under a constitutional obligation to observe the constitutional principle of specialisation in the legislative process as regards the organisation and activities of courts. The changes to the CAP and the CPC, introduced by Law no. 1691, which exempted disputes on social benefits from the jurisdiction of courts of specialist administrative jurisdiction and transferred them to the jurisdiction of general courts (civil jurisdiction), are out of line with Article 125.1 of the Constitution.

The principle of officiality applies in administrative jurisdiction (unlike civil jurisdiction) and so the court plays an active role in the examination of all the facts in a case (Articles 11.4.5, 69.2, 71.5 of the CAP). If a subject of authority is the respondent in an administrative claim, it has to shoulder the burden of proving the lawfulness of its decision, action or omission (Article 71.2 of the CAP). Within the civil jurisdiction each party has to prove the facts to which it refers as grounds for its demands and objections (Articles 11.1, 60.1 of the CPC). The subject of authority must submit to court all available documents and materials which can be used as proof in a case; if he or she fails to do so, the court will apply for them. If the respondent does not fulfill this obligation without a valid reason, the court will consider the case on the grounds of the evidence available (Article 71.4.6 of the CAP). The civil procedural legislation does not envisage such an authority for the Court.

Article 19.2 of the CAP provides that administrative cases on appeal against legal acts of individual action, and the acts or omissions of subjects of authority concerning the interests of a particular person are considered by the administrative court of the applicant's choice, unless otherwise provided by the Code. In the civil jurisdiction, pursuant to Article 109 of the CPC, the court will consider appeals according to the place of residence or location of a respondent unless otherwise provided in Article 110 of the CPC.

The administrative jurisdiction allows the limits of the complaint to be exceeded if this is necessary for human rights protection, and it also allows several complaints by one applicant to be joined into one set of proceedings, which will be considered in the course of

different jurisdictions, according to other laws (Articles 11.2, 21.2 of the CAP). This is inadmissible in the civil jurisdiction (Articles 11.1, 16 of the CPC).

Article 87.3 of the CAP differs from Article 79.3 of the CPC in that it does not envisage judicial expenses for information and technical provision of the consideration of a case, which have to be paid by applicants filing civil claims (Article 119.5 of the CPC).

In contrast to the civil jurisdiction, individuals claiming against subjects of authority in the administrative jurisdiction enjoy an advantage in terms of compensation of judicial expenses, and applicants can also seek assistance from administrative court staff in filing claims (Articles 94.1.5, 105.3 of the CAP).

The above changes to the CAP and the CPC violated the principle of judicial specialization and reduced the individual procedural rights and guarantees previously established by law. The mechanism of the judicial protection of rights also became less effective and accessible.

Under Article 22.3 of the Constitution the content and the scope of existing rights and freedoms should not be diminished when new laws are adopted or changes are made to those already in force. However, the amendments to the CAP and the CPC diminished the applicant's procedural rights in cases on social benefits which limited in turn limited the possibility of judicial protection of their rights in disputes with a subject of authority. This violated Articles 22.3 and 55.1 of the Fundamental Law.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2011-1-001

**a) Ukraine / b) Constitutional Court / c) / d) 26.01.2011 / e) 1-rp/2011 / f)** On the official interpretation of the provisions of the 1960 Criminal Code with amendments, introduced by Law no. 1483-III on Introducing Amendments to the Criminal, Criminal Procedural and Correctional Labour Codes of 22 February 2000, regarding their temporal effect in conjunction with the provisions of Articles 8, 58.1, 92.1.22, 152.2, item 1 of Chapter XV "Transitional

Provisions" of the Constitution, Article 73 of the Law on the Constitutional Court, Articles 4.2, 5.1, 5.3, 5.4, 74.3 of the 2001 Criminal Code (case on substitution of death penalty for life imprisonment) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 10/2011 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**

5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**

5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

*Keywords of the alphabetical index:*

Death penalty / Criminal offence, sanction.

*Headnotes:*

Amendments were made to criminal legislation substituting the death penalty as a form of criminal sanction with life imprisonment. These are to be interpreted as having retroactive effect, i.e. they are applicable to individuals who have committed particularly serious crimes envisaged by the previous relevant legislation, including individuals sentenced to death whose sentences had not been carried out by the time the new legislation came into force.

*Summary:*

I. Under the Constitution, the human being, his or her life and health, honour and dignity, inviolability and security are recognised as the highest social values; human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State; the main duty of the State is the affirmation and the safeguarding of human rights and freedoms (Article 3).

In Ukraine, the principle of the rule of law is recognised and effective; the Constitution has the highest legal force; the norms of the Constitution are of direct effect; laws and other normative legal acts are adopted on the basis of and in conformity with the Constitution (Article 8 of the Constitution).

Laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul a person's liability (Article 58.1 of the Constitution).

Criminal acts (and liability for them) are determined exclusively by law (Article 92.1.22 of the Constitution).

The legislation governing criminal responsibility is the Criminal Code which is based on the Constitution and generally acknowledged principles and norms of international law. The criminality of an act, the sanctions it attracts and other criminal and legal consequences are determined exclusively by this Code (Article 3.1 and 3.3 of the 2001 Criminal Code (hereinafter, the "2001 Code").

The General Part of the 1960 Criminal Code contained provisions on the death penalty as an exceptional form of punishment (Articles 24, 25, 48, 49, 52. The section on sanctions, contained in articles within the Special Part, envisaged responsibility for intentional homicides committed with aggravating circumstances (Articles 58, 59, 60, 93, 190). Other articles stipulated punishment for certain war crimes committed in wartime or in combat situations (Articles 232, 234, 236, 241, 242, 243, 245, 249, 251, 254, 254, 254, 255, 256, 257, 258, 260, 261). The sanctions enumerated in the articles of the Special Part of the 1960 Criminal Code provided, alongside the death penalty, for detention for a maximum of fifteen years. These sanctions, which were established by Parliament, were in proportion to the particular gravity of the crimes mentioned above and the danger their perpetrators posed to society.

In its Decision of 29 December 1999, the Constitutional Court recognised as unconstitutional the provisions of Article 24 of the General Part and those provisions relating to sanctions contained in the articles of the Special Part of the 1960 Code which envisaged the death penalty as a form of punishment. Under Article 152.2 of the Constitution any provisions of the 1960 Code declared unconstitutional would lose their legal force from the date of adoption by the Constitutional Court of a decision to that effect. In the above Decision, Parliament was required to bring the 1960 Code into alignment with the Constitutional Court's Decision.

By means of its adoption of the Law on Introducing Amendments to the Criminal, Criminal Procedural and Correctional Labour Code no. 1483-III, 22 February 2000 (Law no. 1483), Parliament brought the 1960 Code into line with the Constitutional Court's Decision of 29 December 1999. Law no. 1483 resolved integrally the issue of substitution of the death penalty as a form of punishment with a type of sanction such as life imprisonment.

II. The Constitutional Court noted firstly that there was a period between the date of the Constitutional Court's Decision (29 December 1999) and the entry into force of Law no. 483 during which Parliament was adopting a decision on introducing amendments to the 1960 Code regarding substitution of the death penalty with life

imprisonment. This interim period was conditioned by the fact that the loss of effect of the provisions of the 1960 Code on the death penalty and the entry into force of Law no. 1483 establishing a new form of punishment were not simultaneous. It originated from the exercise by the Constitutional Court of control over the constitutional compliance of the provisions of the 1960 Code regarding the death penalty.

This interim period should not, however, result in the various sanctions envisaged in the articles of the 1960 Code, which existed at that time, losing their alternative character and only envisaging punishment in the form of confinement for a maximum term of fifteen years. This is borne out by the fact that the 1960 Code established a "non-alternative" sanction – confinement for a term up to fifteen years – for intentional homicide without aggravating circumstances (Article 94). However, the legislature did not recognise this punishment to be commensurate with the penalty for intentional homicide with aggravating circumstances; it was of the view that courts should be able to impose harsher penalties for such crimes (Article 93 of the 1960 Code).

In this regard, the Constitutional Court stated that the alternative character of sanctions within the articles of the 1960 Code, which envisaged punishment for especially grave crimes did not give courts any leeway to establish other sanctions apart from the death penalty. The latter was substituted by Parliament with life imprisonment as it violated the principle of proportionality of the gravity of crime and sanctions for its perpetration, and did not conform to the principle of equity in criminal law.

Life imprisonment, the new form of criminal punishment introduced by Law no. 1483, is a less severe form of punishment by comparison with the death penalty. This opinion of the Constitutional Court is based on the fact that in the case of life imprisonment, the inalienable right to life is guaranteed for a person who has committed a particularly serious crime. Life imprisonment is now established in the articles containing sanctions for such crimes, including intentional homicide, committed with aggravating circumstances, as the most severe form of punishment rather than the death penalty (item 1 of Article 23.1 of the 1960 Code) along with detention for a maximum of fifteen years. If somebody has been sentenced to life imprisonment, there is provision for this to be substituted with an act of pardon and a shorter prison sentence (Article 25.1 of the 1960 Code, Article 87.2 of the 2001 Code). Persons sentenced to life imprisonment are provided, within the limits stipulated by law, with the possibility of social connections (Articles 28, 38, 39, 41, 42, 43, 44, 58 of the Correctional Labour Code, 23 December 1970; Articles 107, 108, 109, 110, 112, 113, 114, 127, 151, 151 of the Criminal Executive Code, 11 July 2003).

Where grounds exist for the review of a case, there is real potential for a person sentenced to life imprisonment to be rehabilitated.

III. Judge V.M. Kampo submitted a dissenting opinion.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2011-1-002

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.03.2011 / **e)** 2-rp/2011 / **f)** Conformity with the Constitution of various provisions of the Law on the High Council of Justice / **g)** Ophitsiynyi Visnyk Ukrayiny (Official Gazette), 23/2011 / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline**.

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.

#### *Keywords of the alphabetical index:*

High Council of Justice, power / Judge, oath, violation.

#### *Headnotes:*

Certain provisions of the legislation governing the High Council of Justice were challenged for lack of compliance with the Constitution. Under particular scrutiny were those pertaining to the powers of the High Council of Justice to demand and obtain from courts copies of court cases, and those relating to challenges to acts or omissions on the part of Parliament, the President and the High Council of Justice. These provisions might run counter to the principle of judicial independence and impartiality.

#### *Summary:*

I. A group of fifty-three People's Deputies sought a declaration from the Constitutional Court that the provisions of Law no. 22/98-VR of 15 January 1998 on the High Council of Justice as amended were not in conformity with the Constitution.

In particular, the applicants took issue with the constitutionality of the provisions of Article 25.1, 25.2 and 25.3 of Law no. 22. Article 25.3 allows the High Council of Justice, in the implementation of its powers, to demand and obtain from courts copies of court cases which are still under consideration, apart from those being considered in closed session.

Article 25.1 and 25.2 of Law no. 22 set out the procedure the High Council of Justice must follow in order to obtain the information it needs from state administration entities and local government and their officials, administration and local government authorities and their officials, business managers, individuals and public associations.

II. The Constitutional Court considered the applicability of Article 131 of the Constitution to the preparation of materials and issues surrounding the competence of the High Council of Justice. Under Article 25.3 of Law no. 22, the High Council of Justice may examine judicial cases at all levels and instances before the termination of the court proceedings and evaluate the procedural acts of judges in regard to the consideration of a particular case, although the authority for it to do so is not set out in Article 131 of the Constitution, which only allows for Courts of Appeal or Courts of Cassation to carry out this measure. A demand for any materials (such as scripts or copies) of judicial cases by the High Council of Justice results in evaluation of the procedural acts of judges. Such assessment before the adoption of the final decision in a case constitutes interference with the administration of justice, which runs counter to Articles 126.1, 126.2 and 129.1 of the Constitution.

The right of the High Council of Justice to demand copies of court proceedings is set out formally in Article 40.1 of Law no. 22, which states that the verification of information on disciplinary misdemeanours is to be achieved by means of obtaining materials from court proceedings. The administrative responsibility and liability for failure to submit copies of cases is provided by Article 25.4 of Law no. 22 and Article 188.1 of the Code on Administrative Offences.

However, analysis of the content of Articles 25.4, 40.1 of Law no. 22 and Article 188.1 of the Code on Administrative Offences showed a level of incompetence as to which particular copies of cases should be specifically given under the provisions listed above. According to the Constitutional Court, liability for failure to forward copies of cases still under consideration to the High Council of Justice cannot be stipulated in legislation. Provision of such copies is, however, envisaged by the provisions of Article 25.3 of Law no. 22, which the Constitutional Court has recognised as being out of line with the Constitution.

The applicants also took issue with the conformity with the Constitution of the provisions of Article 27.3 of Law no. 22. Under this provision, a complaint can only be made against actions by the High Council of Justice to the High Administrative Court in accordance with the procedure set out in the Code of Administrative Proceedings (hereinafter, the "Code").

The Constitutional Court noted that Parliament determines the judicial system and court jurisdiction in legislation, and may also determine instances where it is not permissible to challenge a court decision by appeal and cassation (Articles 92.1.14 and 129.3.8 of the Constitution).

The specific characteristics of cases challenging acts or omissions on the part of Parliament, the President, the High Council of Justice and the High Qualifications Commission of Judges are set out in Article 171 of the Code. This provision allows for appeals against acts and activities by the above parties to the High Administrative Court. A separate chamber is set aside for this purpose at the High Administrative Court (Article 171.2 of the Code).

Article 18.4 of the Code enumerates the cases within the jurisdiction of the High Administrative Court as the court of first instance. These include cases on establishing the results of elections or the All-Ukrainian referendum by the Central Election Commission; pre-term termination of authorities of a People's Deputy and challenges to the acts and omissions of Parliament, the President, the High Council of Justice and the High Qualifications Commission of Judges.

According to Article 171.6 of the Code, which is in conformity with the provisions of Article 27.3 of Law no. 22, the decisions of the High Administrative Court in instances where the acts, decisions or omissions of Parliament, the President, the High Council of Justice and the High Qualifications Commission of Judges have been challenged are final and not subject to review at appeal or cassation.

The Constitutional Court stressed that legal regulation of the court jurisdiction of the above category of cases has an influence on the ability of someone who perceives that their rights, freedoms or lawful interests have been violated to appeal to the court regarding decisions, acts or omissions on the part of the High Council of Justice.

Acts of the High Council of Justice concerning judges and prosecutors, which may be appealed to the High Administrative Court, are covered by Article 27.1 and 27.2 of Law no. 22.

The rationale behind the approved court procedure for such cases by the High Administrative Court as a court of first instance is the protection of the independence and impartiality of the judges who are to examine the cases mentioned above. The balance between the protection of the rights of judges and prosecutors as citizens and their responsibilities as representatives of the state power is observed by the establishment of a specific procedure for appealing against acts by the High Council of Justice.

The applicants also questioned the conformity with the Constitution of those provisions of Article 32.2 of Law no. 22 that determine which actions on the part of a judge constitute a breach of oath. These include actions which could undermine his or her objectivity, impartiality and independence, and jeopardise public trust in the fairness and incorruptibility of the judiciary; wealth illegally acquired by the judge or the implementation of costs that exceed the judge's income and that of his or her family; deliberate delays by a judge in the consideration of a case in excess of the time limits set by law, and violation of the moral and ethical principles of a judge's contract.

Procedures for the appointment and election of a judge and reasons for his or her dismissal are regulated by the Basic Law (Articles 126, 128). Other issues pertaining to their legal status are established exclusively by law (Article 92.1.14 of the Constitution).

The legal status of the judge envisages the constitutional guarantees of independence and inviolability of judges in the administration of justice and legal liability for failure to fulfill their duties. Under the Basic Law, a judge is dismissed from office by the body that elected or appointed him or her, particularly in cases where he or she has breached the oath. The High Council of Justice is competent to forward submissions on dismissing judges from office (Articles 126.5.5, 131.1.1 of the Constitution). The procedure and the reasons for submissions on the dismissal of judges for the breach of oath are stated in Article 105 of Law no. 2453-VI on the Judiciary and Status of Judges (hereinafter, the "Law on the Judiciary") and Article 32 of Law no. 22.

A judge is under a duty to abide by the oath; this is envisaged by Article 54.4.4 of the Law on the Judiciary. It corresponds to Article 126.5.5 of the Constitution. This allows for the assumption that a judge is under a constitutional responsibility to abide by the oath. A judge's oath accordingly forms part of his or her unilateral, individual, public-legal and constitutional responsibility. The observance by a judge of his or her responsibilities is a necessary requirement of confidence on the part of society in courts and justice.

Breach of oath by a judge is a ground for his or her dismissal from office under Article 126.5.5 of the Basic Law.

III. Judges V.D. Bryntsev and V.I. Shyshkin attached dissenting opinions.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2011-3-015

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.12.2011 / **e)** 20-rp/2011 / **f)** Constitutional compliance of Chapter VII.4 "Transitional Provisions" of the Law on the State Budget for 2011 / **g)** Ophitsiynyi Visnyk Ukrayiny (Official Gazette) / **h)** CODICES (Ukrainian).

#### *Keywords of the systematic thesaurus:*

4.10.2 Institutions – Public finances – **Budget**.

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living**.

#### *Keywords of the alphabetical index:*

Social right, minimum standard / Social protection, right / Social benefits, amount.

#### *Headnotes:*

The amount of social provision the State can make available under the Budget depends on what is feasible for the State, socially and economically. However, the universal constitutional right to a standard of living sufficient for an individual and his or her family, as provided for in the Constitution, must be safeguarded.

#### *Summary:*

A group of 49 People's Deputies, another group of 53 People's Deputies and a further group consisting of 56 People's Deputies applied to the Constitutional Court with a petition suggesting that Chapter VII.4 "Transitional Provisions" of the Law on the State Budget for 2011 (hereinafter, the "Law") did not comply with

Articles 1, 3, 6, 8, 16, 17.5, 19.2, 21, 22, 43.1, 46, 48, 58, 64, 75, 85.1.3, 92.1.1, 92.1.6, 92.2.1, 95.1, 95.2, 95.3, 116 and 117 of the Constitution.

According to the applicants, Parliament, when it enacted the above legislation, gave the Cabinet of Ministers the right to establish the procedure for and amount of social benefits, already envisaged by law, and to change the volume of social benefits depending on the financial resources available under the Budget of the State Pension Fund for 2011. In so doing, Parliament restricted the constitutional right of citizens to social protection.

The applicants also contended that the subject matter of the regulation of a law on the State Budget is an exhaustive list of legal relationships determined by the Constitution and the Budget Code. Decisions on specific features of application of other effective laws are not included therein.

The Constitution determines the guarantees for social protection, in particular, the legal safeguarding of fundamental aspects of social protection, and the forms and types of pension provision (Article 92.1.6). It also determines the sources of state social security (Article 46.2) and control over the use of State Budget funds (Article 98).

The amount of social provision depends on what is feasible for the State, socially and economically. However, the universal constitutional right to a standard of living sufficient for an individual and his or her family, as provided for in Article 48 of the Constitution, should be safeguarded.

The Constitutional Court considered various provisions of international law. Under Article 22 of the Universal Declaration of Human Rights, the amount of social security benefits is established in accordance with the financial resources of each State. The European Court of Human Rights, in its Judgment of 9 October 1979 in *Airey v. Ireland* (*Special Bulletin – Leading cases ECHR* [ECH-1979-S-003], Series A, no. 32), stated that the realisation of human social and economic rights depends on the economic and financial situation within the State. Such provisions also apply to the admissibility of reducing the volume of the social benefits which the European Court of Human Rights mentioned in its Judgment of 12 October 2004 in *Kjartan Ásmundsson v. Iceland*.

The Constitutional Court proceeded from the premise that adherence to the constitutional principles of a social and legal state, and the rule of law (Articles 1 and 8.1 of the Fundamental Law) determines the implementation of the legislative regulation of public relations on the basis of equity and equality, taking into account the State's duty to provide decent living conditions for all citizens.

The social and economic rights envisaged in the legislation are not absolute. The State may need to alter the mechanism of realisation of these rights, especially where it is not possible to finance them by proportional redistribution of funds in order to maintain a balance with the interests of society as a whole. Such measures may also be dictated by the need to eliminate or prevent real threats to economic security. At the same time, the content of the fundamental right may not be violated, which is the generally recognised rule, indicated by the Constitutional Court in Decision no. 5-rp/2005 dated 22 September 2005 (case on permanent use of land plots), *Bulletin* 2005/3 [UKR-2005-3-005]. Establishing a legal regulation under which the amount of pensions and other social payments and assistance will be lower than the level set in Article 46.3 of the Constitution is inadmissible, and will not provide adequate living conditions allowing individuals to live in society and maintain their human dignity, in contravention of Article 21 of the Constitution.

The Constitutional Court therefore found that the disputed provisions of the Law do not contradict Articles 8, 21, 22, 46, 48 and 64 of the Constitution.

Under the Constitution, the fundamentals of social protection, forms and types of pension are determined exclusively by law (Article 92.1.6). The Cabinet of Ministers is authorised to take measures to ensure the rights and freedoms of citizens and pursue a policy of social protection (Article 116.2, 116.3).

The Cabinet of Ministers, as the highest executive authority has the constitutional power to direct and coordinate activities of ministries and other executive agencies, including the Pension Fund.

The Cabinet of Ministers is the body which ensures state policy in the social sphere. The Pension Fund is charged with implementing it. This may be at the expense of State Budget funds.

Parliament, by introducing Chapter VII.4 "Transitional Provisions" to the Law on the State Budget for 2011, identified the Cabinet of Ministers as a state body with responsibility to ensure the implementation of the social rights of citizens envisaged by laws. Essentially, it provided the Cabinet with the right to determine the order and volume of social benefits based on the available financial resources of the budget, which is consistent with the functions of the Government, as defined in Article 116.2 and 116.3 of the Constitution.

Chapter VII.4 "Transitional provisions" of the Law does not therefore contradict Articles 92.1.6, 116, 117 of the Constitution.

The specific purpose of the State Budget is to ensure appropriate conditions for the implementation of other laws, which provide state financial obligations to citizens aimed at their social protection, including benefits, compensations and guarantees (paragraph 4 of the reasoning part of Decision of the Constitutional Court no. 6-rp/2007 dated 9 July 2007 in the case on social guarantees of citizens), *Bulletin* 2007/2 [UKR-2007-2-006].

In its Decision no. 26-rp/2008 dated 27 November 2008 in the case on the balancing of the budget (*Bulletin* 2008/3 [UKR-2008-3-028]), the Constitutional Court mentioned that the provisions of Article 95.3 of the Constitution, concerning the State's aspiration to balance the budget in systemic connection with the provisions of Articles 46, 95.2 of the Constitution, should be understood as the State's intention to maintain an even balance, when defining by law the State Budget of revenues and expenditures and adopting laws and other regulations that may affect the budget. In its Decision no. 6-rp/2004 dated 16 March 2004, in the case on printed periodicals (*Bulletin* 2004/1 [UKR-2004-1-006]), the Constitutional Court also emphasised that the State's aspiration to balance the State Budget is realised through identification of sources of government revenue and spending needs.

In the Constitutional Court's opinion, the principle of a balanced budget is a defining element, along with the principles of equity and proportionality, in the activities of public authorities, particularly in the process of elaboration, adoption and implementation of the State Budget for the current year.

In this regard, the Constitutional Court concluded that Chapter VII.4, "Transitional Provisions" on the implementation of the provisions of legislation on the "Status and Social Protection of Citizens who Suffered from the Chernobyl Disaster", on the "Social Protection of Children of War", on the "Pension Provision of Individuals Released from Military Service and Other Individuals" do not contradict Articles 75, 85.1.3 and 95 of the Constitution.

#### *Languages:*

Ukrainian.



## United Kingdom Supreme Court

### Important decisions

*Identification:* GBR-2001-1-003

**a)** United Kingdom / **b)** Privy Council / **c)** / **d)** 05.12.2000 / **e)** / **f)** Brown v. Stott / **g)** / **h)** [2001] 2 Weekly Law Reports, 817; [2001] 2 All England Law Reports, 97; CODICES (English).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.16 General Principles – **Proportionality.**

3.17 General Principles – **Weighing of interests.**

3.19 General Principles – **Margin of appreciation.**

4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

*Keywords of the alphabetical index:*

Devolution / *Ex facto oritur jus* / Right, implied / Road safety, offence / Road traffic, offence.

*Headnotes:*

A provision requiring a person keeping a motor vehicle to give the police the identity of the person driving it when a suspected road traffic offence was committed is not incompatible with Article 6 ECHR, the right to a fair trial. Whilst it may, *prima facie*, infringe a person's privilege against self-incrimination, such privilege is not absolute and the infringement was both necessary and proportionate in the circumstances.

### Summary:

A woman was suspected of shoplifting at a store. The police believed she had been drinking alcohol and asked her how she came to the store. She said she travelled by her car. She was taken to a police station, charged with theft, and obliged, under provisions in the Road Traffic Act 1988 (hereinafter, the "Act") to tell the police who was driving her car when she travelled to the store. She admitted she was the driver. She was then found to be over the alcohol limit for driving and was charged with an offence under the Act. She raised a "devolution issue", under Section 6 of the Scotland Act 1998, as to whether the prosecution's reliance on her compulsory admission of driving the car was compatible with Article 6.1 ECHR. The High Court of Justiciary in Scotland allowed her appeal and declared the prosecution could not rely on such evidence. The Scottish law officers appealed to the Privy Council.

Section 172 of the Act requires the person keeping a vehicle to provide police with the identity of the driver of that vehicle where the driver is alleged to be guilty of a specified driving offence. The defendant claimed this provision infringed her privilege against self-incrimination.

The Judicial Committee of the Privy Council recalled that Articles 10 and 11.1 of the Universal Declaration of Human Rights (1948) and Article 6 ECHR grant a right to a fair trial but contain no express guarantee of a privilege against self incrimination. The right is implied.

The European Court and Commission of Human Rights have interpreted Article 6 ECHR broadly by reading into it a variety of other rights to which the accused person is entitled in the criminal context. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. They include the right to silence and the right against self incrimination with which this case is concerned. As these other rights are not set out in absolute terms in the article they are open, in principle, to modification or restriction so long as this is not incompatible with the absolute right to a fair trial. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the European Convention on Human Rights could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently avoided by the Court throughout its history. The case-law shows that the Court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur*

*ius*. The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth v. Sweden* at paragraph 69 of the Judgment (*Special Bulletin – Leading cases ECHR [ECH-1982-S-002]*); *Sheffield and Horsham v. United Kingdom* at paragraph 52 of the judgment.

The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it effectively, for the public benefit, cannot be doubted. One way democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers. Under some legal systems (e.g. Spain, Belgium and France) the registered owner of a vehicle is assumed to be the driver guilty of minor traffic offences unless he shows that some other person was driving at the relevant time. The jurisprudence of the European Court tells us that the questions that should be addressed when issues are raised about an alleged incompatibility with a right under Article 6 ECHR are the following: (1) Is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) If it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) If so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised? The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual. There being a clear public interest in enforcement of road traffic legislation the crucial question in the present case is whether the challenged provisions represents a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial.

In determining this question it is recalled that the European Convention on Human Rights places the primary duty on domestic courts to secure and protect rights. The function of the European Court of Human Rights is essential but supervisory. In that capacity it accords to domestic courts a margin of appreciation, which recognises that national institutions are in principle better placed than an international court to evaluate local needs and conditions. That principle is logically not applicable to domestic courts. On the other hand, national courts may accord to the decisions of national legislatures some deference where the context justifies it.

In the Privy Council's view, the challenged provision was not a disproportionate response to the serious problem of misuse of motor vehicles, nor would the defendant's admission undermine her right to a fair trial. The provision puts only a single, simple question, the answer to which cannot, by itself, incriminate a defendant since driving a car in itself is not an offence. The defendant was also required to submit to a breath test to discover her alcohol limit. It was not argued that such a procedure violated her right to a fair trial, and it is difficult to distinguish it from the challenged provision. The possession and use of a motor vehicle carries with it responsibilities including the submission to the regulatory regime in place. For all these reasons, the challenged provision was found to be compatible with Article 6 ECHR and the lower courts declaration was quashed.

#### Cross-references:

European Court of Human Rights:

- *Sporrong and Lönnroth v. Sweden*, 23.09.1982; 5 *European Human Rights Reports* 35, *Special Bulletin – Leading cases ECHR* [ECH-1982-S-002];
- *Sheffield and Horsham v. United Kingdom*, 30.07.1998; 27 *European Human Rights Reports* 163.

#### Languages:

English.



#### Identification: GBR-2002-2-004

- a)** United Kingdom / **b)** Special Immigration Appeals Commission / **c)** / **d)** 30.07.2002 / **e)** / **f)** A. and others v. Secretary of State for the Home Department / **g)** SC/1-7/2002 / **h)**.

#### Keywords of the systematic thesaurus:

- 1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.
- 2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation**.

#### 3.15 General Principles – **Publication of laws**.

#### 4.7.12 Institutions – Judicial bodies – **Special courts**.

#### 4.18 Institutions – **State of emergency and emergency powers**.

#### 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.

#### 5.1.5 Fundamental Rights – General questions – **Emergency situations**.

#### 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.

#### 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.

#### 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

#### 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

#### 5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

#### Keywords of the alphabetical index:

Detention, without trial / Detention, unlawful / Derogation, ECHR / Evidence, undisclosed / Immigration / Terrorism.

#### Headnotes:

The Anti-terrorism, Crime and Security Act 2001 (hereinafter, the "2001 Act") authorising the indefinite detention without trial of foreign nationals who were suspected of being international terrorists was incompatible with the Human Rights Act 1998 (hereinafter, the "HRA"), and the detention of nine foreign nationals under the Act was unlawful, because the powers were discriminatory and breached Article 14 ECHR.

Whilst the United Kingdom government had established that a state of emergency existed and were entitled to derogate from Article 5 ECHR for the purposes of detaining international terrorist suspects who posed a real threat to the safety of the nation, the HRA required a the 2001 Act be given a restrictive interpretation.

#### Summary:

The 2001 Act was introduced following the terrorist attacks on the United States of America on 11 September 2001. It allowed for the Secretary of State for the Home Department (hereinafter "the Minister") to certify that an individual was a suspected international terrorist and then detain them without trial under immigration powers. Only non-British nationals could be detained this way, because the detention was under

immigration legislation. However, in order to overcome the problem caused by the decision of the European Court of Human Rights in no. 22414/93, *Chahal v. United Kingdom*, that detention under immigration powers was only legitimate pursuant to Article 5.1.f ECHR where action was being taken with a view to deportation, the United Kingdom government derogated from Article 5 ECHR. The terms of the government's derogation were contained in a *note verbale* addressed to the Council of Europe. Under the HRA it was also necessary for the Minister to make an order authorising derogation. This was done in the same terms as the *note verbale* (see Venice Commission *Bulletin* 2001/3, p. 551).

The 2001 Act also specified that any challenge to the legality of the Act or the detentions pursuant to it must take place in the Special Immigration Appeals Commission (hereinafter, the "SIAC") and not the normal courts. SIAC was entitled to receive and consider "closed material" (i.e. evidence not open to the public, the appellants or their legal representatives).

The nine appellants submitted that their detention and the 2001 Act breached Article 5 ECHR because there existed no public emergency threatening the life of the United Kingdom, that no other signatory to the European Convention on Human Rights had derogated from any obligation in it because of terrorist activities, and that in any event even if there was a public emergency the measures taken were more than were strictly necessary in the circumstances. They further alleged that the United Kingdom government's derogation was limited to the terms of the *note verbale* and thus only derogated from Article 5 ECHR and that the 2001 Act was incompatible with Articles 3, 6 and 14 ECHR.

The SIAC held that the government was justified in finding that there was a public emergency threatening the life of the nation. The European Court of Human Rights had determined that such a state existed where an exceptional situation of crises or emergency affects the whole population and constitutes a threat to the organised life of the community of which the state is composed. After 11 September such a threat existed in the United Kingdom. The authorities could not be expected to wait until they were aware of an imminent attack before taking necessary steps to avoid it. A real risk that an attack would take place unless measures were taken to prevent it was enough to demonstrate that a public emergency existed. The United Kingdom was a prime target for those behind the attacks on 11 September, second only to the United States. If a similar attack took place on the United Kingdom it could take place without warning and threaten the life of the nation. The question whether other signatories of the European Convention on Human Rights had derogated from the European Convention on Human Rights was

not material: the United Kingdom was under a greater threat from those responsible for the attacks on 11 September than other European nations.

The SIAC did not find the measures taken were more than were strictly necessary. The fact that less intrusive measures might have had the same impact was not determinative. The SIAC rejected the argument that the powers of detention went too far because the definition of terrorist under the 2001 Act was too wide: the HRA required a narrow definition, only those associated with al-Qaeda could be detained.

The diplomatic communications provided for in Article 15.3 ECHR and Article 4.3 of the International Covenant of Civil and Political Rights were directory not mandatory. According to the United Kingdom international law obligations under the European Convention on Human Rights or the International Covenant of Civil and Political Rights the derogation was not limited to the terms of the *note verbale* and thus only to Article 5 ECHR.

However, in national law the HRA did limit any derogation to the terms of the government's order. Hence, the derogation from the Convention was limited to Article 5 ECHR, and the appellants could succeed if they were able to demonstrate a breach of any of the other rights under the European Convention on Human Rights.

The appellants failed to show any breach of Articles 3 and 6 ECHR. However, the SIAC did find a breach of Article 14 ECHR. The 2001 Act discriminated against foreign nationals. British nationals who were suspected of international terrorism could not be detained under its provisions. Such discrimination was not rational or justifiable: a provision entitling the Minister to detain suspected international terrorists should extend to all suspected international terrorists regardless of nationality.

The SIAC therefore allowed the appellant's appeal and made an order declaring the impugned sections of the 2001 Act incompatible with Article 14 ECHR.

#### Cross-references:

European Court of Human Rights:

- *Chahal v. United Kingdom*, 15.11.1996, (1997) 23 *European Human Rights Reports* 413, *Bulletin* 1996/3 [ECH-1996-3-015].

#### Languages:

English.



### *Identification:* GBR-2003-1-001

a) United Kingdom / b) House of Lords / c) / d) 30.01.2003 / e) UKHL 1 / f) The Queen v. H. / g) [2003] 1 WLR 411 / h).

### *Keywords of the systematic thesaurus:*

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

### *Keywords of the alphabetical index:*

ECHR, direct application / Criminal procedure / Defendant, unfit to stand trial.

### *Headnotes:*

Where a defendant had been found unfit to stand trial a jury could go on to consider whether the defendant had committed the alleged acts. There was no determination of a criminal charge and therefore no breach of Article 6 ECHR.

### *Summary:*

H. was charged with two offences of indecent assault on a 14-year-old girl. At the time of the alleged offences H. was 13 years old. Before his trial he was examined by psychiatrists who were of the opinion that he was unfit to stand trial. A jury was then empanelled to determine whether H. was fit to plead and stand trial under Section 4 of the Criminal Procedure (Insanity) Act 1964 (1964 Act). The jury found that H. was under a disability and therefore unfit to plead.

Following that determination, Section 4A of the 1964 Act requires that a jury determine, on the evidence available, whether the defendant committed the act or made the omission charged against him. Thus, at a further hearing a different jury, as directed by the judge, found that H. had done the acts alleged against him. H. was subsequently given an absolute discharge and his father was directed to register H. as a sex offender. H.

appealed against the finding of the second jury, contending that the procedure followed was incompatible with Article 6 ECHR.

The House of Lords held that the Section 4A procedure did not have to comply with Article 6 ECHR because it did not involve the determination of a criminal charge. Their lordships noted that Section 4A of the 1964 Act was introduced in order to prevent the unnecessary detention of an individual. For example, prior to Section 4A, where a defendant had confessed to a murder and subsequently been found unfit to plead she had nevertheless been detained as potentially dangerous when that inference of risk was drawn from the commission of an act (the killing of an individual) that subsequent investigation had shown she did not commit.

Applying the case of *Engel v. The Netherlands*, European Court of Human Rights [1976] *European Human Rights Reports* 647, the House of Lords held that:

- i. domestic law did not treat the Section 4A procedure as involving the determination of a criminal charge,
- ii. the Section 4A procedure lacked the features of a criminal process and
- iii. the procedure could not be criminal because it could not result in the imposition of a penalty.

It was held, therefore, that under the Section 4A procedure the defendant was not charged with a criminal offence within Article 6 ECHR. In any event, it was held that the procedure, if properly conducted, was fair and compatible with the rights of the accused person.

### *Cross-references:*

European Court of Human Rights:

- *Engel and others v. the Netherlands*, 08.06.1976, Vol. 22, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1976-S-001].

### *Languages:*

English.



***Identification:*** GBR-2007-3-005

**a)** United Kingdom / **b)** House of Lords / **c)** / **d)** 12.12.2007 / **e)** / **f)** R (Al-Jedda) v. Secretary of State for Defence / **g)** [2007] UKHL 58 / **h)** CODICES (English).

***Keywords of the systematic thesaurus:***

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

***Keywords of the alphabetical index:***

Terrorism / Detention, without trial / Armed forces, use, abroad / Armed forces, use, within NATO / United Nation, Security Council, resolution.

***Headnotes:***

UK armed forces in Iraq were not there at the United Nation's behest. They were not mandated to operate under its auspices. They were not under its effective command and control. Their status was not analogous to that of NATO forces in Kosovo. UK armed forces' actions were not therefore attributable to the UN but, rather, to the UK. The UK was, however, required by various UN Security Council Resolutions (hereinafter, "UNSCRs") to intern without trial individuals in Iraq where it was necessary to do so for imperative security reasons. Article 25 of the UN Charter required member states to accept and carry out UNSC decisions. Article 103 of the UN Charter established that in the event of a conflict between that obligation and a member state's obligation under any other international agreement, the former took precedence. The Article 103 UN duty is unqualified. It prevails over the Article 5 ECHR prohibition on internment. The UK could thus lawfully intern without trial where it was necessary to do so for imperative security reasons pursuant to UNSC Resolution 1546. However, it was required to ensure that, in exercising the power to intern, it did not infringe a detainee's rights under Article 5 ECHR any more than was inherent in such detention.

***Summary:***

I. The appellant, a citizen of both the UK and Iraq, has been detained without trial by UK forces in Iraq since October 2004. He has not been charged with any criminal offence, and is unlikely to stand trial in the foreseeable future. However, he is suspected of involvement in a large number of terrorist activities in Iraq. His detention was justified on the grounds that it was necessary for imperative reasons of security.

II. The House of Lords dealt with three issues, the first two of which questioned the relationship between the European Convention on Human Rights and the UN Charter and UNSCR. The first issue arose as a consequence of the decision of the Strasbourg court's Grand Chamber in *Behrami v. France, Saramati v. France, Germany v. Norway* (nos. 71412/01 and 78166/01), 2 May 2007. The issue was whether the actions taken by UK forces against the appellant were, in law, attributable to the UN and thus outside the scope of the European Convention on Human Rights. The second issue was whether the duty imposed on the UK by Article 5 ECHR was in any way qualified or displaced by the legal regime established by the UN Charter and a number of UNSCRs (Resolutions 1483/2003, 1511/2003, 1446/2004, 1637/2005 and 1723/2003).

The first issue was resolved by an assessment of whether or not the UK armed force's conduct in Iraq was attributable to the UN. It rested on an assessment of whether or not the UK forces were in law a subsidiary organ of the UN. Did the UN maintain effective command and control of the UK forces? The Secretary of State relied on the decision in *Behrami* and argued that the UK forces, by analogy with NATO forces in Kosovo, were exercising powers lawfully delegated by the UN. As such their actions were directly attributable to the UN. The Lords rejected the Secretary of State's argument. There was no genuine analogy between the UK forces in Iraq and NATO forces in Kosovo. As Lord Bingham put it, the analogy broke down at 'almost every point.' The UK forces were not sent to Iraq by the UN; neither did they occupy it under UN mandate. The UNSC did not delegate its power to the UK forces, it gave them authority to promote peace and stability in order for them to carry out acts it could not itself perform. The UK forces were not under the UN's effective command or control. This was in stark contrast to NATO forces in Kosovo which were there at the express request of the UN and which were a subsidiary organ of the UN under its effective control.

The second issue required the court to resolve the nature of the relationship between Article 5 ECHR and Article 103 UN Charter. The Secretary of State submitted that the UN Charter and various UNSCRs

required the UK to detain the appellant and that this requirement overrode its obligations under Article 5 ECHR. The appellant submitted that the UNSCRs only authorised the UK, at best, to take action to detain him but did not require it do so. The appellant therefore submitted that Article 103 was not therefore engaged. The Lords rejected the appellant's argument that Article 103 was not engaged. Lord Bingham identified three reasons why this was the case. First, the UK was required to take necessary measures to protect the public in those areas which it effectively occupied. Article 43 of the Hague Regulations 1907 and Articles 41, 42 and 78 of the 4<sup>th</sup> Geneva Convention showed that an occupying power could intern individuals where it considers it necessary for imperative security reasons. Secondly, there was a strong body of academic opinion that Article 103 was engaged where the UN had authorised conduct just as well as when it required conduct. Such a purposive interpretation of Article 103 was consistent with the UN's and its member states' practice over 60 years and was appropriate given the context of the UN Charter's other provisions. Thirdly, Article 103 should not be given a narrow contract-based meaning; especially where the promotion of peace and security in the world could not be exaggerated. While the UK was not required to detain the appellant in particular, it was required to exercise its power to detain where it was necessary to do so. If it did not it would fail to give effect to the UNSC's decisions.

Finally, the Lords held that the Strasbourg Court had on a number of occasions accepted that the European Convention on Human Rights had to be interpreted in the light of and in conformity with the principles that govern international law. See *Loizidou v. Turkey* (1996) 23 European Human Rights Reports 273 513; *Fogarty v. UK* (2001) 34 European Human Rights Reports 273 302; *Al-Adsani v. UK* (2001) 34 European Human Rights Reports 273; and *Behrami*. It was now generally accepted that binding UNSC decisions under Chapter VII of the UN Charter took precedence over all other treaty commitments.

#### *Languages:*

English.



#### *Identification: GBR-2009-1-001*

- a)** United Kingdom / **b)** House of Lords / **c)** / **d)** 21.01.2009 / **e)** / **f)** R (Black) v. Secretary of State for Justice / **g)** [2009] UKHL 1 / **h)** [2009] 2 Weekly Law Reports 282; CODICES (English).

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

#### *Keywords of the alphabetical index:*

Prisoner, sentence, periodic review / Prison sentence, determinate / Prison sentence, indeterminate.

#### *Headnotes:*

A distinction is drawn between the approach taken under Article 5.4 ECHR between determinate prison sentences, the lawfulness of which was determined by the original sentencing procedures and indeterminate prison sentences, the lawfulness of which was determined by matters unknown at the time the sentence was handed down and by way of periodic review. The fact that the Secretary of State for Justice had a power, subject to judicial review, to refuse or to authorise release on licence a prisoner serving a determinate sentence did not infringe Article 5.4 ECHR. The lawfulness of a determinate sentence was not affected by the fact that the Parole Board was required to consider whether a prisoner should be released on licence and make recommendations accordingly.

#### *Summary:*

I. Mr Black had a long history of criminal activity in the UK and Denmark, Switzerland and Portugal. In 1995 he was sentenced to 20 years' imprisonment for offences of false imprisonment, kidnapping, conspiracy to kidnap and robbery. In 1996, he was sentenced to a consecutive term of four years for the offence of escaping from custody and assault. He was therefore sentenced to a total of 24 years' imprisonment. He became eligible for parole in June 2006. The Parole Board recommended, in May 2006, he be released on licence. That recommendation was rejected by the Secretary of State for Justice. Mr Black brought judicial review proceedings in respect of the Secretary of State's decision. He did so on the ground that it breached his rights under Article 5.4 ECHR.

II. Lord Brown gave the lead judgment, with which the other Lords agreed, apart from Lord Phillips.

The Secretary of State, the appellant on the appeal, submitted that in all cases where a determinate sentence was handed down its lawfulness, for the purposes of Article 5.4 ECHR was determined at that time. It could only be challenged at a later time if new arises arose. Mr Black, who was the respondent on the appeal, submitted that where legislation provides for a prisoner subject to a determinate sentence to be eligible for parole further detention is thereafter unlawful unless an independent body with the characteristics of a court concludes that there remains an unacceptable risk that the prisoner will reoffend. Only in those circumstances can continued detention remain lawful.

Lord Brown noted that the Strasbourg Court had held, in respect of indeterminate sentences, that the entirety of such sentences i.e., the fixed punitive tariff and the post-tariff period the length of which depended on the threat the prisoner posed of reoffending, had to be decided judicially: *Thynne, Wilson and Gunnell* (1990) 13 European Human Rights Reports 666 and A190-A; *Hussain v. UK* (1996) 22 European Human Rights Reports 1996-I; *Bulletin* 1996/1 [ECH-1996-1-004]; and *Stafford v. UK* (2002) 35 European Human Rights Reports 1121, *Reports of Judgments and Decisions* 2002-IV. Fixing the punitive tariff engaged Article 6 ECHR as it formed part of the sentencing decision. Fixing the post-tariff period engaged Article 5.4 ECHR and had to be conducted by a body with the characteristics of a court. The Strasbourg Court had however treated determinate sentences differently: see *Stafford* at paragraph [87]; and *Mansell v. UK* (no. 32072/96), unreported, 02.07.1997.

He went on to hold that if the Court were to hold that Article 5.4 ECHR was to be applied to determine sentences it would widen its scope beyond its proper limits. Permitting the Secretary of State to overrule the Parole Board did not introduce a risk of arbitrariness into the parole system as any such decision was susceptible to judicial review. There was nothing insofar as the European Convention of Human Rights was concerned which rendered it intrinsically objectionable for the Executive to take parole decisions where such decisions were reviewable by the courts. It might be indefensibly anomalous to permit this to occur, but it is not contrary to Article 5.4 ECHR.

Lord Phillips in his dissenting judgment noted that the Strasbourg Court had not as yet extended its approach to indeterminate sentences to determinate sentences. He went on however to state that there was 'no great leap of reasoning' to apply the same approach as taken to the former to the latter. He went on to state that it was not the case that a determinate sentence rendered

detention lawful for the full period of that sentence. It provided the legal foundation for detention during the sentence's term providing other conditions were satisfied. It was the case that the law provided for circumstances when a person subject to such a sentence was entitled to release. Article 5.4 ECHR was, insofar as he understood, properly engaged at that point in order to enable the prisoner to seek a determination of whether the release conditions had been satisfied. In support of this he referred to *Gebura v. Poland* (no. 63131/00, unreported, 06.03.2007).

#### *Languages:*

English.



#### *Identification: GBR-2009-1-002*

- a) United Kingdom / b) House of Lords / c) / d) 18.02.2009 / e) / f) RB (Algeria) v. Secretary of State for the Home Department & Others / g) [2009] UKHL 10 / h) [2009] 2 Weekly Law Reports 521; CODICES (English).

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

#### *Keywords of the alphabetical index:*

Prisoner, deportation, legality / Deportation, torture, risk / Deportation, receiving state, assurances.

#### *Headnotes:*

A number of issues arose in respect of Articles 3, 5 and 6 ECHR in three conjoined appeals. Insofar as Article 3 ECHR was concerned, there was no principle of law that required a state to be satisfied that there was no risk of torture if an individual was deported to another

state. It was a question of fact whether assurances from the receiving state could be relied on to provide a sufficient guarantee that a deportee would not be at risk of treatment that would breach Article 3 ECHR. 50 days detention once deported would not constitute a breach of Article 5 ECHR so as to require an individual not to be deported to the state where he was likely to be detained. Finally, for deportation proceedings to violate Article 6 ECHR there had to be substantial grounds for believing that there was a real risk that once deported there would be a fundamental breach of the Article 6 right in the state to which the individual was to be deported.

#### **Summary:**

I. The deportation of three individuals was sought by the Secretary of State for the Home Department. Deportation was sought on the grounds that they each posed a threat to the United Kingdom's national security. Each of the three individuals challenged the deportation on the basis that to deport them would breach their European Convention on Human Rights. Two of the three individuals argued that their deportation to Algeria would breach their Article 3 ECHR right. The third individual argued that if returned to Jordan he would be subject to treatment that would breach his Articles 3, 5 and 6 ECHR.

II. Lord Phillips gave the lead judgment, with which the other Lords agreed. He dealt with the three issues as follows:

Article 3 ECHR: *Chahal v. UK*, 23 European Human Rights Reports 413, Reports of Judgments and Decisions 1996-V; Bulletin 1996/3 [ECH-1996-3-015], was the starting point for an assessment of this issue. The Strasbourg Court identified in that decision that the relevant test was one which required there to be substantial grounds for believing that if deported an individual would face a real risk of treatment that would breach Article 3 ECHR. The UK Government in that case relied on guarantees that there was no risk of such treatment. The issue was whether those assurances could be relied on. The Strasbourg Court had not specified what level of assurance could be relied on. It was noted that the Court had in *Saadi v. Italy BHRC* 123, Bulletin 2008/2 [ECH-2008-2-003] noted that the deporting government had to dispel any doubts regarding future treatment. Lord Phillips did not consider however that the Strasbourg Court had gone so far as to require that assurances had to be given which would eliminate all risk of inhuman treatment. A state had however to demonstrate that there was a good reason to rely on assurances from the receiving state such that they could amount to a reliable guarantee that the deportee would not be subject to inhuman treatment. These assurances formed part of

all the circumstances the state had to take account of in assessing whether there were substantial grounds for believing there was a real risk of such treatment.

Article 5 ECHR: Again it was necessary to demonstrate that there were substantial grounds for believing that if an individual were to be deported there would be a real risk that he would be subject to treatment that breached his Article 5 ECHR right. It was also necessary to demonstrate that the treatment, of which there was a real risk, was such as would, as per *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] AC 323, amount to a flagrant breach of Article 5 ECHR. A flagrant breach was one, the consequences of which were so severe that they overrode the state's right to expel a foreign national from its territory.

Article 6 ECHR: The flagrant breach test applied to questions of breaches of Article 6 ECHR as it did to Article 5. There was no guidance however from the Strasbourg Court how to apply that test in the context of Article 6 ECHR as a procedural rather than substantive right. For there to be a flagrant breach there had to be a deficiency or deficiencies in the trial process in the receiving state that the fairness of a prospective trial would be fundamentally destroyed. The assessment however must not simply focus on the nature of the trial process. It had to also take account of the potential consequences of the trial process. The extent of any potential breach of an individual's substantive human rights from a breach of the fair trial right had to be taken account of in that assessment. There must therefore be substantial grounds for believing that there is a real risk of a fundamental breach of the Article 6 right and that that would lead to a flagrant violation of fundamental, substantive rights.

#### **Languages:**

English.



# United States of America Supreme Court

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## Important decisions

*Identification:* USA-2003-2-005

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.2003 / **e)** 02-102 / **f)** Lawrence v. Texas / **g)** 123 Supreme Court Reporter 2472 (2003) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.6.3.1 Constitutional Justice – Effects – Effect erga omnes – **Stare decisis.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.17 General Principles – **Weighing of interests.**

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

*Keywords of the alphabetical index:*

Homosexuality / Sodomy, crime.

*Headnotes:*

Legislation that makes certain forms of sexual conduct a crime implicates constitutional liberty interests by intruding upon individual privacy.

To be constitutionally valid, legislation making certain forms of sexual conduct a crime must advance a legitimate state interest sufficient to justify the intrusion on individual privacy.

The doctrine of binding precedent, or *stare decisis*, while advancing respect for court judgments and the stability of the law, is not an inexorable command that

precludes the court from overriding its own earlier decisions when compelling reasons exist to do so.

*Summary:*

Police officers, responding to a reported weapons disturbance in a private residence, entered an apartment and found two adult men engaged in a private, consensual act of sodomy. The men were arrested and found guilty of violating a criminal statute of the State of Texas that prohibits a person from engaging in "deviate sexual intercourse with another individual of the same sex." Both men were fined 200 U.S. dollars and required to pay court costs of 141 U.S. dollars. The Texas Court of Appeals affirmed the convictions.

The United States Supreme Court reversed the judgment of the Texas Court of Appeals. The Court ruled that the Texas statute invalidly infringed upon the petitioners' exercise of liberty interests protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Section One of the Fourteenth Amendment, in relevant part, prohibits the States from depriving any person of liberty "without due process of law."

In making this determination, the Court declared that it was overruling its 1986 Decision in the case of *Bowers v. Hardwick*, in which the Court upheld the constitutional validity of a State of Georgia statute that made it a criminal offence to engage in sodomy, whether or not the participants were of the same sex. The Court concluded that, in *Bowers v. Hardwick*, it failed to appreciate the extent of the liberty in question because it framed the question simply in terms of deciding whether the U.S. Constitution confers a fundamental right upon homosexuals to engage in sodomy. Instead, the Court stated, the laws at issue in both *Bowers v. Hardwick* and the instant case did more than prohibit a particular sexual act: they implicated sensitive privacy concerns by affecting the most private human conduct, sexual behaviour, in the most private of places, the home. Finding that the Texas statute did not advance any legitimate state interest that could justify the intrusion into individuals' private lives, the Court concluded that the right to liberty gave the petitioners the full right to engage in their conduct without government interference.

In stating that it was overruling *Bowers v. Hardwick*, the Court addressed the doctrine of *stare decisis*, stating that while the doctrine of binding precedent advances respect for the Court's judgments and the stability of the law, it is not an inexorable command. In this regard, the Court concluded that its holding in *Bowers v. Hardwick* had not induced any individual or societal reliance that would suggest caution in overruling the decision, once

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compelling reasons exist to do so. Because *Bowers v. Hardwick* was incorrectly decided, the Court concluded, it should not remain binding precedent.

*Supplementary information:*

Six of the nine Justices voted in favour of the Court's judgment. One of the six, Justice O'Connor, concurred in the judgment but did not join the Court in overruling *Bowers v. Hardwick*. Instead of relying on the Due Process Clause, Justice O'Connor based her decision on the Equal Protection Clause of the Fourteenth Amendment (which prohibits the States from denying any person the equal protection of the laws), focusing on the fact that the Texas Statute made sodomy a crime if engaged in by members of the same sex, but not opposite-sex partners. In a dissenting opinion, Justice Scalia criticized the Court for overlooking the will of the majority of Texas citizens, expressed via the legislature, when the Court concluded that the legislation did not further any legitimate state interest. Such an approach, Justice Scalia stated, effectively means the end of all legislation based upon views of public morality.

Of note also in *Lawrence v. Texas* is the dialogue among the Justices as to the value of taking into account foreign judicial decisions. The Court's opinion, in discussing the question of views on homosexuality in Western civilization, made reference to Judgments of the European Court of Human Rights in *Dudgeon v. United Kingdom* (1981) and subsequent cases. This reportedly is the first time that a majority opinion of the Supreme Court has invoked decisions of the European Court of Human Rights. Justice Scalia's dissenting opinion criticized such discussion and consideration of foreign views.

*Cross-references:*

- *Bowers v. Hardwick*, 478 United States Reports 186, 106 Supreme Court Reporter 2841, 92 Lawyer's Edition Second 140 (1986).

*European Court of Human Rights:*

- *Dudgeon v. United Kingdom*, 22.10.1981, Vol. 45, Series A; *Special Bulletin – Leading cases ECHR* [ECH-1981-S-003].

*Languages:*

English.



# **CO-OPERATION OF CONSTITUTIONAL COURTS IN EUROPE**



## **CHAPTER II INTERACTIONS BETWEEN CONSTITUTIONAL COURTS**



# Austria

## Constitutional Court

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### Important decisions

*Identification:* AUT-1998-2-006

**a) Austria / b) Constitutional Court / c) / d)** 25.06.1998 / **e) V 98/97, V 125/97, V 128-130/97, V 149/97 / f) / g)** to be published in *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest) / **h) Europäische Grundrechte Zeitschrift**, 1998, 383; CODICES (German).

*Keywords of the systematic thesaurus:*

- 1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**
- 1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**
- 2.3.7 Sources – Techniques of review – **Literal interpretation.**

*Keywords of the alphabetical index:*

Spelling, reform / Memorandum of intent / Treaty, element.

*Headnotes:*

The “Joint Memorandum of Intent on a New Standard (a New Regulation) of German spelling of 1 July 1996”, cannot be regarded as a treaty pursuant to Article 140a of the Constitution establishing rights and obligations between the contracting parties. On the contrary, its wording already proves clearly that the “Joint Memorandum of Intent” is a non-binding promise of the signatories simply to give effect to the new German spelling in the respective states.

*Summary:*

Several individual applications, mostly filed by minors represented by their parents, were brought to the Court challenging the lawfulness of the so-called reform on German spelling. The applicants asked the Court to overrule the “Joint Memorandum of Intent on a New Standard (a New Regulation) of German spelling of 1 July 1996”, Article 15.1 of the Regulation on Grading and Evaluation of Performance (*Leistungsbeurteilungsverordnung*) as well as two

departmental orders issued by the Minister of Education and Cultural Affairs.

The Court rejected all applications on the ground that the Ministers of Education signing the relevant Joint Memorandum of Intent took notice of the experts' report on a new German spelling and stated their common intention to support the implementation of the reform. It is not to be qualified as a treaty as its wording does not constitute any mutual rights and obligations but contains only a non-binding promise.

Article 15.1 of the Regulation on Grading and Evaluation of Performance (*Leistungsbeurteilungsverordnung*) entering into force on 1 September 1998, stipulates that variations of the new spelling which are in conformity with the spelling used hitherto are to be corrected but not to be counted as mistakes. This provision was challenged by the application of a pupil who had attended her last year of grammar school during the past school year. Her application was inadmissible, as it was obvious that her rights could not have been directly encroached any more by the impugned provision.

As regards the two departmental orders issued by the Minister of Education and Cultural Affairs the Court found that those orders had no normative character at all but contained only more detailed information on the new German spelling and recommendations on how to give effect to it.

*Supplementary information:*

The question whether the new German spelling was a successful effort to simplify spelling and whether it should be implemented was widely discussed in the mass media not only in Austria but also in Germany. Consequently, the German Federal Constitutional Court also had to deal with a similar application (Judgment of 14 July 1998, 1 BvR 1640/97), see *Bulletin* 1998/2 [GER-1998-2-008].

Legal norms referred to:

- Articles 139 and 140a of the Constitution.

*Languages:*

German.



# Belgium

## Court of Arbitration

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### Important decisions

*Identification:* BEL-1996-1-001

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 09.01.1996 / **e)** 4/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.02.1996; *Cour d'arbitrage – Arrêts* (Official Digest), 1996, 21 / **h)** *Journal des tribunaux*, 1996 (abbreviated), 188; *Information et documentation juridiques*, 1996, liv. 4, 20.

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

3.16 General Principles – **Proportionality.**

5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status.**

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

*Keywords of the alphabetical index:*

Family reunion, law / Immigration / Marriage.

*Headnotes:*

The principles of equality and non-discrimination contained in Articles 10 and 11 of the Constitution are not infringed by the distinction made by the legislator, regarding admission to Belgian for a period of more than three months with a view to family unification, between married foreigners who are not nationals of a member State of the European Union, to the effect that anyone married to a Belgian may automatically reside in Belgium, whereas anyone who is not

married to a Belgian only receives authorisation to stay if their cohabitation is genuine and lasting. This difference in treatment reflects the legislator's aim to curb immigration whilst catering for the situation of foreigners who have ties with Belgians. It is not contrary to this objective to subject family unification of two foreign partners to more stringent conditions than family unification between two partners of whom one is Belgian. Interference in the private life of the persons concerned is not disproportionate, provided that the administrative authorities assess whether cohabitation is genuine and lasting within a reasonable time and that they do not consider a separation which is not genuine and lasting as a ground for refusing authority to reside in the country. Once granted, the right to reside cannot be withdrawn for reasons of divorce or separation.

*Summary:*

A Moroccan man who was married to a Moroccan woman who had settled in Belgium but with whom he had cohabited only from mid-1988 to the beginning of 1990, brought before the *Conseil d'Etat*, the highest administrative court, an action to set aside and a request to suspend a ministerial decision denying the right to residence and ordering him to leave the territory. In connection with this case, the *Conseil d'Etat* applied to the Court of Arbitration for a preliminary ruling as to whether the legislation which requires that cohabitation between foreign partners residing in Belgium for more than three months is genuine and lasting is discriminatory, considering that this condition is not imposed on foreigners (from outside the European Union) who are married to a Belgian. Having noted that foreigners in Belgium enjoy the same personal and property rights as Belgians, apart from the exceptions prescribed by law (Article 191 of the Constitution), the Court decided that the distinction made by the legislator was justified, given that the action taken was based on an objective criterion, namely the nationality of the spouse, that it was in reasonable proportion to the goal of the legislator, and did not, as far as the checks on cohabitation were concerned, constitute a disproportionate infringement of the right to respect for private and family life guaranteed by Article 22 of the Constitution and Article 8 ECHR, provided that the authorities took a decision within a reasonable time (at the time that this case was brought before the *Conseil d'Etat* the time limit was one year, and could be extended by three months).

*Cross-references:*

- no. 93-325 DC, 13.08.1993 of the Constitutional Council of France, *Bulletin* 1993/2, 22 [FRA-1993-2-007];
- no. 28/1995, 19.01.1995 of the Constitutional Court of Italy, *Bulletin* 1995/1, 48 [ITA-1995-1-003];
- no. 8152, 07.05.1993 of the Supreme Court of the Netherlands, *Bulletin* 1994/2, 141 [NED-1994-2-005].

*Languages:*

French, Dutch.



*Identification:* BEL-2000-1-002

- a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.03.2000 /  
**e)** 27/2000 / **f)** / **g)** *Moniteur belge* (Officiel Gazette),  
26.05.2000 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**  
5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

*Keywords of the alphabetical index:*

Road traffic, offence / Number plate, vehicle / Road safety / Burden of proof.

*Headnotes:*

The “presumption” that the person in whose name a vehicle is registered was the perpetrator of an offence committed with the vehicle is not at variance with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), considered separately or in conjunction with the principle of presumption of innocence as enshrined in Article 6.2 ECHR.

*Summary:*

In a number of criminal cases, the applicants denied committing Highway Code offences established on the basis of the number plates of their vehicles. Under the Traffic Police Act, if the driver is not identified when an offence is reported, the offence is presumed to have been committed by the person in whose name the vehicle is registered. The applicants requested a preliminary ruling by the Court of Arbitration on whether such a presumption was at variance with Articles 10 and 11 of the Constitution, considered in conjunction with Article 6.2 ECHR.

The Court found that the provision at issue was informed by the desire to improve road safety; consequently, the burden of proof, which in principle was placed on the prosecuting authorities (the State Counsel's Office), had been lightened. This legal provision therefore established differential treatment by departing from the principle of placing the burden of proof on the prosecuting authorities. In the Court's view, however, this was justified by the impossibility, in a field in which countless offences were committed and were often only observed fleetingly, of otherwise establishing the offender's identity with any degree of certainty. Since it was possible under the legislation at issue to adduce refuting evidence “by any legal means”, there was no unjustified infringement of the principle of presumption of innocence as enshrined in Article 6.2 ECHR.

*Supplementary information:*

European Court of Human Rights:

- *Salabiaku*, 07.09.1988, Series A, no. 141-A.

Constitutional Council of France:

- *Bulletin* 1999/2 [FRA-1999-2-006].

*Languages:*

French, Dutch, German.



### *Identification: BEL-2001-3-008*

**a)** Belgium / **b)** Court of Arbitration / **c) / d)** 06.11.2001 / **e)** 140/2001 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.12.2001 / **h)** CODICES (French, German, Dutch).

### *Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

3.16 General Principles – **Proportionality.**

3.20 General Principles – **Reasonableness.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status.**

### *Keywords of the alphabetical index:*

Tax, unequal treatment, married persons, cohabitantes / Legislator, omission / Tax, deduction / Tax, spouse / Tax, cohabitantes.

### *Headnotes:*

Article 131 of the Income Tax Code, fixing the tax-exempted proportion of income at 165 000 BEF (4,090,24 €) for single taxpayers and 130 000 BEF (3,222,62 €) for married persons, is not contrary to the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution). Conversely, it is unjustified that married couples and unmarried persons living together should receive different treatment through the application to unmarried cohabitantes (in the absence of any specific statutory provision) of the regulations for single taxpayers. However, this discrimination does not arise from the aforementioned Article 131 which was the subject of the preliminary question.

### *Summary:*

When assessing tax on annual income, a tax-exempted proportion of income is allowed in Belgium, i.e. an amount that may be deducted from the taxable income on which tax is calculated. Married couples are required to make a joint declaration of income and both husband and wife are allowed a deduction of 130 000 BEF (3 222,62 €) each, in accordance with Article 131 of the 1992 Income Tax Code. The same provision specifies 165 000 BEF (4 090,24 €) as the tax-exempted proportion of income for a single person. Unmarried cohabitantes are regarded as single persons for taxation purposes.

A married couple, both earning occupational income, laid a complaint against the personal income tax levy for the 1998 taxation year on the ground that discrimination between married and cohabiting persons existed in their estimation. After their complaint was dismissed by the tax authorities, they appealed to the taxation court. This court asked the Court of Arbitration to determine whether or not Article 131 of the Income Tax Code infringed the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) “construed to the effect that an unmarried cohabiting couple, both earning a significant taxable occupational income, qualify for twice the tax-exempted income amount of 165 000 BEF (not indexed), whereas cohabiting spouses, both likewise earning a significant taxable occupational income, can claim twice the tax-exempted income amount of 130 000 BEF (not indexed)”.

The Court firstly recalled its modus operandi for review in the light of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), and quoted the following recital appearing in many of its judgments and strongly resembling the phraseology of the European Court of Human Rights with regard to Article 14 ECHR:

“The constitutional rules of equality and non-discrimination do not rule out the possibility of different treatment being applied to different categories of people, provided that it is based on objective criteria and reasonably justified.

The existence of such justification must be appreciated in the light of the aim and the effects of the impugned measure and the nature of the principles at issue; the principle of equality is violated where it is established that there is no reasonable proportionality between the means employed and the aim.”

The Court held that the difference in treatment between spouses and unmarried cohabitantes was based on an objective criterion, namely their dissimilar legal position regarding not only their mutual obligations but also their pecuniary situation. This differing legal position could in some cases, where linked with the object of the measure in question, justify a difference in treatment between married and unmarried cohabitantes.

The Court found that the different treatment of single and married taxpayers was not unjustified with regard to the level of the tax-exempted income amount, as the legislator may have taken account of the fact that regular subsistence expenses per head are generally lower for married couples than for single persons.

In the Court's view, this justification would nevertheless be unacceptable when comparing the situation of spouses with that of unmarried cohabitantes, also jointly bearing regular subsistence expenses. These expenses being essentially unaffected by the married or unmarried status of persons living together, the distinction as to marital status was not material in determining the amount of tax-exempted income allowed them. Consequently, there was an unjustified difference of treatment between married and unmarried cohabitantes.

The Court nevertheless held that the discrimination in question did not arise from Article 131 of the 1992 Income Tax Code. It had its origin in the application to unmarried cohabitantes of the provision relating to single taxpayers, the legislator having failed to make any specific provision for the former.

#### *Supplementary information:*

The law of 10 August 2001 (Moniteur belge of 20.09.2001 – [www.moniteur.be](http://www.moniteur.be)) laid down new tax regulations.

#### *Cross-references:*

Federal Constitutional Court of Germany:

- nos. 2 BvR 1057/91, 2 BvR 1226/91 and 2 BvR 980/91, 10.11.1998, *Bulletin* 2000/2 [GER-2000-2-002].

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2007-3-008

- a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 10.10.2007 / **e)** 128/2007 / **f)** / **g)** *Moniteur belge* (Official Gazette), 24.10.2007 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.

- 3.1 General Principles – **Sovereignty**.
- 3.10 General Principles – **Certainty of the law**.
- 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.
- 3.26 General Principles – **Principles of EU law**.
- 4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.
- 5.2 Fundamental Rights – **Equality**.
- 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence**.
- 5.3.13.24 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the reasons of detention**.

#### *Keywords of the alphabetical index:*

European arrest warrant, constitutionality / Criminal liability, dual / International criminal law, dual criminal liability, exception / European Communities, legal order, unity / Surrender.

#### *Headnotes:*

Following the answer given by the Court of Justice of the European Communities to the questions put to it by the Constitutional Court in its request for a preliminary ruling on the Council of the European Union's Framework Decision on the European arrest warrant, the Constitutional Court decided that the Belgian law transposing that framework decision was not contrary to the Constitution, taken in conjunction with certain provisions of the European Convention on Human Rights.

#### *Summary:*

The non-profit-making association, "Advocaten voor de Wereld" (Lawyers for the World), sought repeal of the Act of 19 December 2003 on the European Arrest Warrant, which transposed the Council of the European Union's Framework Decision 2002/584/JHA of 13 June 2002 on the warrant and on surrender procedures between member states, and which had been adopted on the basis of Article 34.2.b EU. It put forward five arguments, alleging violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with various provisions of the Constitution and the European Convention on Human Rights.

The applicant association argued, firstly, that the subject-matter (the European arrest warrant) could be regulated only by a convention and not by a framework decision, since, under Article 34.2.b EU, framework decisions could be adopted only for the purpose of approximating member states' laws and regulations. There had thus been a discriminatory breach of the constitutional guarantees applying to the powers of parliament (Article 168 of the Constitution), which covered all litigants.

After the Court of Justice had ruled, in its Judgment of 3 May 2007 in Case C-303/05 on the preliminary question put to it by the Constitutional Court [BEL-2005-2-011], that the framework decision did not violate Article 34.2.b EU, the latter court concluded, from paragraphs 28 to 43 of that judgment, that the first argument was unfounded.

The applicant association argued, secondly, that the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with the right to personal freedom (Article 12 of the Constitution) and Articles 5.2, 5.4 and 6.2 ECHR, was violated by the fact that a person arrested for trial on a European warrant did not, if remanded, enjoy the guarantees provided by national law on detention on remand.

The Constitutional Court replied that the guarantees applying to arrest for the purpose of possible surrender were largely equivalent to those provided by the Act of 20 July 1990 on detention on remand. The investigating judge's decision to detain, on a European warrant, a person sought for trial was a judge's order which satisfied Article 12 of the Constitution and Article 5.2 and 5.4 ECHR. Nor did it violate the presumption of innocence enshrined in Article 6 ECHR, since the merits of the case had still to be determined in a manner consistent with the rights of the person covered by the warrant.

Replying to the association's third argument – that Section 7 of the disputed act violated Articles 10 and 11 of the Constitution, taken in conjunction with Article 13 of the Constitution and Article 6 ECHR, since a fair hearing was insufficiently guaranteed in the case of a person arrested on the strength of a judgment given *in absentia* – the Court ruled that Section 7 of the Act, which transposed Article 5.1 of the Council's Framework Decision of 13 June 2002, specifically made surrender conditional on that person's being able to secure retrial in the state issuing the warrant.

The fourth and fifth arguments focused on Article 5.1 and 5.2 of the act. Paragraph 1 stated that the European arrest warrant would not be executed if the offences concerned were not punishable in Belgian law.

However, paragraph 2 waived that rule for certain offences, which it specified, provided that these carried maximum prison sentences of at least three years in the issuing state. Such as Article 2.2 of the Council of the European Union's Framework Decision, which it transposed, Section 5.2 of the act listed offences for which surrender was possible under a European warrant without the requirement of dual criminal liability.

The applicant association argued that the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) was violated by the fact that Section 5.2 waived the dual liability requirement without objective and reasonable justification, although it still applied to other offences (fourth argument), and because the contested provision violated the principle of lawfulness in criminal matters by failing to define the offences it listed with sufficient clarity and precision (fifth argument).

In its Judgment no. 124/2005 of 13 July 2005, the Constitutional Court had put a second preliminary question on this matter to the Court of Justice [BEL-2005-2-011]. In its Judgment of 3 May 2007, in Case C-303/05, that Court had ruled that Article 2.2 of the framework decision was not invalidated by its dispensing with any examination of dual criminal liability. The Constitutional Court reproduced paragraphs 45 to 60 of the Court of Justice's Judgment in its own decision.

Having noted that the Union was based on the rule of law (Article 6 EU), the Court of Justice recalled, in that part of its judgment, that the rule that offences and penalties must be strictly defined in law (*nullum crimen, nulla poena sine lege*) was one of the general legal principles on which the shared constitutional traditions of the member states were based, and had also been enshrined in various international treaties, particularly Article 7.1 ECHR. It observed that the framework decision did not seek to harmonise the offences in question, and that defining and determining penalties remained a matter for the member states, which must respect the principle of lawfulness.

The Court of Justice ruled that the Council could, without violating the principle of equality, waive the condition of dual criminal liability for certain offences.

The Constitutional Court considered that the reasons given by the Court of Justice in its judgment on the framework decision also applied *mutatis mutandis* to the Act of 19 December 2003, which transposed that decision into Belgian law. It also noted that the executing judicial authority was not required to execute European arrest warrants automatically. The rule in Section 5.2 of the act must be assessed with reference to the other conditions to which surrender was subject.

Taking account of the other provisions in the act, the Court concluded that surrender under a European arrest warrant was accompanied by sufficient guarantees.

The Court accordingly dismissed the application.

*Supplementary information:*

Judgment of the Court of Justice of the European Communities, 03.05.2007, no. C 303/05 'Advocaten voor de wereld VZW', following the preliminary question of the Constitutional Court of Belgium, 13.07.2005 [BEL-2005-2-011];

Judgment of the Constitutional Court of Poland, 27.04.2005 [POL-2005-1-005] and the Constitutional Court of Germany, 19.07.2005 [GER-2005-2-002];

See also Kestutis Lapinskas (former member of the Venice Commission, President of the Constitutional Court of Lithuania, representing the Court presiding the Conference of European Constitutional Courts – "The European Arrest Warrant from the view point of the European Constitutional Courts ([www.europarl.europa.eu/meetdocs/20042009/documents/pv/586/586174/586174fr.pdf](http://www.europarl.europa.eu/meetdocs/20042009/documents/pv/586/586174/586174fr.pdf));

See also replies to the question on the Venice Forum from Mr B. Banaszkiewicz, Polish liaison officer, in February-March 2005 and from P. Novackova, Czech Republic.

*Languages:*

French, Dutch, German.



## Croatia Constitutional Court

### Important decisions

*Identification:* CRO-2011-2-005

- a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 06.04.2011 /
- e)** U-I-3843/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 48/11 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

- 3.9 General Principles – **Rule of law**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

*Keywords of the alphabetical index:*

Prisoner, money, right to receive / Prisoner, treatment.

*Headnotes:*

The legislation contained no guidance whatsoever to assist a prison warden in deciding whether it would be reasonable to authorise a particular inmate to receive money from a person outside his or her family or to send money to such a person. This could give rise to potential for arbitrary behaviour on the part of the administrative authority (the prison warden in this case), which is unacceptable in a democratic society based on the rule of law.

*Summary:*

The Constitutional Court accepted (in part) a proposal from a prison inmate for a review of the constitutionality of Article 127.1 of the Execution of Prison Sentences Act (hereinafter, the "Act"). It repealed the first sentence, which read "on approval of the warden". It did not, however, accept that part of the applicant's proposal relating to the second sentence of the same article of the Act.

In its review of the grounds for the proposal, it took note of Articles 3, 14 and 16 of the Constitution, Article 14 ECHR and Article 1 Protocol 12.

The Act regulates the execution of prison sentences. Article 127 of the Act regulates the manner in which inmates send, receive and spend money, and make payments and conduct other transactions.

The Constitutional Court began by examining the first sentence of Article 127.1. It stipulates that prison inmates are entitled to send and receive money to and from family members, via the penitentiary or prison, and to and from other persons upon the approval of the warden.

The applicant argued that this provision discriminated against inmates without a family. Such inmates were dependent on the warden's decision in terms of the exercise of their right to send and receive money, but this did not apply to inmates with family.

The Constitutional Court found that the aim Article 127.1 sought to achieve was undoubtedly legitimate; it was aimed at preventing unlawful activities by inmates within the prison system, in the first instance amongst themselves.

The measure did not, in the Constitutional Court's opinion, discriminate against those inmates who did not have family by comparison with those who did.

Inmates without family could not, of course, be in a situation of receiving money from family members or sending it to them, in fact or in law. Such inmates were in a different position, in a legal situation that could not be compared with that of inmates with family, who were, both in fact and in law, in a situation where they could send money to family members or receive it from them.

However, the part of the first sentence of Article 127.1 of the Act which provides that inmates may, upon the warden's approval, send money to or receive it from other persons (apart from family members) applied to all inmates equally, irrespective of whether they had family. Since all the inmates were in the same legal position as this rule applied to them, irrespective of whether they had family, the Constitutional Court found that there was no basis to the applicant's contention that inmates with no family suffered discrimination.

However, it noted that the warden had legal authority to approve the right of inmates to receive money from or send it to persons outside the family. This statutory power on the part of the warden was not expanded upon in the Act or in the Ordinance on Disposing with Money. It found this to be a case of "legalised arbitrariness" rather than discretionary assessment. No guidance was given in the legislation to assist wardens in assessing whether it would be reasonable to allow a particular inmate to receive money from someone outside the family or to send it to them.

This could pave the way for arbitrary behaviour on the part of an administrative authority (the prison warden in this case), which is unacceptable in a democratic society based on the rule of law.

The Constitutional Court therefore held that the part of the first sentence of Article 127.1 of the Act, which reads: "on the approval of the warden" contravenes the requirements placed on statutes by the principle of the rule of law (Article 3 of the Constitution).

It then proceeded to examine the second sentence of Article 127.1, the conformity of which with the Constitution the applicant had also disputed. This stipulates that the monthly sum of money inmates may send and receive is to be established in the Ordinance.

The applicant had put forward the view that this provision restricted the right of all citizens to freely dispose of money because it prevented them from sending money to persons serving prison sentences; inmates were not allowed to receive it and the money would be returned to the sender with a note endorsed refuses receipt'.

The Constitutional Court found the applicant's claims to be ill-founded; the conditions and requirements of life inside prison are by the nature of things different from those outside it. The special features of prison life dictate that the community and all its members must respect the regulations in public law to which inmates' lives are subject.

The legal rule preventing citizens from freely sending inmates unlimited quantities of money cannot from any constitutional perspective be perceived as a restriction on their right to dispose freely of their own property. Similarly, this legal rule cannot be viewed from the inmates' perspective as a restriction on their right to receive unlimited quantities of money from citizens who have not been deprived of freedom.

The Constitutional Court reiterated that this is a special regulation under public law within the prison system from which specific objective rules of behaviour result, which are compulsory for all. It did not, therefore, accept the applicant's arguments that the second sentence of Article 127.1 of the Act contravened Articles 3, 14 and 16 of the Constitution.

#### Cross-references:

European Court of Human Rights:

- *Orsus and Others v. Croatia*, no. 15766/03, 17.03.2010;

- *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, no. 9214/80, 9473/81 and 9474/81, 28.05.1985, *Special Bulletin – Leading cases ECHR* [ECH-1985-S-002];
- *Unal Tekeli v. Turkey*, no. 29865/96, 16.11.2004;
- *Beian v. Romania*, no. 30658/05, 06.12.2007;

Federal Constitutional Court of Germany:

- nos. 1 BvR 370/07 and 27.02.2008, *Bulletin* 2008/1 [GER-2008-1-006].

*Languages:*

Croatian, English.



## Czech Republic Constitutional Court

### Important decisions

*Identification:* CZE-2001-3-017

- a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 05.12.2001 / **e)** Pl. US 9/01 / **f)** Lustration laws / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
- 1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force before the entry into force of the Constitution.**
- 2.1.1.4 Sources – Categories – Written rules – **International instruments.**
- 2.1.3 Sources – Categories – **Case-law.**
- 3.3 General Principles – **Democracy.**
- 3.18 General Principles – **General interest.**
- 3.21 General Principles – **Equality.**
- 4.6.9.2.1 Institutions – Executive bodies – The civil service – Reasons for exclusion – **Lustration.**
- 4.7.1 Institutions – Judicial bodies – **Jurisdiction.**
- 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

*Keywords of the alphabetical index:*

Lustration, law / Civil service, loyalty, political / Civil servant, recruitment / Civil servant, duty of loyalty / Loyalty, public / Constitutional Court, predecessor state, decision, *res judicata* / Democracy, defence / Council of Europe, Recommendation.

*Headnotes:*

A democratic state can condition an individual's entry into civil service, and subsequent holding of a civil servant position, to meeting certain prerequisites and in particular, the political loyalty.

The concept of loyalty covers, on the one hand, the level of loyalty of every individual in public services, and, on the other hand, the level of loyalty of public services as a whole. In addition, it is not only relevant

whether the public services are actually loyal, but also whether they appear loyal to the public.

Certain lustration laws still protect an existing public interest, or pursue a legitimate aim, which is the active protection of a democratic state from the dangers, which could be brought to it by insufficiently loyal and trustworthy public services. Thus lustration laws setting specific prerequisites for being a civil servant supplement the absence of a key law on civil service required by the Constitution. Their existence is therefore still necessary.

### **Summary:**

The Constitutional Court received a petition from a group of 44 deputies in which the petitioners sought the annulment of some provisions of so-called lustration laws because of their conflict with the Constitution. The Chamber of Deputies stated that a right to any position of power does not exist in a democratic state, as it is up to the state to decide the criteria by which it will fill such positions. The Senate stated that each state has the right to set by statute conditions for holding positions in the civil service. The Ministry of the Interior stated its position on the Court disputes on protection of fundamental rights. From all issued lustration certificates, only 3.45% were positive. Until 5 September 2001 the ministry's records show a total of 692 petitions for protection of personal rights of an individual.

When deciding on the annulment of acts and other legal regulations the Constitutional Court assesses the content of these regulations from the point of view of their compatibility with the constitutional laws and with international treaties pursuant to Article 10 of the Constitution; it also establishes whether they were adopted and issued within the competence given by the Constitution and in a constitutionally prescribed way.

Wherever legal regulations were issued before the Constitution of the Czech Republic became effective, the Court examines the compliance of their content with the present constitutional order. The Constitutional Court of the former Czechoslovakia had already evaluated the main lustration law in terms of its constitutionality. Therefore, the Constitutional Court had first to decide on the admissibility of the petition.

The jurisdiction of the Constitutional Court of the former Czechoslovakia was transferred to the Supreme Courts of the Czech and Slovak Republics. The existence of both Constitutional Courts is mutually independent. The Constitutional Act functions in a system of judicial protection of constitutionality established by the Constitution of the Czech Republic. Significant changes had occurred in the society during the course of more

than eight years and the amendment is now to be evaluated in the light of new instruments.

The decision by the Constitutional Court of the former Czechoslovakia does not establish a *res iudicata* obstacle. The Constitutional Court, like the European Court of Human Rights right from its first decisions, relies on the cases of its predecessor. In this sense, the Court noted that the continuity of protection provided permits the new Court, on the one hand, to diverge from the legal opinion of the preceding Court if there has been a change in the circumstances under which the previous Court made its decision, and on the other hand, not to cast doubt on the decisions of the previous Court if no such change in circumstances has occurred. The Constitutional Court of the former Czechoslovakia reviewed the constitutionality of the main lustration law from the point of view of the then Constitution and did not find conflict with it. The other, smaller lustration law was not reviewed in terms of its constitutionality.

The Constitutional Court of the former Czechoslovakia recognised the public interest consisting of the need of society and the state to have persons in certain publicly significant positions replaced. It also stressed the restricted validity in time of the law. In democratic states among requirements for persons seeking employment in the civil service is fulfilment of certain civic prerequisites (i.e. loyalty to the state). The state cannot be denied the ability to set prerequisites in which it takes into consideration its own security. The determination of the degree of development of democracy in a particular state is a social and political question. Thus, the Court is not able to review the claim of "completion" or, on the contrary "non-completion" of the democratic process. Loyalty cannot be expected "without anything further and without reservation" from members of previous power structures. A democratic state has an obligation to defend actively its democratic establishment, i.e. not only in a phase where it is being built but also in a phase where democracy has been brought to completion. Indeed, the European Court of Human Rights has also repeatedly recognised in its decisions the justification of the idea of a democracy able to defend itself (*Glasenapp v. Germany*, *Vogt v. Germany*, *Pellegrin v. France*).

Meeting the requirement of political loyalty on the individual's entry into state administration is proved also by judicial practice in the USA (*Adler v. Board of Education of City of New York*).

The Constitutional Court also recorded that an untrustworthy civil service and state administration result in a danger to democracy. The Act on the Lawlessness of the Communist Regime and Resistance to it enumerates crimes and other comparable events, which occurred in the territory of

the present-day Czech Republic during 1948-1989. It assigns full responsibility for them to those who promoted the communist regime as officers, organisers and instigators in the political and ideological arena. It states the special responsibility of the pre-November Communist Party. The lustration legislation only takes a position on it and draws certain conclusions only from classified forms of involvement in it. In its judgment the Constitutional Court of the former Czechoslovakia pointed out that other European states also apply lustration legislation. Their common feature is the fact that they concentrate on an individual's position and/or behaviour under totalitarianism, which may have negative consequences for him in terms of his involvement in public life in the present democratic state. Similar Acts were passed in Germany and other countries in Central and Eastern Europe.

The Parliamentary Assembly of the Council of Europe admits the compatibility of lustration laws with the attributes of a democratic legal state, with the presumption that their purpose is not to punish the affected persons, but to protect the nascent democratic regime. In light of the foregoing facts, the Court had grounds to state that certain behaviour or a certain position of an individual in a totalitarian state is generally considered, from the viewpoint of the interests of a democratic state, to be a risk to the impartiality and trustworthiness of its public services, and therefore has a restrictive influence on the possibility and the manner of including "positively lustrated" persons in them. With the passing of time the relative significance of attitudes and the position of persons in the totalitarian state certainly does not disappear, but it decreases.

The time of application of individual lustration laws or individual provisions based on them differ. In the great majority of other European states lustration laws are still valid and effective. Both acts pursue their legitimate aim by setting certain prerequisites for the performance of certain positions in state bodies and organisations, in the police of the Czech Republic and in the Correction Corps of the Czech Republic. The Recommendation no. R (2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe of 24 February 2000 regulates the position of representatives of public power. Public administration plays a substantial role in democratic societies and those persons in it are subject to special obligations and commitments because they serve the state.

Law may provide for both general and specific prerequisites for access to public positions. Both lustration laws set special prerequisites only for access to managerial or significant positions in civil and public services.

The specific presumptions reflect the position of an individual in the period of totalitarianism of 1948-1989. While this position meets the elements provided in the lustration laws, it makes it impossible for a lustrated individual to access public positions listed in them. The Constitutional Court, in agreement with its Czechoslovak predecessor, considered the close connection of persons with the totalitarian regime and its repressive components to be a relevant circumstance that can cast doubt on political loyalty and damage trustworthiness of public services of a democratic state and thus threaten such state and its establishment.

At present other new democratic European states view this aspect of the past of their public representatives and officials in a similar way. The Constitutional Court considered it very clear that the relevance of the stated presumption decreases with the passage of time from the fall of the totalitarian regime, and therefore considers lustration legislation to be temporary. The Constitutional Court takes as a starting point the fact that lustration prerequisites apply only to a restricted circle of fundamentally important positions. It also takes into account the declining tendency to apply the lustration laws in practice. The parliament has not yet regulated by law the legal relations of state employees in ministries and other administrative authorities (The Act on Civil Service). Thus, by setting specific prerequisites for working in civil service, both lustration laws substitute, to a certain extent, the absence of a key law required by the Constitution. Their existence is therefore still necessary.

With the exception of certain acts, (among others the Act on Courts and Judges), access to elected, appointed and designated positions specified in the lustration laws is regulated only by these laws. However, the Constitutional Court did not consider this situation to be optimal. It therefore noted that the legislator should speedily regulate the prerequisites for access to public offices in the full extent. According to the background report to the amendment of the main lustration act, its validity should be terminated upon the adoption of the Act on Civil Service.

For all the foregoing reasons, the Court granted part of the petition and denied the remaining part.

The dissenting opinion stated that the Court has annulled the prerequisite demanding the persons recruited into the Police and Corrections Corps not to be conscious collaborators of the former State Security Service (hereinafter, "StB"). Nowadays elements protecting and approving legal procedures during the totalitarian period are emerging more and more often. These pressures appear to be in contradiction with

democratic postulates. Therefore the two lustration judgments can be connected neither from the point of view of time nor from the point of view of public interest. From the moral point of view conscious collaborators of the StB are one of the groups of persons most heavily subjected to the shorter lustration law. While other agents or StB employees only built the totalitarian system and infringed the citizens' rights in general, conscious StB collaborators directly participated in persecuting people. Such persons are most easily influenced, as in their case there is no guarantee of resistance against the pressure when they did not pass the test in the past. The qualification of conscious collaboration was precisely defined in the law and the courts guarantee the protection of applicants against unjust decisions. Therefore the protection of democracy has to be put above the protection of an individual's right.

#### *Supplementary information:*

In Judgment Pl. US 25/2000, the Constitutional Court rejected a petition of a group of deputies to annul provisions of the amending act, which has no independent legal existence and has become part of the amended act.

#### *Cross-references:*

##### Supreme Court of the United States:

- *Adler v. Board of Education of City of New York*, 03.03.1952.

##### Constitutional Court of the Czech Republic:

- no. Pl. US 9/01, 05.12.2001, *Bulletin* 2001/3 [CZE-2001-3-017].

##### European Court of Human Rights:

- *Glasenapp v. Germany*, 28.08.1986, Series A, no. 104;
- *Vogt v. Germany*, 26.09.1995, Series A, no. 323; *Bulletin* 1995/3 [ECH-1995-3-014];
- *Pellegrin v. France*, no. 28541/95, 08.12.1999, §§ 60, 66 and 67, *Reports of Judgments and Decisions* 1999-VIII; *Bulletin* 1999/3 [ECH-1999-3-009].

#### *Languages:*

Czech.

## Germany Federal Constitutional Court

### Important decisions

*Identification:* GER-2011-1-006

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 22.02.2011 / **e)** 1 BvR 699/06 / **f)** Fraport / **g)** to be published in the Official Digest / **h)** Deutsches Verwaltungsblatt 2011, 416; Neue Juristische Wochenschrift 2011, 1201; Europäische Grundrechte-Zeitschrift 2011, 152; CODICES (German).

*Keywords of the systematic thesaurus:*

- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

*Keywords of the alphabetical index:*

Binding force, fundamental rights, private parties / Airport, assemblies / Enterprises owned both by private owners and the state, binding force, fundamental rights / Airport, ban, demonstrations.

*Headnotes:*

1. Like public enterprises that are in the sole ownership of the state and are organised in the forms of private law, enterprises owned both by private shareholders and the state (*gemischtwirtschaftliche Unternehmen*) on which the state has a controlling influence and which are organised in the forms of private law are directly bound by fundamental rights.
2. The fact that an airport is especially sensitive to disruptions justifies, under the precept of proportionality, more extensive restrictions of the freedom of assembly than are permissible in public street space.



### **Summary:**

I. Frankfurt am Main Airport is operated by *Fraport Aktiengesellschaft* (hereinafter, "Fraport AG"), a stock corporation. The majority of its shares are in public ownership, divided between the Land (state of) Hesse and the City of Frankfurt am Main. Apart from the infrastructure which serves to handle air traffic, the airport comprises numerous facilities for consumer and leisure purposes, which are open to the general public.

The applicant is a member of an initiative which objects to foreigners being deported with the co-operation of private airlines. She distributed leaflets in the departure lounge of Frankfurt Airport, which were directed against a deportation. Fraport AG thereupon imposed an "airport ban" on her. At the same time, she was informed that a criminal complaint for unlawful entry would be initiated against her as soon as she would again be found to "unjustifiedly" stay at the airport.

The action instituted by the applicant against Fraport AG before the civil courts for a declaration that the ban on demonstrating and on expressing one's opinion imposed with regard to the premises of Frankfurt Airport was unlawful, remained unsuccessful in all instances. The applicant's constitutional complaint is directed against that.

II. The Federal Constitutional Court decided with 7:1 votes that the contested civil-court decisions violated the applicant's fundamental rights to freedom of expression (sentence 1 of Article 5.1 of the Basic Law) and to freedom of assembly (Article 8.1 of the Basic Law), and has hence annulled them. The matter has been remitted to the Local Court (*Amtsgericht*) for a new ruling.

In its relation to the applicant, Fraport AG is directly bound by fundamental rights. The use of private-law forms of organisation does not exempt state authority from its being bound by fundamental rights pursuant to Article 1.3 of the Basic Law. Like public enterprises that are in the sole ownership of the state and are organised in the forms of private law, enterprises owned both by private shareholders and the state on which the state has a controlling influence are directly bound by fundamental rights.

Pursuant to Article 1.3 of the Basic Law, fundamental rights shall bind the legislator, the executive and the judiciary comprehensively as directly applicable law; they bind state authority in its entirety. This also applies where the state makes use of the civil law when assuming its responsibilities.

The direct binding force of fundamental rights does not only apply to enterprises which are completely in public ownership, but also to enterprises owned both by private owners and the state on which the state has a controlling influence. As a general rule, this is the case if more than half of the shares are publicly owned. The assumption that not only the share-holders, but also the respective enterprise itself are directly bound by fundamental rights corresponds to the enterprise's nature as a single operating entity; this assumption ensures an effective binding force of fundamental rights irrespective of whether, to what extent and in what form the owner or owners can exert an influence under company law on the management of business and of how, in the case of enterprises with different public shareholders, a co-ordination of the influence rights of several public owners can be guaranteed.

The contested decisions violated the applicant's freedom of assembly.

The area of protection of the freedom of assembly applies here. The freedom of assembly guarantees the holders of a fundamental right *inter alia* the right to freely determine the location of the assembly. However, it does not thereby provide them with the right of access to any location. The freedom of assembly is, however, not restricted to public street space either. Instead, it ensures that assemblies can also be held in other places in which a public enterprise has opened a general public traffic.

Places of general traffic for communication purposes, which, apart from public street space, can be used for organising assemblies, are first of all only places which are open and accessible to the general public. On the other hand, the question of whether such a place that is located outside public streets, paths and places can be deemed a public space of communication can be answered according to the concept of the public forum. The characteristic of the public forum is that a variety of different activities and concerns can be pursued in it which results in a varied and open communication network. The meetings intended by the applicant fall within the area of protection of the freedom of assembly because they also concern areas of Frankfurt Airport which are designed as places of general traffic for communication purposes.

The contested decisions encroach upon the freedom of assembly. In general, the provisions of the Assembly Act (*Versammlungsgesetz*), as the legal basis of encroachments by the authorities competent with regard to assemblies and by the police, also apply at Frankfurt Airport. Apart from this, encroachments by the airport operator can also rely on the right under private law of the owner of premises to undisturbed possession as a law restricting the freedom of assembly within the

meaning of Article 8.2 of the Basic Law. Assemblies in places of general traffic for communication purposes are outdoor assemblies within the meaning of Article 8.2 of the Basic Law.

The encroachment is not justified because the ban, which has been confirmed by the civil courts, is disproportionate. In principle, the authorisations under civil law cannot be interpreted in such a way as to go beyond the limits set by constitutional law to the authorities competent for assemblies. Under these limits, banning an assembly only comes into consideration if there is a direct danger, which can be ascertained from recognisable circumstances, to fundamental legal interests that rank equally with the freedom of assembly. This, however, is not an obstacle to specifically responding to the special potential danger involved with assemblies in an airport and to paying due account to the rights of other holders of fundamental rights. Here, the fact that an airport, in its primary function as a place in which air traffic is organised, is especially sensitive to disruptions also justifies restrictions that would not have to be tolerated under the precept of proportionality in public street space.

In the instant case, however, the ban imposed on the applicant prohibits her, without the existence of the forecast of a specific danger, from organising an assembly in any area of the airport for an unlimited period of time unless permission to organise such assemblies has been granted beforehand by Fraport AG on the basis of a fundamentally discretionary decision. This is not compatible with the freedom of assembly.

The contested decisions also violated the applicant's freedom of expression.

The freedom of expression is also guaranteed to citizens, but only in places to which they actually have access. However, with regard to its area of protection, it is not restricted to public forums that serve communication. As a right of the individual, citizens have a fundamental right to it wherever they are at any given moment.

The ban on distributing leaflets in the airport without Fraport AG's permission is disproportionate. The wish to create a "feel-good atmosphere" in a sphere which is strictly reserved to consumer purposes and which remains free from political discussions and controversies in society cannot be invoked as a legitimate purpose for restricting the freedom of expression. What is also out of the question are bans which serve the purpose of preventing certain expressions of opinion for the sole reason that the airport operator does not share them, disapproves of

their content or regards them as discrediting the business of an enterprise because of the critical statements it contains. In contrast, the use of the airport premises for disseminating opinions can be restricted and regulated according to functional aspects for the protection of legal interests, just as is the case with public street space. The restrictions must, however, comply with the principle of proportionality. This at any rate precludes a general prohibition to distribute leaflets in the airport, and thus also in the areas designed as public forums, or making it generally dependent on a permission. In contrast, to avoid disruptions, restrictions applying to certain places, manners or points in time of expressions of opinion in the airport are not, in principle, precluded.

III. One of the justices of the Federal Constitutional Court wrote a dissenting opinion. It relates to the reasons given for Fraport AG being directly bound by fundamental rights, to the question of the area of protection of the freedom of assembly and to the examination of proportionality with regard to Article 8 of the Basic Law.

#### Cross-references:

- nos. 2 BvR 1390/12, 1421/12, 1438/12, 1439/12, 1440/12 and 2 BvE 6/12, 12.09.2012, *Bulletin* 2012/3 [GER-2012-3-022].

#### Languages:

German; press release in English on the Court's website.



# Hungary

## Constitutional Court

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### Important decisions

*Identification:* HUN-2008-1-003

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 30.04.2008 / **e)** 63/2008 / **f)** / **g)** Magyar Közlöny (Official Gazette), 2008/69 / **h)**.

*Keywords of the systematic thesaurus:*

4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.

4.5.10.3 Institutions – Legislative bodies – Political parties – **Role**.

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation**.

*Keywords of the alphabetical index:*

Political party, equal treatment / Political party, foundation, state support, equality.

*Headnotes:*

It is not unconstitutional for the state to finance foundations close to political parties, provided such foundations are independent from parties both legally and effectively, fulfilling their duties independently and freely. When giving state financial support, however, the results of past political elections cannot be the constitutional basis for differentiating between political parties. In a democracy, no law can favour certain parties in forthcoming national elections based on the results of previous political elections.

*Summary:*

I. In this decision, the Constitutional Court examined the constitutionality of certain provisions of Act XXXIII of 1989 on the financial management and operation of political parties and Act XLVII of 2003 on foundations helping the operation of political parties.

II. The decision emphasised that under Article 3 of the Constitution, the state cannot hinder the formation and the activity of parties that are established within the constitutional framework, as this would hinder the principle of freedom of association. The parties can be of

various types; they may have differing financial situations. They may start from different positions in the competition for constituents' votes, and they may be able to participate in the formation and expression of the will of the people to a different extent. If the legislature creates a rule relating to the state support of parties, it must take these differences into consideration.

Several decisions of the Constitutional Court have emphasised that, for the sake of Parliament's decision-making ability and the stability of government it is acceptable for parties with the least support not to have access to parliamentary mandates. In order to have state support, a party has to be able to fulfil its constitutional duty. The jurisprudence of the Constitutional Court demands rules related to the state support of parties to be adjusted to their duty of participating in the formation and expression of the will of the people, and to their social support.

Besides the operability of the parliamentary system, the Constitutional Court also emphasised that the fundamental value of democratic society is the ability of the multi-party system to renew itself, that is, the system's ability to adjust to changes in society, to answer the changing needs of constituents. The basis of parliamentary democracy is the competition between political parties for the support of constituents. The healthy operation of democracy is impossible without political pluralism and the equal opportunity of parties to participate in the political contest. For this reason the state has to remain neutral in political contests and in creating legal rules regulating the conditions of this contest.

When creating rules relating to parties, the legislator has to treat parties equally, taking their interests into consideration with equal impartiality and circumspection. It cannot act arbitrarily when making a decision. The legislator has to legislate with the purpose of state support in view, that is, that parties should be able to fulfil their duties laid down in the Constitution. A regulation on state support cannot restrict the freedom of political parties to compete, as is demonstrated in case no. U-I-367/96. of the Slovenian Constitutional Court, and in Decision no. US 53/2000 of the Czech Constitutional Court (*Bulletin* 1999/1 [SLO-1999-1-003]; *Bulletin* 2001/1 [CZE-2001-1-005]).

A statute validly in force must contain regulations that are not only "seemingly" neutral. It also has to ensure that the legal norm that applies to all parties equally should not result *de facto* in a constitutionally unsubstantiated discrimination in the case of a well-defined group of parties. Accordingly, if the statute allows discrimination between the parties, even though the legislator has taken account of equality in other respects, there must be a constitutionally acceptable reason for that discrimination.

In the light of the above, the Court stated that if the legislator decides to support the parties, then, based on the legal regulation financial support must be given to all parliamentary parties. This does not, in itself, secure the equal opportunities of different political powers in the elections. For this reason, state support must be extended to all political parties commanding the support of the bulk of the constituents, and which can nominate candidates in the parliamentary elections [Guidelines and Report on the Financing of Political Parties adopted by the Venice Commission, 9-10 March 2001, A. Regular Financing, a. Public Financing].

The Court stated that Article 70/A.1 of the Constitution is violated by the provision to the effect that full financial support can only be given to the foundation of a party that had had representatives in Parliament in at least two consecutive parliamentary cycles. The Court also found the provision unconstitutional, which gave full financial support exclusively to parties that formed factions in the forming session of Parliament.

The decision also annulled the provision, which secured basic, rather than full, financial support to the formation of parties that were excluded from Parliament after two cycles with a faction, and to the formation of parties that formed factions in the forming session of Parliament but had not been present in Parliament previously.

The reason for repeal was that the legal provision drew a distinction between parties merely on the basis of previous presence in Parliament. This distinction, however, was not found constitutionally acceptable by the Court, because it was irrelevant from the perspective of the duty of parties laid down in the Constitution, their participation in the formation and expression of the will of the people. The basis of parliamentary democracy is competition for the support of constituents, and regular elections. However, we cannot draw conclusions from the results of a party in previous elections, neither as to future results, nor the extent to which it is able to fulfil its constitutional duties.

With effect from the date of the decision, the Court directed the repeal of provisions that made it impossible for the Tax Authorities and the Health Services to keep a financial-economic check on party formation. The Constitutional Court also found it unconstitutional that the prosecutor's competence differs between party formation and the formation of other entities.

Finally, the Constitutional Court found unconstitutionality manifested in omission, as there was no legal guarantee that parties founded under the auspices of the legislation on the operation of parties would use the financial support they were given to cover setting-up expenses. It could become covert party financing.

Mihály Bihari attached a dissenting opinion to the decision, which was joined by András Bragyova, Péter Kovács, Péter Paczolay, and László Trócsányi. According to the dissenting opinion as long as there is a reasonable justification for the legislator to differentiate between parties with a parliamentary faction and parties outside parliament in terms of their foundations being entitled to financial support, it is not possible to state the violation of Article 70/A.1 of the Constitution. This is true even if the legislator differentiates between parties with a parliamentary faction on the basis of whether they have a permanent presence in Parliament, when deciding on the extent of the financial support of their foundations.

#### *Languages:*

Hungarian.



# Italy

## Constitutional Court

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### Important decisions

*Identification:* ITA-1998-2-003

**a) Italy / b) Constitutional Court / c) / d)** 20.05.1998 / **e)** 185/1998 / **f) / g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 22, 03.06.1998 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

*Keywords of the alphabetical index:*

Multitherapy, tumour pathology / Medication, free / Medical experimentation / Illness, terminal phase / Treatment, evaluation by the Court / Right to health, minimum content / Recovery, expectation.

*Headnotes:*

The lack of provision for the distribution, at National Health Service expense, under criteria to be set down by the legislature itself, of the drugs prescribed in a treatment for certain types of cancer, to those living in poverty, is unconstitutional. Only those drugs forming part of the treatment for patients suffering from forms of cancer that are the subject of clinical trials are to be distributed free of charge until the effectiveness of this therapy has been confirmed following these trials.

*Summary:*

The Council of State, in a case referred to it, raised before the Court the question of the constitutional legitimacy of Act no. 94/1998, which only granted free treatment to patients in the terminal phase of cancer who had been selected for clinical trials of the “*Di Bella* multitherapy” in a hospital environment. For other patients in the terminal phase who were not selected for clinical trials, the law authorised doctors to prescribe drugs belonging to the “*Di Bella* therapy” but stipulated that these drugs were to be supplied entirely at the patient’s expense. The Council of State found that the

law in question was in violation both of the principle of equality (Article 3 of the Constitution) on account of the disparity in treatment between patients undergoing clinical trials, who received the drugs free of charge, and other cancer sufferers who had to pay for treatment, and of the right to protection of health enshrined in Article 32 of the Constitution.

The Constitutional Court points out above all that it is not within its jurisdiction to pass judgment on the therapeutic effectiveness of the “*Di Bella* multitherapy” in treating cancer; this is currently being investigated through clinical trials conducted by competent technical and scientific bodies, with the aim of assessing its effectiveness in the field of oncology.

The Court finds, however, that the start of clinical trials of the “*Di Bella* multi-drug treatment” on cancer sufferers in specialist medical establishments, and the authorisation of the use of the multi-drug treatment on other patients not undergoing clinical trials but also suffering from cancer, have aroused expectations of a cure among these patients, for whom existing forms of therapy have proved inappropriate; such expectations are to be understood as a minimum component of the right to health. It is unacceptable, under the principle of equality, that effective enjoyment of this fundamental right should depend, for patients who do not undergo clinical trials, on their respective financial circumstances.

The provision, in the law challenged before the Court, for a reduction in the sale price of the drugs belonging to the “*Di Bella* multi-drug treatment”, as agreed between the Ministry of Health and pharmaceutical companies, is insufficient to be regarded as a guarantee of the right to protection of health enshrined in Article 32 of the Constitution; the same is true of the provision allocating a fixed sum to local authorities for 1998, to fund contributions towards particularly heavy medical costs for poor people.

*Supplementary information:*

The government has adopted a decree increasing contributions to the funding of the National Health Service from those receiving health care, precisely in order to cover the increase in expenditure caused by the reimbursement of costs incurred by the less well-off in paying for the “*Di Bella* multitherapy”. The results of trials conducted up to September 1998 on this method of therapy have not demonstrated its effectiveness.

*Cross-references:*

The matter at issue in this judgment has considerable similarities with that at issue in the *Bundesverfassungsgerichts* decision reported in *Bulletin 1997/1* [GER-1997-1-004].

*Languages:*

Italian.



## Latvia Constitutional Court

### Important decisions

*Identification:* LAT-2000-3-004

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 30.08.2000 / **e)** 2000-03-01 / **f)** On Compliance of the Saeima Election Law and the City Dome, Region Dome and Rural Council Election Law with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 307/309, 01.09.2000 / **h)** CODICES (English, Latvian).

*Keywords of the systematic thesaurus:*

- 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
- 2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.
- 2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.
- 2.1.3.3 Sources – Categories – Case-law – **Foreign case-law**.
- 2.3.3 Sources – Techniques of review – **Intention of the author of the enactment under review**.
- 3.3 General Principles – **Democracy**.
- 3.13 General Principles – **Legality**.
- 3.16 General Principles – **Proportionality**.
- 3.19 General Principles – **Margin of appreciation**.
- 4.6.9.2.1 Institutions – Executive bodies – The civil service – Reasons for exclusion – **Lustration**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

*Keywords of the alphabetical index:*

Election, candidacy, restriction / Organisation, anti-constitutional, participation / Social need, pressing / Morality, democracy, protection.

### **Headnotes:**

The right to be elected may be restricted for persons who have been active in organisations that tried to destroy the new democratic state and were recognised as anti-constitutional. Such restrictions are lawful where their aim is to protect the democratic state system, national security and the territorial unity of the state.

However, the legislator should determine the term of the restrictions; such restrictions may last only for a certain period of time.

### **Summary:**

The case was initiated by twenty-three members of Parliament who claimed that provisions of the Parliament (Saeima) Election Law and of the City Dome, Regional Dome and Rural Council Election Law establishing various restrictions on the right to be elected contradicted Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR, and Article 25 of the International Covenant on Civil and Political Rights.

The laws established restrictions on the right of the following to be elected as deputies in Parliament and in the municipalities: those who after 13 January 1991 have been active in the Communist Party of the Soviet Union, the Working People's International Front of the Latvian S.S.R., the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees; those who belong or have belonged to the regular staff of the U.S.S.R., the Latvian S.S.R. or foreign state security, intelligence or counterintelligence services.

Article 101 of the Constitution establishes the right of every citizen of Latvia, prescribed by law, to participate in the activity of the state and local authorities. This right guarantees the democracy and legitimacy of the democratic state system.

However the right is not absolute; Article 101 includes the condition "in the manner prescribed by law". The constitution leaves it for the legislature to make decisions limiting the right. By including the words "in the manner prescribed by the law" the legislature determined that in every case one should interpret the words "every citizen of Latvia" as including the limitations established by law. Article 101 of the Constitution shall be interpreted together with Article 9 of the Constitution: "Any citizen of Latvia, who enjoys full rights of citizenship and, who is more than twenty-one years of age on the first day of elections may be elected to the parliament." Article 9 of the Constitution authorises Parliament to specify the content of the notion of "a citizen of Latvia, who enjoys full rights of citizenship"; and this is done in the Saeima

Election Law. The limitations of this right are permissible only if they do not contradict the notion of democracy, mentioned in Article 1 of the Constitution, other and general principles relating to fair elections. Thus the legislature, in passing the disputed norms creating a necessary legal norm to be realised for the right to be elected, implemented the task of Article 101 of the Constitution.

Reasonable restrictions on the right to vote and to be elected at genuine periodic elections, established in Article 25 of the International Covenant on Civil and Political Rights, are permitted. Not all types of different treatment constitute prohibited discrimination. Reasonable and objective prohibitions with an aim that is considered as legitimate by the Covenant cannot be regarded as discrimination.

The restrictions to the election rights established in Article 3 Protocol 1 ECHR shall be established according to the universal procedure: although the states have "a wide margin of appreciation in this sphere", any restrictions must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Rights may be restricted only to the extent the restrictions do not deprive the right of its essence and/or diminish its efficiency. The principle of equality of treatment shall be respected and arbitrary restrictions must not be applied. Article 14 ECHR does not establish a prohibition of all difference in treatment with regard to the realisation of the rights and freedoms provided by the Convention. The principle of equal treatment is considered violated only if the difference of treatment does not have a reasonable and objective justification.

The Court found that the statement of the applicants that the disputed norms discriminated against the citizens just because of their political membership was groundless. The disputed norms do not establish difference in treatment just because of the political opinion of the person, they establish a restriction for activities against the renewed democratic system. The words "to be active", used in the disputed norms mean to continuously perform something, to take an active part, to act, to be engaged in. Thus the legislature has connected the restrictions with the degree of individual responsibility of every person in the realisation of the aims and programme of the organisations mentioned in the disputed norms. Formal membership of any of the mentioned organisations cannot alone serve as the reason for forbidding a person from being included in the candidate list and being elected. Thus the disputed norms are directed only against those persons who, with their activities after 13 January 1991 and in the presence of the occupation army, tried to renew the former regime, and are not applied just to those with different political opinions.

The norms of human rights included in the Constitution should be interpreted in compliance with the practice of application of international norms of human rights. To establish whether the disputed restrictions comply with Articles 89 and 101 of the Constitution, one has to evaluate whether the restrictions included in the disputed norms are determined by law, adopted under due procedure; justified by a legitimate aim, and necessary in a democratic society. As this case does not contain any dispute on whether the restrictions were determined by law or adopted under the due procedure, the two last issues have to be evaluated.

In 1990, although the democratic state and the first of 1922 were renewed, the Latvian Communist Party was not going to give up the role of the "leading and ruling force". It started anti-state activities. With the efforts of the Latvian Communist Party and its satellite organisations the All-Latvia Salvation Committee was established. The aims of the activities of these organisations were connected with the destruction of the existing state power, and were therefore anti-constitutional. In August 1991 the legislature prohibited these organisations, evaluating them as anti-constitutional. Thus the aim of the restrictions of the election rights is to protect the democratic state system, national security and the territorial unity of Latvia. The disputable norms are not directed against a pluralism of ideas in Latvia or the political opinions of a person, but against persons, who with their activities have tried to destroy the democratic state system. Enjoyment of human rights must not be turned against democracy as such.

The essence and efficiency of rights lies also in morality. To demand loyalty to democracy from its political representatives is within the legitimate interests of a democratic society. The democratic state system has to be protected from persons who are not ethically qualified to become the representatives of a democratic state on the political or administrative level. The state should be protected from persons who have worked in the former apparatus, implementing occupation and repression, and from persons who after the renewal of independence to the Republic of Latvia tried to renew the anti-democratic totalitarian regime and resisted the legitimate state power. The restrictions to the election right do not refer to all members of the mentioned organisations, but only to those who had been active in the organisations after 13 January 1991. Excluding a person from the candidates list if he has been active in the mentioned organisations is not administrative arbitrariness; it is based on an individual court decision. Thus the principle, requiring an equal attitude to every citizen has not been violated, the protection by a court is guaranteed, and the restrictions are not arbitrary. Consequently the aim of the restrictions is legitimate.

To establish whether the restrictions of the election right is proportional to the aims of protecting the democratic state system, national security and the territorial unity of Latvia, the legislature has repeatedly evaluated the political and historical conditions of the development of democracy in connection with the issues of the election right, adopting or amending the election law just before elections. The Court held that at the present moment there did not exist the necessity to doubt the proportionality of the applied restrictions. However, the legislature, in periodically evaluating the political situation in the state as well as the necessity of the restrictions, should decide on determining the term of the restrictions. Such restrictions to the election rights may last only for a certain period of time.

The Constitutional Court decided by a majority of four votes to three. The dissenting judges disagreed with the majority on several grounds. According to the dissenting opinion, restrictions to human rights in a democratic society were necessary not only if they had a legitimate aim, but also if there was a pressing social need to establish the restrictions and the restrictions were proportionate. Today, ten years after the re-establishment of independence, the election of the persons mentioned in the disputed norms would not threaten democracy in Latvia, and therefore the pressing social need to establish the restrictions does not exist. Restrictions of fundamental rights are proportionate only if there are no other means that are as effective but are less restrictive of the fundamental rights. The election rights are restricted so far that in fact the persons do not enjoy the right at all; the legislature has the possibility of using other "softer" forms, therefore the measure is not proportionate.

#### *Cross-references:*

In the decision the Constitutional Court referred to the following Judgments of the European Court of Human Rights:

- *Mathieu-Mohin and Clerfayt*, 02.03.1987;
- *Belgian Linguistic Case*, 23.07.1968;
- *Karlheinz Schmidt v. Germany*, 18.07.1994.

Federal Constitutional Court of Germany:

- no. 2 BvE 1/95, 21.05.1996, *Bulletin* 1996/2 [GER-1996-2-017].

In the dissenting opinion, the judges referred to the following Judgments of the European Court of Human Rights:

- *Dudgeon Case*, 22.10.1981;
- *Handyside Case*, 07.12.1976;

- Barthold Case, 25.03.1985;
- Vogt v. Germany, 26.09.1995;
- Rekvenyi v. Hungary, no. 25390/94, 20.05.1999.

Constitutional Tribunal of Poland:

- no. K 39/97, 10.11.1998; *Bulletin* 1998/3 [POL-1998-3-018].

#### *Languages:*

Latvian, English (translation by the Court).



#### *Identification:* LAT-2001-3-006

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 21.12.2001 / **e)** 2001-04-0103 / **f)** On Compliance of Article 19 of the State Language Law and the Cabinet of Ministers, 22 August 2000, Regulation no. 295 on Spelling and Identification of Names and Surnames with Articles 96 and 116 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 187, 22.12.2001 / **h)** CODICES (English, Latvian).

#### *Keywords of the systematic thesaurus:*

- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.  
 2.1.3.3 Sources – Categories – Case-law – **Foreign case-law**.  
 4.3.1 Institutions – Languages – **Official language(s)**.  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

#### *Keywords of the alphabetical index:*

Name, spelling, approximation / Language, official, use / Language, official, strengthening.

#### *Headnotes:*

When evaluating whether the limitation on a person's private life pursue a legitimate aim, the role of the Latvian language has to be taken into consideration.

Spelling of a foreign surname in accordance with the Latvian language is a justified limitation on a person's private life insofar as it is exercised in a legitimate aim:

to protect the right of other inhabitants of Latvia to use the Latvian language and to protect the democratic state system, and is proportionate to that aim.

On the contrary, so-called approximation (adjustment of the form of the first name and surname to the current rules of the Latvian language), is a limitation that is disproportional to the legitimate purposes of limitations of private life, and is thus unconstitutional.

#### *Summary:*

Mrs Juta Mencena introduced the constitutional complaint questioning the conformity of Article 19 of the State Language Law, the Cabinet of Ministers Regulations On Spelling and Identification of Surnames, and the Regulations On the Citizen of Latvia Passports, with Articles 96 and 116 of the Constitution.

The Constitutional Court established that as the person's name and surname are a consistent part of the private life of the person, they shall be protected by Article 96 of the Constitution, which guarantees the right of everyone to the inviolability of private life.

The applicant acquired in Germany the surname Mentzen, after her marriage with a German citizen. Issuing a new passport to the applicant – a citizen of Latvia – the surname was reproduced as Mencena.

It was pointed out that the fact that the spelling of the surname differs from that of her husband's surname has caused a psychological discomfort and created social inconveniences to the applicant. Taking into account the applicant's psychological attitude to the reproduced surname and complications connected with difficulties of establishing her link with the family in foreign countries, the rule on reproduction of a foreign personal name and its spelling in passports in accordance with the norms of the Latvian language was considered as a limitation of one's private life.

Article 116 of the Constitution establishes that the right to a private life may be limited only in cases prescribed by law in order to protect the rights of others, a democratic state system, and the safety of society, welfare and morals. The limitation of the applicant's private life in the present case has been established by the law, and specified with the Cabinet of Ministers Regulations.

Personal names are one of the elements of language influencing the whole language system. Thus, evaluating whether the limitation on people's private life has a legitimate purpose, the role of the Latvian language has to be taken into consideration. Article 4 of the Constitution fixes the constitutional status of Latvian

language as the state language. Taking into account the fact that the number of Latvians in the state territory has decreased during the 20<sup>th</sup> century (in the biggest cities Latvians are a minority), and that the Latvian language only recently regained its status as the state language, the necessity of protecting the language and strengthening its usage is closely connected with the state democratic system.

Thus, the Constitutional Court considered that the limitation on the private life of the applicant has a legitimate purpose: to protect the right of other inhabitants of Latvia to use the Latvian language and to protect the democratic state system.

Furthermore, it was observed that it is also necessary to check whether the interference of the state in the applicant's private life is proportionate to its legitimate purposes. It is not possible to isolate the spelling of people's names in documents from the other sectors of language. The threat to the functioning of the Latvian language as a unified system, if the spelling of foreign personal names in the documents only in their original form was allowed, is much greater than the discomfort of individuals. Spelling only the original form of a surname at a time when the Latvian language as the state language is just starting to be instituted could negatively influence the process. Thus, the functioning of the Latvian language as a unified system is a social necessity in Latvia, and the limitations are justified.

To diminish the inconvenience caused by the reproduction of the person's name the law establishes that in the person's passport in addition to the name and surname, which are reproduced, the original form of the names of other languages must be indicated, if the person so requires, and is able to provide documents confirming it. The Regulations On Passports specifies that the original form of the name and surname must be entered in the "Special Notes" section of the passport pages.

As the reproduction of foreign personal names is a limitation on people's private lives, application of the limitation should be as careful as possible and respectful to a person and his or her family ties. On the contrary, the Instruction of the Director of the Citizenship and Immigration Department of the Ministry of the Interior On the Passports of the Republic of Latvia Citizens establishes that the original form of the foreign personal name shall be entered only on page 14. Besides, it permits the possibility of entering the original form into the passport if "the form has noticeably changed in comparison with the former documents". Thus, it is possible even to ignore the request of a person to fix the original form of the personal name in the passport. The norm on entering the original form of a foreign personal name and

surname under the title "Special Notes" limits the person's private life disproportionately and is contrary to Article 96 of the Constitution and the State Language Law.

The Cabinet of Ministers Regulations on Spelling and Identification of Names and Surnames also establish the so-called approximation of the name and surname and the adjustment of the form of the name and surname to the currently effective rules of the Latvian language. Approximation is applied if the former usage of the name or surname in personal documents contradicts the current norms of the Latvian language. Approximation may be applied if the documents are issued for the first time, e.g. issuing the birth certificate; and, if they are issued repeatedly, for example, in the case of losing one's passport or if its expiry date has passed.

Precision and consequence is needed in usage and spelling of personal names. Approximation creates a certain precariousness as the individual has to take into consideration that his or her identity and ties with the family might be doubted. From the moment the reproduced personal name is entered into the Republic of Latvia passport, the person has the right not only to use it but also to protect it. Errors or inaccuracy on the part of the officials as well as new conclusions of linguistics cannot be a reason to change the spelling of names reproduced and fixed in documents. Therefore approximation of personal names, if they have already been reproduced and if the individual himself or herself does not require it, is disproportionate to the legitimate purposes of limitations on private life.

#### *Cross-references:*

European Court of Human Rights:

- *Stjerna v. Finland*, 25.11.1994, Vol. 299-B, Series A; *Bulletin* 1994/3 [ECH-1994-3-019];
- *Burghartz v. Switzerland*, 22.02.1994, Vol. 280-B, Series A; *Bulletin* 1994/1 [ECH-1994-1-001];

Constitutional Court of Lithuania:

- no. 14/98, 21.10.1999, On writing of names and family names in passports of citizens of the Republic of Lithuania; *Bulletin* 1999/3 [LTU-1999-3-011].

#### *Languages:*

Latvian, English (translation by the Court).



*Identification:* LAT-2003-2-009

- a) Latvia / b) Constitutional Court / c) / d) 27.06.2003 /
- e) 2003-03-01 / f) On the Compliance of Article 77.7 (sentence three) of the Code of Criminal Procedure of Latvia with Article 92 of the Constitution (*Satversme*) /
- g) *Latvijas Vestnesis* (Official Gazette), 97, 01.07.2003 / h) CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

3.18 General Principles – **General interest.**

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

*Keywords of the alphabetical index:*

Arrest, safeguards / Detention, provisional, right to take part in proceedings / Security, measure, arrest, extension of the term.

*Headnotes:*

The provision of the Code of Criminal Procedure (hereinafter, the “CCP”) that provides that the term of preventive detention of one year and six months may be extended by the Supreme Court Senate in exceptional cases does not run contrary to the observation of the presumption of innocence by the Court and does not deny the right of the defendant to have the matter reviewed within a reasonable time; however, it is incompatible with Article 92 of the Constitution on the ground that a procedure for ensuring the realisation of the right of the accused to be heard is not laid down by the law.

### *Summary:*

Article 77.7 CCP provides that the term of preventive detention, from the day the Court receives the case until the completion of its review by the first instance court, shall not exceed one year and six months. At the end of that term, the order of preventive detention shall be revoked, and the accused shall be immediately released. The Supreme Court Senate (hereinafter, the “Senate”) may prolong the term of preventive detention in exceptional cases, i.e. – criminal matters involving especially serious crimes connected with violence or threat of violence.

The applicants brought a constitutional claim challenging the compatibility of Article 77.7.3 CCP (hereinafter, the “impugned provision”) with the first and second sentences of Article 92 of the Constitution.

The Court noted that Article 92 of the Constitution requires the State to set up a system under which the Court may review criminal matters in proceedings ensuring fair and impartial adjudication of the matters. Article 92 of the Constitution guarantees the minimum rights enshrined in Articles 5.4 ECHR, 6.1 ECHR and 6.2 ECHR.

The Court stated that the presumption of innocence meant that in carrying out their duties, the Court and its officials are not permitted to voice the assumption that the defendant is guilty of the crime until the announcement of the judgment. Proof and determination of guilt takes place only in court when the case is reviewed on its merits. The justification of the decision to detain a person for a long period of time is to be assessed in every individual case by taking into consideration the particular circumstances of the case. Detaining a person for a long period of time may be justified only in cases where there are specific indications of a true public interest, which – bearing in mind the presumption of innocence – is more important than the right of a person to liberty, guaranteed by Article 5 ECHR. As the impugned provision does not require assessment of the guilt of the accused, a court does not violate the presumption of innocence by asking the Senate to extend preventive detention in a case where there are well-founded suspicions that the person committed the crime and where the Court does not mention the guilt of the accused in its request. Consequently, the impugned provision does not run contrary to the observation of the presumption of innocence by the Court.

The Court held that even though the impugned provision did not determine the maximum term of preventive detention, it did not prevent a court from adjudicating the case within a reasonable time because neither the Court requesting extension of detention nor

the Senate may apply the provision without grounds. When evaluating the amount of time needed for the adjudication of the case, the Court must consider all factors, *inter alia*, the complexity of the case, behaviour of the accused and the activity of the competent institution (the Court). Because of objective reasons, a court is not always able to adjudicate the matter in a year and a half (for example, in especially serious crimes connected with violence or threat of violence). Had the impugned provision not been adopted, an accused would be able to deliberately delay the legal process in such a way as to be released from prison. Moreover, if the accused were released from prison without an assessment of his or her personality, the security of both the witnesses and the public might be endangered. Therefore, the impugned provision does not deny the right of the accused to a review of the matter within reasonable time.

The Court pointed out that the right to be heard follows from the principle of justice, which includes all the guarantees of due process. It is one of the most important procedural guarantees of an accused. This right is realised in several ways. It includes also the right of the person to express his or her viewpoint on facts and legal issues. Implementation of that right, at least in the written form, must be ensured.

The Court held that the impugned provision, when providing that the Senate could extend detention after a year and six months, did not provide for the right of the accused to participate in the court hearing or to express his or her viewpoint in another way. The accused must be given the opportunity of becoming acquainted with the conclusions of the Court on the extension of his or her detention and be given an opportunity to defend himself or herself. However, neither the provisions of the Code nor the case-law of the Senate on the extension of preventive detention safeguard the above-mentioned right. Consequently, the impugned provision did not guarantee the right to a fair court, laid down by Article 92 of the Constitution.

The Court declared that Article 77.7.3 CCP was incompatible with Article 92 of the Constitution, and null and void as of 1 October 2003, if by that date the law did not set out a procedure for ensuring the realisation of the right of the accused to be heard.

#### Cross-references:

##### Constitutional Court:

- no. 2001-08-01, *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-10-01;
- no. 2001-17-0106, *Bulletin* 2002/2 [LAT-2002-2-006];
- no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-06-01.

#### European Court of Human Rights:

- *Sanchez-Reisse v. Switzerland*, Vol. 107, Series A;
- *Niedbala v. Poland*;
- *Bezicheri v. Italy*, Vol. 164, Series A;
- *Süßmann v. Germany*, *Bulletin* 1996/3 [ECH-1996-3-013]; *Reports of Judgments and Decisions* 1996-IV;
- *Assenov v. Bulgaria*, *Reports of Judgments and Decisions* 1998-VIII;
- *Lavents v. Latvia*.

#### The Czech Constitutional Court:

- no. IV.US 358/98, 10.11.1998, *Bulletin* 1998/3 [CZE-1998-3-014].

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2006-1-002

**a) Latvia / b) Constitutional Court / c) / d) 08.03.2006 / e) 2005-16-01 / f) On the Conformity of Section 13 of 20 December 2004 Law "Amendments to the Law On Residential Tenancy" with Sections 1, 91 and 105 of the Constitution / g) Latvijas Vestnesis (Official Gazette), 40(3408), 09.03.2006 / h) CODICES (Latvian, English).**

#### Keywords of the systematic thesaurus:

- 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
- 3.9 General Principles – **Rule of law**.
- 3.10 General Principles – **Certainty of the law**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
- 5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation**.

#### Keywords of the alphabetical index:

Denationalisation, building / Tenancy, rental payment, maximum.

### Headnotes:

In a democratic state the principle of legitimate trust (trust in law) does not preclude the implementation of extensive and vital reforms. However, a reform with an unlimited time span may contradict this principle. In carrying out the reform, the State has a duty to bring about a reasonable conclusion. Rent, determined under administrative procedure, would be substituted by a lasting solution, adapted to the conditions of a market economy, which would balance the interests of both pre-reform tenants and property owners.

### Summary:

I. Denationalisation and the return of buildings to their lawful owners after the renewal of the national independence of Latvia were carried out under the property reform. The legislation governing this reform also covered the relationship between the owners of the properties and those who had occupied the properties before the reform, hereinafter referred to as "pre reform tenants". Previous provisions within the Tenancy Law set out a maximum rental payment covering the period to 31 December 2004.

Parliament passed the legislation containing the impugned norm on 20 December 2004 and it took effect on 1 January 2005. Several amendments were made to paragraph 4 of the Transitional Provisions of the Tenancy Law. A maximum rental period was also set out, covering the period up to 31 December 2007.

The petitioners – who owned several denationalised buildings – claimed that the impugned norm breached their fundamental rights, determined by Articles 1, 91 and 105 of the Constitution. They requested that it be declared null and void from the moment of its adoption. They also pointed out that the impugned norm came into effect only two days after it had been passed, which resulted in a gross violation of the principle of trust in law. The owners were given no opportunity of adapting to the sudden changes.

II. The Constitutional Court pointed out that in bringing about property reform, for example, when denationalising and returning buildings to their lawful owners, the legislator must observe the rules of a state governed by law. One problem which the petitioners have with the amendments to the legislation is that it was adopted more than ten years after the expiry of the time for submission of applications for restoration of buildings by owners of the buildings.

The Court reiterated that property rights also include the right to derive benefit from ownership, *inter alia* through rental. This not only ensures the maintenance of the respective property but also brings profit to the owner.

The Court observed that the impugned norm restricts owners' rights to demand rental payments from the pre-reform tenants. The rent would cover reasonable maintenance expenses and be substantiated by calculations, the correctness and validity of which the owner could prove in court. As a result, the owners have to cover the expenses from other resources. At the same time, the impugned norm prevents owners from gaining a reasonable profit from renting their property. It therefore restricts the rights of owners of properties which have been denationalised and returned to them, such rights being set out in Article 105 of the Constitution.

The Court stated that the right to property is not absolute. Firstly, property shall serve public interests. Secondly, the right to a property can be restricted if the restrictions are determined by law, have a legitimate aim and are proportionate.

When the legislator is determining rental rights, he must not only take into consideration constitutional property rights, but also the requirement to utilise the property in a socially fair way.

The Court found that the legitimate aim of the impugned norm is the protection of poor and needy pre-reform tenants where there is a shortage of reasonably-priced accommodation. On the whole, this norm is appropriate for reaching the legitimate aim. The problem with it is that it does not link the maximum amount of rental payment with the financial position of the tenants. It offers the possibility of low rent not only to the poor and needy but also to those who might be in a better financial position than the owner of the property which has been denationalised. The aim set out above cannot therefore justify the restrictions on rental payments for all pre-reform tenants.

The Court acknowledged the duty of the State to safeguard the welfare of its residents. However, it took the view that there were other ways of achieving this, and not just by the onerous regulation of tenancy rights, although a short-term interference in tenancy law might be justifiable. It concluded that the restrictions on the rights of property owners were not proportionate to the public benefit gained from the restrictions.

In a democratic state the principle of legitimate trust (trust in law) does not preclude extensive and vital reforms. A reform with an unlimited time span might contravene this principle. In achieving the reform, the State was obliged to bring it to a reasonable conclusion, under which rent, determined under administrative procedure, would be substituted by a lasting solution, adapted to the conditions of a market economy and which would balance the interests of both pre-reform tenants and the property owners.

The Court declared the impugned norm to be incompatible with Articles 1 and 105 of the Constitution and invalid with effect from 1 January 2007.

#### Cross-references:

##### Constitutional Court:

- no. 2001-12-01, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-01-03;
- no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-12-01, *Bulletin* 2003/1 [LAT-2003-1-004];
- no. 2003-04-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-008];
- no. 2004-10-01, *Bulletin* 2005/1 [LAT-2005-1-001];
- no. 2005-12-0103.

##### Other Constitutional Courts:

- Republic of Estonia Supreme Court, no. 3-4-1-20-04, of 02.12.2004;
- German Federal Constitutional Court Judgment (*BVerfGE* 37, 132);
- Constitutional Court of the Czech Republic, no. IV.US 524/03 of 23.09.2004, *Bulletin* 2004/3 [CZE-2004-3-015];
- Constitutional Tribunal of Poland, no. K48/01, 02.10.2002, *Bulletin* 2002/3 [POL-2002-3-031];
- Constitutional Tribunal of Poland, no. K 4/05, 19.04.2005.

##### European Court of Human Rights:

- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31, p. 23, § 5; *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002].
- *Mellacher and others v. Austria*, 23.11.1989;
- *Velosa Barreto v. Portugal*, 21.11.1995; *Bulletin* 1995/3 [ECH-1995-3-020];
- *Scollo v. Italy*, 28.09.1995, *Bulletin* 1995/3 [ECH-1995-3-018];
- *Immobiliare Saffi v. Italy*, no. 22774/93, 28.07.1999, *Bulletin* 1999/2 [ECH-1999-2-007];
- *Broniowski v. Poland*, no. 31443/96, 30.01.2004;
- *Hutten-Czapska v. Poland*, no. 35014/97, 22.02.2005.

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2006-2-003

- a) Latvia / b) Constitutional Court / c) / d) 15.06.2006 / e) 2005-13-0106 / f) On the Compliance of Section 5 (Items 5 and 6) of the Parliament Election Law and Section 9 (Items 5 and 6 of the first paragraph) of the City Dome, District Council and Rural District Council Election Law with Sections 1, 9, 91 and 101 of Constitution as well as with Sections 25 and 26 of the International Covenant on Civil and Political Rights / g) Latvijas Vestnesis (Official Gazette), no. 95(3463), 20.06.2006 / h) CODICES (Latvian, English).**

#### Keywords of the systematic thesaurus:

##### 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.

1.6.3.1 Constitutional Justice – Effects – Effect erga omnes – **Stare decisis**.

4.6.9.2.1 Institutions – Executive bodies – The civil service – Reasons for exclusion – **Lustration**.

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

#### Keywords of the alphabetical index:

Lustration, secret service / State security, organ / Secret service, member, right to be elected / Loyalty, to democratic state.

#### Headnotes:

Restrictions on the passive electoral rights of members or former members of the regular staff of the USSR or the Latvian SSR, foreign state security, intelligence or counter-intelligence services, as well as those who, after 13 January 1991, had been active in CPSU (CP of Latvia), Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees comply with the Latvian Constitution and the International Covenant on Civil and Political Rights.

The principle of legal equality accommodates and sometimes even demands differing attitudes for people in differing circumstances. Such a differentiated attitude is necessary for those who decided to support Latvia in becoming an independent and democratic state. When the parliamentary draftsmen imposed restrictions on election rights for all former State Security Committee employees and did not allow for the possibility of

different treatment for those who helped to bring about Latvia's independence, they brought about equal treatment for persons in fundamentally different circumstances. There are no reasonable and objective grounds for such equal treatment.

**Summary:**

I. Under the Parliamentary Election Law and the City Council, District Council and Rural District Council Election Law, persons cannot be included in candidate lists and cannot stand as parliamentary candidates or in local elections if they:

1. belong or have belonged to the regular staff of the USSR, Latvian SSR or foreign state security, intelligence or counter-intelligence services;
2. played an active role after 13 January 1991 in the CPSU (Latvian Communist Party), Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees.

Two cases were joined for the purpose of these constitutional proceedings. Twenty members of parliament asked the Constitutional Court to decide whether the above-mentioned provisions were in accordance with various norms of higher legal force. Juris Bojars submitted a constitutional complaint on the conformity of restrictions in the parliamentary election law upon former regular staff of the USSR state security service.

This is the second time the compliance of these provisions has been challenged in the Constitutional Court. On 30 August 2000, the Constitutional Court handed down Judgment no. 2000-03-01 [LAT-2000-3-004], which held that the norms complied with Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR and Article 25 of the International Covenant on Civil and Political Rights.

II. The Court began by settling various procedural points, emphasising that it carries out its reviews by assessing the circumstances which exist at the time the matter is adjudicated. At this point and under certain defined circumstances, the claim is deemed to be "already adjudicated". New proceedings can only be launched if there is a fundamental change to the circumstances. Major changes resulted from the Law of 27 May 2004 "Amendments to the Law on Maintenance and Use of Documents of the Former State Security Committee and on the Stating of Facts about Persons' Collaboration with the State Security Committee". When the Constitutional Court handed down its Judgment on 30 August 2000, the applicable law was Section 17 of the KGB Documentation Law. It stated

that "once ten years have elapsed from the entry into force of this legislation, statements of the fact of collaboration with the KGB under the procedure established by Articles 14 and 15 of this law shall not be permitted and the possibility that someone may have collaborated with the KGB will not be used in legal proceedings involving this person". The amendments to the KGB Documentation Law extended the above term to twenty years.

Reference was made to the decision of the European Court of Human Rights Grand Chamber in "*Zdanoka v. Latvia*". The Constitutional Court established that restrictions on those who had played an active role after 13 January 1991 in CPSU (the Latvian Communist Party), the Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees were in line with the norms of higher judicial force. However, the Constitutional Court pointed out to the parliament several times that the necessity for such restrictions should be reviewed as a matter of urgency.

The Court went on to examine restrictions upon members or former members of the regular staff of the USSR, the Latvian SSR or the state security, intelligence or counter-intelligence services. It also looked at restrictions on former or existing employees of the current foreign state security, intelligence or counter-intelligence services. It held that restrictions on these categories of citizens were not at variance with norms of higher legal force.

Nonetheless, the Court emphasised to parliament that these restrictions needed to be reviewed as soon as possible. If they cannot be repealed, a procedure should be put in place which allows for exceptions for certain persons. Such a procedure must not jeopardise democratic values.

The Court also explained the significance of January 1991 as "decision time", when the people of Latvia chose where their respective allegiances lay. The point was made that those who fought for Latvia as an independent and democratic state, and those who opposed this could not be regarded as posing an equal danger to state security, territorial integrity and democracy.

The Court recognised that Mr J. Bojars, who had submitted the constitutional complaint, had contributed significantly to the renewal of democratic values in Latvia. In presenting Mr Bojars with the high State Order, the State acknowledged his proven loyalty to Latvia as an independent and democratic state. He is in a different situation from somebody who opposed Latvia's independence and should accordingly be treated differently.

The Court held that Section 5.5 and 5.6 of the Parliamentary Election Law and Section 9.1.5 and 9.1.6 of the City Council, Regional Council and Rural District Council Election Law complied with Articles 1, 9, 91 and 101 of the Constitution and with Articles 25 and 26 of the International Covenant on Civil and Political Rights.

It also held that with regard to the plaintiff in these proceedings, Juris Bojars, Section 5.5 of the Parliamentary Election Law and Section 9.1.6 of the City Council, Regional Council and Rural District Council Election Law are incompatible with Articles 1, 9, 91 and 101 of the Constitution and with Articles 25 and 26 of the International Covenant on Civil and Political Rights. They will lose their validity immediately the judgment is published.

#### Cross-references:

##### Constitutional Court:

- no. 2000-03-01, 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 3-4-1-7-02, Constitutional Review Chamber of the Supreme Court of Estonia, *Bulletin* 2002/2 [EST-2002-2-006];
- no. Pl. US 1/92, 26.11.1992, Czechoslovakia Constitutional Court, *Special Bulletin – Leading Cases* 1 [CZE-1992-S-002].

##### European Court of Human Rights:

- *Zdanoka v. Latvia* [GC], no. 58278/00, 16.03.2006];
- *Sidabras and Dziautas v. Lithuania*; nos. 55480/00 and 59330/00, 27.07.2004, 395, *Reports of Judgments and Decisions* 2004-VIII;
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, *Reports of Judgments and Decisions* 2002-VI.

#### Languages:

Latvian, English (translation by the Court).



#### Identification: LAT-2007-3-005

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 18.10.2007 /  
**e)** 2007-03-01 / **f)** On Compliance of the Words "for an

Unlimited Term" of Part 1 of Section 7 of the Constitutional Court Law with Articles 83, 91.1 and 101.1 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), no. 170 (3746), 23.10.2007 / **h)** CODICES (Latvian, English).

#### Keywords of the systematic thesaurus:

- 1.1.2.1 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Necessary qualifications**.
- 4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.
- 4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office**.
- 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.

#### Keywords of the alphabetical index:

Civil service, term of office, specific rights after expiration.

#### Headnotes:

Rights to fulfil civil service are not confined to those holding the office of a civil servant or a similar position in public administration. They also extend to those fulfilling public service in the position of a public prosecutor or a justice. Rights to fulfil civil service do not bestow a guaranteed right to occupy a certain position in the civil service.

The responsibility to present and justify the legitimate objective behind different treatment during Constitutional Court proceedings falls primarily upon the institution that has passed the contested act. This remains the case where Parliament has not indicated the legitimate objective of the different treatment.

The legitimate objective behind the necessity to impose certain requirements on those who put themselves forward for judicial office and the order according to which persons are admitted to judicial office is the right of other persons to a fair trial.

Article 83 of the Constitution states that judges are to be independent and subject only to the law. It also obliges the legislator to set out clear guidance, in legislation on the judicial system, for the development of judges' careers. The absence of such rules or a margin of appreciation for the executive power when deciding on the development of a judge's career may jeopardise the independence of judges.

#### Summary:

- I. The Ombudsman and a former Constitutional Court judge submitted an application contending a violation

not only of the right to hold a position in the civil service, (including the right to fulfil it in the position of a justice), and the principle of equality. Section 7.4 of the Constitutional Court Law guarantees the rights to the former position of a judge only for somebody who, under the Law on Judicial Power, has been appointed to judicial office for an unlimited term.

II. The Constitutional Court reiterated that rights to fulfil public service do not bestow guaranteed rights to occupy a certain position in the civil service. Article 101 of the Constitution provides in general for the rights of a person to continue fulfilling public service. The fact that the legislator has not put in place a special procedure for justices of the Constitutional Court to continue civil service once their term of office has expired does not per se violate the basic rights established in Article 101 of the Constitution.

The Constitutional Court noted that Section 7.4 of the Constitutional Court Law sets out different rules for continuation of civil service for justices of the Constitutional Court in the issue of legal policy. This falls within the competence of the legislator. Although the regulation of these issues might be useful, the absence of a separate regulation *per se* does not violate basic rights.

The establishment of a special order for the continuation of civil service for separate groups of persons is an issue for political determination by the legislator. Nonetheless, the legislator must observe the basic rights and general legal principles established in the Constitution, particularly, the principle of equality before the law.

The Constitutional Court examined the compliance of the contested provision with Article 91 of the Constitution, which guarantees equality of all persons. It found that there was a legitimate objective behind the necessity to impose certain requirements on those standing for judicial office and the order in which persons are appointed to the position of a justice, namely the rights of other persons to a fair trial. In order to justify the different treatment, the legitimate objective must comply with the principle of proportionality.

In order to establish whether the principle of proportionality had been observed, the Constitutional Court investigated whether the means selected by the legislator were appropriate for achieving the legitimate objective, whether methods that are more lenient existed of reaching it, and whether the legislator's actions were commensurate or proportionate. Noting the importance of the Constitutional Court as a constitutional institution and considering the applicant's situation, the Constitutional Court concluded that the means selected were not appropriate for the reaching the legitimate objective. Thus, the contested provision did not comply with Article 91 of the Constitution.

The Constitutional Court assessed whether the principle of judicial independence had been observed. Article 83 of the Constitution requires the legislator to set out clear guidance for the development of a judge's career in the laws on the judicial system. Absence of such order of freedom of action provided by institutions of the executive power when deciding on the development of a judge's career may jeopardise independence of judges. Since the legislator has not provided for an order of exercise of rights in the contested provision, it does not comply with Article 83 of the Constitution.

One judge submitted a dissenting application. He agreed that the Constitutional Court had to eliminate the violation of the rights of the former justice resulting from the application of the contested provision. However, he disagreed with several of the arguments and conclusions within the judgment.

#### Cross-references:

##### Constitutional Court:

- no. 2006-31-01, 14.06.2007;
- no. 2006-30-03, 02.05.2007;
- no. 2006-12-01, 20.12.2006;
- no. 2005-24-01, 11.04.2006;
- no. 2005-12-0103, 16.12.2005;
- no. 2005-02-0106, 14.09.2005;
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2004-04-01, 05.11.2004, *Bulletin* 2004/3 [LAT-2004-3-008];
- no. 2003-08-01, 06.10.2003, *Bulletin* 2003/3 [LAT-2003-3-010];
- no. 2002-15-01, 23.12.2002;
- no. 2002-06-01, 04.02.2003;
- no. 2001-12-02, 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2001-10-01, 05.03.2002;
- no. 2001-08-01, 17.01.2002; *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-06-03, 22.02.2002; *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2001-02-0106, 26.06.2001, *Bulletin* 2001/2 [LAT-2001-2-003];
- no. 2000-07-0409, 03.04.2001, *Bulletin* 2001/1 [LAT-2001-1-002];
- no. 2000-03-01, 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004].

##### Lithuanian Constitutional Court:

- no. 16/98, 21.12.1999, *Bulletin* 1999/3 [LTU-1999-3-014].

European Court of Human Rights:

- *Campbell and Fell v. The United Kingdom*, 28.06.1984, paragraph 78, *Special Bulletin – Leading cases ECHR* [ECH-1984-S-005];
- *Langborger v. Sweden*, 22.06.1989, paragraph 32;
- *Bryan v. The United Kingdom*, 22.11.1995, paragraph 37, *Bulletin 1995/3* [ECH-1995-3-022];
- *Coeme and others v. Belgium*, 22.06.2000, paragraph 120.

*Languages:*

Latvian, English (translation by the Court).



*Identification:* LAT-2008-3-005

- a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 05.11.2008 /  
**e)** 2008-04-01 / **f)** On Compliance of the second part of Section 441 of the Civil Procedure Law (insofar as it Concerns Decisions Regarding Imposition of a Fine as Procedural Sanction) with Article 92 of the Constitution /  
**g)** *Latvijas Vestnesis* (Official Gazette), no. 175(3959), 11.11.2008 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.

*Keywords of the alphabetical index:*

Fine / Sanction, nature / Economy, principle.

*Headnotes:*

A fair trial as a judicial procedure in a State governed by the rule of law comprises several mutually related rights.

Examination of a case pursuant to both appellate and cassation procedures is guided towards issues that are substantial for the adjudication of the relevant civil case. The provisions regarding the imposition of a fine as a procedural sanction, however, shall not be applied to

the dispute under consideration; neither can it affect the dispute. The decision as to the imposition of the above-mentioned fine or refusing to release somebody from the fine or to reduce the amount cannot serve as the subject of proceedings pursuant to appellate or cassation procedures.

*Summary:*

I. Under Article 92 of the Constitution, everyone has the right to defend his or her rights and lawful interests in a fair trial.

The provisions under dispute do not allow for appeal against a decision imposing a fine as procedural sanction. In the case in point, a person had failed to attend a court session. The applicant submitted a constitutional complaint holding that the contested provisions were a disproportionate restriction on the right to a fair trial.

II. The Constitutional Court concluded that Article 92 of the Constitution does not require provision to be made in every case for the possibility of an appeal to a higher instance court, if there have been proper court proceedings at the instance where the fine was imposed. The right to a fair trial means that the person has the right to be heard. The procedural law provides for the possibility to be heard and to submit evidence. According to the law somebody who has been given a fine may apply to the Court which imposed the fine to release him or her from the fine or reduce the amount. The Court is under an obligation to release a person from a fine imposed as a procedural sanction if he or she succeeds in submitting evidence that demonstrates that there were justified reasons for their non-attendance at a court session and lack of notice to that effect.

The Constitutional Court held that that the right to fair trial had been restricted, as the rights of the individual to be heard were only guaranteed once a fine had been imposed and executive procedure initiated. However, this restriction was permissible and proportionate.

The legitimate objective of the restriction included in the contested provision is to ensure an effective adjudication of a case in its terms, and to observe the principle of procedural economy by ensuring protection of the rights of other persons.

The fact that a fine as procedural sanction is imposed immediately and the person who avoids attending court immediately feels the negative consequences of the fine makes that fine an effective means for reaching a legitimate objective. Moreover, the benefit derived by society as a whole from the possibility of effective sanctions for parties to proceedings who have no valid excuse not to turn up to court and who do not give

notice of non-attendance will be demonstrated by a smaller workload for the judicial system and an increase in prestige. Moreover, those involved in the proceedings will be spared the necessity of attending several fruitless court hearings.

#### Cross-references:

Constitutional Court:

- no. 2001-10-01, 05.03.2002;
- no. 2001-17-0106, 20.06.2002; *Bulletin* 2002/2 [LAT-2002-2-006];
- no. 2003-04-01, 27.06.2003; *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2004-04-01, 05.11.2004; *Bulletin* 2004/3 [LAT-2004-3-008];
- no. 2004-10-01, 17.01.2005; *Bulletin* 2005/1 [LAT-2005-1-001];
- no. 2004-16-01, 04.01.2005;
- no. 2004-18-0106, 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-18-01, 14.03.2006;
- no. 2005-19-01, 22.12.2005;
- no. 2006-12-01, 20.12.2006; *Bulletin* 2006/3 [LAT-2006-3-006];
- no. 2007-03-01, 18.10.2007;
- no. 2007-22-01, 02.06.2007.

European Court of Human Rights:

- *Engel and Others v. the Netherlands*, 08.06.1976, paragraph 2;
- *Weber v. Switzerland*, 22.05.1990, paragraphs 31-34;
- *Ravnsborg v. Sweden*, 23.03.1994, paragraphs 30, 34, 35;
- *Putz v. Austria*, 22.02.1996, *Reports of Judgments and Decisions* 1996 I, paragraphs 31, 33, 34-37.

Other Constitutional Courts:

- no. StGH 1996/6; *Bulletin* 1996/3 [LIE-1996-3-002];
- Judgment of 19.05.1992, Federal Constitutional Court, Germany, *BVerfGE* 86, 133 <144>;
- Judgment of 11.09.1963, Federal Court, Switzerland, *Zbl.* 1964, S.216.

Languages:

Latvian, English (translation by the Court).



## Lithuania Constitutional Court

### Important decisions

*Identification:* LTU-2012-1-001

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 28.09.2011 / **e)** 21/2008 / **f)** On the State Family Policy Concept / **g)** *Valstybes Zinios* (Official Gazette), 118-5564, 30.09.2011 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

1.3.5.7 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-legislative regulations**.  
 1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules**.  
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

*Keywords of the alphabetical index:*

Family, concept / Marriage / Unmarried persons.

*Headnotes:*

The constitutional concept of family may not derive solely from the institution of marriage. It is based on mutual responsibility among family members, understanding, emotional affection, assistance and similar relations as well as a voluntary determination to assume certain rights and responsibilities, i.e., the content of relationships. The form of expression of these relationships, however, has no essential significance for the constitutional concept of family.

*Summary:*

I. The petitioner, a group of Member of Parliament (*Seimas*), requested the Constitutional Court to review the Resolution of the *Seimas* “On the Approval of the State Family Policy Concept” of 3 June 2008 (hereinafter, the “Concept”) to determine whether the definitions of family, harmonious family, extended family, and incomplete family comport with the Constitution.

II. The Constitutional Court stated that under the Concept, the family is directly tied to marriage; that is, the idea of family is based exclusively on marriage. Under the provisions of the Concept, a man and a woman who live together and may be raising children (adopted children) but are not married to each other are not regarded as a family. A man or a woman, who has not been married, with their child is not regarded as an incomplete family. A man and a woman who fulfil all the criteria of the harmonious family, multi-child family, family living through a crisis, or family at social risk, but who are not married to each other or a man or a woman raising children, but who has not been married, with their child, are not correspondingly regarded as a harmonious family, multi-child family, family living through a crisis, or family at social risk.

The Constitutional Court established that the constitutional concept of family may not be derived solely from the institution of marriage. The fact that the institution of marriage and family are entrenched in the same Article 38 of the Constitution indicates an inseparable and unquestionable relationship between marriage and family; marriage is one of the grounds of the constitutional institution of family to create family relations. It is a historically established family model that undoubtedly has an exceptional value in the life of society, which ensures the viability of the Nation and the state as well as their historical survival. However, this does not mean that, *inter alia*, the provisions of Article 38.1 of the Constitution does not protect and defend families other than those founded on the basis of marriage.

The state has a duty to establish legal regulation, by law and other legal acts, that would ensure the protection of the family as a constitutional value, which implies an obligation, *inter alia*, to create preconditions for a proper functioning of a family, strengthen family relations and defend the rights and legitimate interests of family members. It also implies an obligation to regulate family relations, such that there would be no preconditions to discriminate against certain participants of family relations (e.g., a man and a woman who live together without having registered their union as a marriage, their children, one of the parents who is raising a child). In the Concept, which was approved by its resolution, the Seimas consolidated the notions of family whereby only a man and a woman who are or were married as well as their children are regarded as a family. The notion of the family in the Concept created preconditions to establish legal regulation under which other family relations are not protected. Under the Concept, the life of a man and a woman who are not and were not married, as well as their children living together, even though their relation is based on permanent bonds of emotional affection, reciprocal understanding, responsibility, respect, shared

upbringing of the children and similar ones, as well as on the voluntary determination to take on certain rights and responsibilities, which are characteristic of the family as a constitutional institution, would nevertheless not be deemed a family.

Taking into account the arguments set forth, the Constitutional Court concluded that the Seimas, by establishing in the Concept, regarded the notion of family as only a man and a woman who are married or were married, as well as their children (adopted children). However, the narrowing of the content of the family as a constitutional institution did not observe the concept of the family as a constitutional value that stems from the Constitution, which may be founded on the basis of marriage and other family relations.

The Court also noted that the Concept is not intended to directly regulate family relations. The Concept provides for certain state family policy guidelines, its objectives, principles, course of actions and tasks, and sets forth a certain position of the Seimas regarding the formation of the state family policy. It also creates preconditions to correspondingly change as well as establish legal regulation in the field of family policy. The Concept, which lays down certain guidelines of the formation and main directions of family policy, may provide some notions that help to disclose the aims and objectives of the law-making subject who adopted that Concept. The Seimas, when establishing the state family policy guidelines, its objectives, principles, course of actions and tasks, may define how, in the context of the Concept, the family is to be understood because this is necessary to develop the future state family policy.

III. This decision had one dissident opinion in which one judge disagreed with the argumentation of the Court, mostly in the field of construing the constitutional concept of family.

#### *Supplementary information:*

The judgment prompted wide discussion amongst law writers as well as society as a whole. It also led to initiatives in Parliament to change the Constitution (process currently started, but not completed yet).

#### *Cross-references:*

European Court of Human Rights:

- *Kroon and Others v. the Netherlands*, 27.10.1994, Vol. 297-C, Series A; *Bulletin* 1994/3 [ECH-1994-3-016];
- *Keegan v. Ireland*, 26-05-1994, Vol. 290, Series A; *Bulletin* 1994/2 [ECH-1994-2-008].

### Constitutional Courts:

- Federal Constitutional Court of Germany, nos. 1 BvL 1/04 and 1 BvL 12/04, 18.07.2006, *Bulletin* 2007/1 [GER-2007-1-002];
- Constitutional Court of Slovenia, no. U-I-71/98, 28.05.1998, *Bulletin* 1998/2 [SLO-1998-2-007];
- Constitutional Court of Croatia, no. U-X-1457/2007, 18.04.2007, *Bulletin* 2007/2 [CRO-2007-2-007];
- Constitutional Court of Hungary, no. 154/2008, 17.12.2008, *Bulletin* 2008/3 [HUN-2008-3-009];
- Constitutional Court of the Czech Republic, no. II. US 568/06, 20.02.2007, *Bulletin* 2007/1 [CZE-2007-1-002].

### Languages:

Lithuanian, English (translation by the Court).



### Identification: LTU-2008-3-004

- a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 01.10.2008 / **e)** 26/08 / **f)** On elections to the parliament (*Seimas*) / **g)** *Valstybes Zinios* (Official Gazette), 114-4367, 04.10.2008 / **h)** CODICES (English, Lithuanian).

### Keywords of the systematic thesaurus:

- 1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**
- 3.3.1 General Principles – Democracy – **Representative democracy.**
- 4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**
- 4.5.10.3 Institutions – Legislative bodies – Political parties – **Role.**
- 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
- 4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**
- 5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

### Keywords of the alphabetical index:

- Election, parliamentary / Election, candidate, condition / Election, candidate, requirements / Electoral rights / Electoral system.

### Headnotes:

Legislation must not be enacted that would result in somebody wishing to avail himself or herself of his or her passive electoral rights in the election of members of parliament being compelled to become a member of or to become linked to any political party other than by way of formal membership. The system for electing members of parliament whereby candidates recorded in the lists of political parties and individual candidates nominated by political parties compete for mandates for election to parliament is possible provided that citizens who are not recorded in the lists of political parties or who are not nominated by them are guaranteed the chance to participate in parliamentary elections.

### Summary:

The petitioner, the Supreme Administrative Court, requested an assessment of the constitutional compliance of Article 37.1 of the Law on Elections to the parliament (*Seimas*). The petitioner had concerns over its provision that candidates for election to the parliament may only be nominated in the multi-member constituency by a party which has been registered in accordance with the Law on Political Parties and which meets the requirements regarding the number of party members, laid down in the Law on Political Parties, in that it might run counter to Articles 34.1, 35.2 and 55.1 of the Constitution.

The Supreme Administrative Court of Lithuania, the petitioner, suggested that this particular legal regulation, under which only political parties have the right to nominate candidates for members of the parliament in the multi-member constituency violates the democratic principles of universal, equal and direct suffrage, since those citizens who do not belong to a political party may nominate candidates for election to parliament only in single-member constituencies.

The Constitutional Court noted that the Constitution does not establish a concrete system of parliamentary election. Article 55.3 of the Constitution leaves the legislator with a wide discretion in this regard. Neither proportional, majority nor a mixed electoral system combining proportional and majority electoral systems may be regarded as themselves creating the preconditions to violate the requirements of free and democratic elections, universal and equal suffrage, secret ballot and other standards for elections in a democratic state under the rule of law.

The Constitutional Court stressed that the establishment of political parties and their activities are inseparable from seeking public power, and therefore also from participation in elections to the representative

institutions of public power, including the parliament. The Constitution does not allow for the establishment of any legal regulation which would prevent political parties and their nominated candidates from participating in parliamentary elections. It also prevents any legislation being enacted which would compel somebody wishing to avail him or herself of passive electoral rights in parliamentary elections to join or to become involved with any political party other than through formal membership. A system of election of members of parliament whereby candidates recorded in the lists of political parties and individual candidates nominated by political parties compete for mandates for election as members of parliament is possible provided that citizens who are not recorded in the lists of political parties and who are not nominated by them are guaranteed the chance to participate in parliamentary elections.

It was noted in the ruling that the legislator established a mixed electoral system for parliamentary elections, whereby seventy members of the parliament are elected in the multi-member constituency according to the proportional system, drawn only from those candidates included in the lists of political parties. Seventy-one members of the parliament are elected according to the majority system in single-member constituencies, where citizens may nominate themselves as candidates provided they meet the requirements of the passive electoral right established in the Law on Elections to the parliament; they do not have to be put forward by a political party. Therefore, in terms of the legal regulation enshrined in Article 37.1 of the Law on Elections to the parliament, a citizen seeking election to the parliament who is not directly or indirectly bound to any party, and who meets the requirements of the law, is not deprived of the opportunity to nominate himself or herself as a candidate.

The Constitutional Court held that the disputed provision of the Law on Elections to the parliament did not contravene the Constitution.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification: LTU-2012-1-002*

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 25.10.2011 / **e)** 36/2010-37/2010-38/2010-39/2010-41/2010-42/2010-43/2010 62/2010-63/2010-64/20 10-65/2010-66/2010-67/2010-68/2010-69/2010-71/20 10-72/2010-74/2010-75/2010-78/2010-79/2010-80/20 10-91/2010-92/2010-93/2010-103/2010-104/20 10-105/2010-108/2010-3/2011 / **f)** On the consequences of recognition of a legal act as being in conflict with the Constitution / **g)** Valstybes Zinios (Official Gazette), 129-6116, 27.10.2011 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

- 1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc)**.
- 1.6.5.3 Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect**.
- 1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect**.
- 1.6.9 Constitutional Justice – Effects – **Consequences for other cases**.

#### *Keywords of the alphabetical index:*

Retroactivity.

#### *Headnotes:*

Article 107.1 of the Constitution stipulates that a law may not be applied from the day of official promulgation of the Constitutional Court's decision that the act in question (or part thereof) conflicts with the Constitution. No obligation arises for the legislator to provide for a legal regulation establishing that the unconstitutional act is invalid from its entry into force.

#### *Summary:*

I. The petitioner, the Vilnius Regional Administrative Court, requested the Constitutional Court to review the constitutionality of Article 72 of the Law on the Constitutional Court, insofar as it does not establish that a legal act recognised as being in conflict with the Constitution becomes invalid from its entry into force; and Article 72.4 of the Law on the Constitutional Court, insofar as it does not explicitly establish what types of decisions are entrenched in the formulations "decisions <...> must not be executed" and "if they had not been executed". The petitioner doubted whether the Law on the Constitutional Court and other legal acts include such legal regulation, for which it would be possible to establish exceptions to the general rule whereby Constitutional Court rulings are effective only prospectively.

II. The general rule entrenched in Article 107.1 of the Constitution, whereby the power of Constitutional Court decisions regarding the compliance of legal acts with the Constitution is prospective, is not absolute. The Constitutional Court established that Article 67.1 of the Law on the Constitutional Court prescribes that provided there are grounds to believe a law or other legal act that should be applied in a concrete case actually conflicts with the Constitution, the court (judge) shall suspend the consideration of the case, take into account the Constitutional Court's competence, and request it to review the constitutionality of the law or other legal act in question. Thus, Article 67.1 of the Law on the Constitutional Court provides for one of the exceptions to the prospective power of Constitutional Court rulings, which the petitioner contends is not the case, even though it should have been provided for in Article 72 of the Law on the Constitutional Court. Consequently, contrary to what is being maintained by the petitioner, from Article 107.1 of the Constitution, the legislator is not obligated to provide in Article 72 of the Law on the Constitutional Court for a legal regulation establishing that a legal act recognised as being in conflict with the Constitution is invalid from its entry into force.

From Article 107.1 of the Constitution, which implements the general rule that the power of Constitutional Court decisions is prospective, no obligation arises for the legislator to establish the legal regulation under which the power of Constitutional Court decisions regarding the compliance of legal acts with the Constitution is directed retroactively rather than prospectively.

Taking into account the arguments set forth, the Constitutional Court held that Article 72 of the Law on the Constitutional Court insofar as it does not establish that a legal act recognised as being in conflict with the Constitution is invalid from its entry into force, is not in conflict with the Constitution.

Since the part of the petitioner's request to investigate the regulation established in Article 72.4 of the Law on the Constitutional Court raises questions concerning application of legal acts, the Court dismissed the request to review whether the said article explicitly establishes what types of decisions are entrenched in the formulations "decisions <...> must not be executed" and "if they had not been executed". The reason is that the Court determined that it does not conflict with Article 7.2 of the Constitution, Article 107.1 of the Constitution and the constitutional principle of a state under the rule of law.

III. This decision had one dissent opinion in which one judge disagreed with the argumentation and raised some questions that should be answered by the Constitutional Court.

*Cross-references:*

Constitutional Court of Latvia:

- no. 2009-43-01, 21.12.2009, *Bulletin* 2009/3 [LAT-2009-3-005].

*Languages:*

Lithuanian, English (translation by the Court).



# Mexico

## Electoral Court of the Federal Judiciary

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### Important decisions

*Identification:* MEX-2010-3-023

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 28.02.2007 / **e)** SUP-JDC-20/2007 / **f)** Enfranchisement of Mexican prisoners / **g)** Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.2 Fundamental Rights – **Equality.**

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

*Keywords of the alphabetical index:*

Election, prisoner, vote, prohibition / Imprisonment, disenfranchisement.

*Headnotes:*

The regime of parole does not imply imprisonment; therefore, it should not lead to the disenfranchisement of citizens under Article 38.II of the Federal Constitution.

*Summary:*

I. On 14 September 2006, Mr Omar Hernández Caballero (the appellant) was granted the regime of parole which, according to Article 196 of the Organic Law of the Judiciary of the State of Mexico (federal entity where the appellant was convicted), has the purpose of the social reinstatement of the individual. Nonetheless, on 6 December 2006, the Federal Electoral Registry denied the issuance of the voter identification card to Mr Hernández Caballero, considering that he was a disenfranchised felon.

II. In an opinion presented by Electoral Justice Salvador Nava Gomar, the Court points out that it is important to note that under Article 38.III and 38.IV of the Federal Constitution, citizens are disenfranchised when imprisoned or if a judicial sentence specifically determines the suspension of political rights as a punishment. In the case in question, the appellant was disenfranchised as a direct and necessary consequence of serving time in prison. However, as stated in Article 43 of the Penal Code of the State of Mexico, the suspension of rights as a necessary consequence of another sanction starts and ends with the punishment that caused the disenfranchise-ment. Therefore, even though imprison-ment carries as a consequence the suspension of political rights, as soon as the time or cause of suspension ends, rehabilitation of the individual should operate without the need of a specific judicial declaration.

The International Covenant on Civil and Political Rights, which is binding for Mexico, establishes that every citizen should be able to take part in the conduct of public affairs, should have the right to vote and be elected, and have access, on general terms of equality, to public service in his or her country (Article 25). Any restriction to these prerogatives should be reasonable and not impair their effectiveness.

The decision also considered the importance of Article 9.1 of the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), which states that the competent authority has to have at its disposal a wide range of post-sentencing alternatives in order to assist offenders in their early reintegration into society.

Consequently, the electoral justices of the Court unanimously determined that, as soon as Mr Hernández Caballero concluded his term in prison and entered into a regime of parole, he had to begin his reinstatement in society. Therefore, the Court ordered the Federal Electoral Registry to allow the voter identification card of the appellant to be issued, guaranteeing his right to vote. This credential is a necessary document, not only to vote in elections, but also to realise different administrative, banking and professional processes. The possibility of being able to practice these activities is clearly linked to the reinstatement of ex-felons to society.

*Cross-references:*

- no. 187/2005, 06.02.2006, Court of Arbitration of Belgium *Bulletin* 2005/3 [BEL-2005-3-018];
- *Hirst v. United Kingdom* (no. 2) [GC], no. 74025/01, 06.10.2005, *Reports of Judgments and Decisions* 2005-IX;
- *Sauvé v. Canada (Chief Electoral Officer)*. 3 S.C.R. 519, 2002 SCC 68. Docket: 27677, 31.10.2002.

*Languages:*

Spanish.



*Identification:* MEX-2010-3-025

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 06.07.2007 / **e)** SUP-JDC-695/2007 / **f)** Challenges regarding interpretation according to the Constitution / **g)** Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

*Keywords of the alphabetical index:*

Election, constitutional requirements / Treaty, ratification / *Dubio pro libertate*, principle / *Dubio pro homine*, principle.

*Headnotes:*

According to Article 133 of the Federal Constitution, international treaties that are signed by the Executive and ratified by the Senate are considered Supreme Law of the Union, as well as laws issued by Congress and the Constitution itself.

When international treaties broaden the application of fundamental rights established in the legal system, all legal provisions have to be harmonised and apply the norms which are most favourable to liberties. To maximise fundamental rights, it is important to apply the principle in *dubio pro libertate* or in *dubio pro homine*.

*Summary:*

I. Article 42 of the local Constitution of the Mexican state of Baja California establishes that members of the federal or local Congress, municipal presidents and other representatives of local government cannot be elected as state governors, even if they give up office. Nonetheless, Article 41.VI of the same local Constitution states that to be state governor it is necessary that candidates are not employed in the federal, local or municipal government, unless they provisionally renounce their office 90 days before the election.

Notwithstanding the provisions of Article 42 of the local Constitution, the municipal president of Tijuana, Baja California, from 1 December 2004 to 30 November 2007, Mr Jorge Hank Rhon, presented himself as a candidate for the governor election of the aforementioned Mexican state to be held on 5 August 2007. The local Electoral Institute granted Mr Hank Rhon registration as candidate, but this was contested by an opposing coalition in the local Electoral Court. This Court revoked his registration and he filed Proceedings for the Protection of the Political and Electoral Rights of Citizens before the High Chamber of the Electoral Court of the Federal Judiciary of Mexico.

II. In the decision, presented by Electoral Justice Pedro Esteban Penagos López, the Court stated that, considering that Article 42 of the Baja California Constitution prohibits municipal presidents in office to be candidates in governor elections and that Article 41.VI provides the possibility to be registered as candidate if the officer in question provisionally gives up office 90 days before election, the Electoral Justices of the Court had to interpret the law as set out by Article 2 of the Law of Electoral Dispute Resolution.

Therefore, the Electoral Justices recognised that, according to Article 133 of the Federal Constitution, international treaties that are signed by the Executive and ratified by the Senate are part of the legal system of our country. Article 23 of the American Convention on Human Rights (Pact of San José) establishes that every citizen has the right to vote and to be elected and that law may regulate the exercise of these prerogatives *only* on the basis of "age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings." This provision is in accordance with the criteria of the Supreme Court of Justice of Mexico, which states that limitations to political-electoral rights of citizens are only justified when the circumstance or situation is inherent in the person himself or herself (i.e. age, nationality, mental capacity, etc.).

The Electoral Court of the Federal Judiciary gave preeminence to the interpretation of Article 41.VI over Article 42 of the local Constitution, quashed the decision of the local Electoral Court and allowed Mr Hank Rhon the possibility of registration as candidate. This decision tried to maximise the fundamental right of being elected in genuine regular elections.

III. There was one concurring vote elaborated by Electoral Justice Salvador Nava Gomar.

#### Cross-references:

Constitutional Court of Albania:

- no. 186, 23.09.2002, *Bulletin* 2002/3 [ALB-2002-3-007].

#### Languages:

Spanish.



*Identification:* MEX-2010-3-026

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 01.11.2007 / **e)** SUP-JRC-375/2007 / **f)** Investigation powers of election management bodies and freedom of expression / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary Mexico* / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969**.

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

#### Keywords of the alphabetical index:

Election, campaign, media, defamation / Election, campaign, defamation, facts, establishment.

#### Headnotes:

Election management authorities should be able to initiate summary administrative proceedings in order to determine the truth of facts and establish whether audiovisual advertising is contrary to the electoral guiding principles in such matters.

Freedom of expression should not lead to defamation.

#### Summary:

I. An electoral process to elect local representatives in the state of Tamaulipas, Mexico, began on 1 April 2007. On 20 September 2007, the National Action Party (PAN) presented a complaint before the Electoral Council of the Electoral Institute of Tamaulipas (local election management body) against the Revolutionary Institutional Party (PRI). On October 2007 the Electoral Council ruled that the complaint was unfounded because it was not possible to determine that PRI had prepared an election advertisement that contained defamatory messages against PAN, or that it was broadcast on television following PRI's instructions. The local Electoral Court confirmed this decision; PAN took the case to the last instance: the Electoral Court of the Federal Judiciary of Mexico.

PAN argued that when they presented the complaint before the local election management body, regarding the alleged violations to the electoral law, the Electoral Council had the obligation to initiate an exhaustive investigation to find out who had participated in or ordered the preparation and transmission of the election advertisement. If these actions were indeed contrary to the electoral guiding principles, the electoral authority should have taken the necessary measures to avoid their pernicious effects, impose the appropriate sanctions and, as a consequence, set up the corresponding administrative dispute resolution procedure.

II. In the opinion presented by Electoral Justice Flavio Galván Rivera, the High Chamber of the Electoral Court unanimously ruled in favour of the National Action Party. The decision considered that the local election management body did not take the measures in their power which were necessary for following up on the requirements imposed on the corresponding television broadcasting companies – TELEAZTECA, S.A. de C.V. and TELEVISA NORESTE, S.A. de C.V. – to provide answers about the broadcasting of the aforementioned election advertisement.

In addition, the Court considered -after analysing the contents and images of the election advertisement in question- that this kind of electoral advertising infringed the provisions of Articles 60.II, 60.VII, 138.4 and 142 of the Electoral Code of the State of Tamaulipas. According to the decision, the advertisement or video (called *Transformers* because of its type of images and contents) was clearly identified with the intention to favour a determined political option, presenting it to the electorate as the only viable choice. Moreover, the election advertisement contained messages like "defend yourself against the threat", "punish the enemy, destroy it and live in peace with your family; it's your prerogative", contents that were considered violent and defamatory and which did not contribute to the formation of the opinion of the electorate in a democratic context.

Therefore, as recognised in Article 19 of the International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights (both binding on Mexico), everyone has the right of freedom of thought and expression, which can be subject to restrictions such as the respect of the rights and reputation of others. As established in Jurisprudence 14/2007 of the High Chamber of the Electoral Court of the Federal Judiciary, the protection of honour and reputation during an electoral process is justified, as these are fundamental rights that are recognised in the exercise of freedom of expression.

#### Cross-references:

High Court of Justice (Supreme Court) of Israel:

- no. 5432/03, 03.03.2004, *Bulletin* 2006/2 [ISR-2006-2-002].

Constitutional Court of Bosnia and Herzegovina:

- no. AP-1005/04, 02.12.2005, *Bulletin* 2005/3 [BIH-2005-3-005].

#### Languages:

Spanish.



#### *Identification: MEX-2011-1-003*

**a)** Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 06.06.2007 / **e)** SUP-JDC-11/2007 / **f)** Tanetze Case / **g)** Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico / **h)** CODICES (Spanish).

#### *Keywords of the systematic thesaurus:*

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

5.3.41.6 Fundamental Rights – Civil and political rights – Electoral rights – **Frequency and regularity of elections**.

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

#### *Keywords of the alphabetical index:*

Election campaign, media coverage / Defamation, press / Right to reply.

#### *Headnotes:*

Petitions by indigenous groups which have been inappropriately filed with the Electoral Court of the Federal Judiciary in terms of the legal remedy selected and with various deficiencies of claim should not be set aside but should instead be channeled to the appropriate legal remedy and the deficiencies made up.

The suspension of elections on the basis that they would threaten the public peace if they went ahead must be correctly founded.

#### *Summary:*

I. In 2002, the legislature of the state of Oaxaca declared the disappearance of public powers in the municipality of Tanetze de Zaragoza (Tanetze). In December 2006, the General Council of the Electoral

Institute of Oaxaca issued an agreement to the effect that elections for the Council of the municipality of Tanetze would endanger public peace. The state Legislature ratified this agreement by issuing Decree no. 365 which enabled the Governor to designate a new administrator for Tanetze.

On 1 January 2007 a group of citizens from Tanetze filed a claim with the Electoral Court of the Federal Judiciary, seeking to instruct the General Council of the Electoral Institute of Oaxaca to arrange elections in order to democratically elect their local authorities.

II. In the opinion presented by Electoral Justice José Alejandro Luna Ramos, the High Chamber resolved to channel the claim into a trial in order to protect the citizens'political/electoral rights and to make a supplementary complaint to compensate for the deficiencies in the claim. It accordingly decided to revoke Decree no. 365, to instruct the Legislature of the State of Oaxaca to issue a properly founded decree, and to instruct the General Council of the State Electoral Institute of Oaxaca to take the necessary, adequate and appropriate steps to assess the possibility of arranging the elections for Council.

This is an emblematic case, which demonstrates the judicial compromise in actively protecting the political and electoral rights of indigenous groups by minimising the constraints of the formalities of law by means of a supplementary complaint, compensating for the deficiencies in the original claim. This derives from an implementation of Article 17 of the Federal Constitution, which protects both the right to effective access of justice and the right to an effective remedy and fair trial, as well as from the application of Article 2, which protects the right to self-determination of indigenous groups.

#### Cross-references:

- *Bulletin* 2005/3 [HUN-2005-3-004].

#### Languages:

Spanish.



*Identification:* MEX-2011-1-004

**a) Mexico / b) Electoral Court of the Federal Judiciary / c) High Chamber / d) 20.06.2007 / e) SUP-JDC-85/2007 / f) Presumption of innocence and the right to vote: the Pedraza case / g) Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico / h) CODICES (Spanish).**

#### Keywords of the systematic thesaurus:

- 1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**
- 3.3.1 General Principles – Democracy – **Representative democracy.**
- 4.6.9.2 Institutions – Executive bodies – The civil service – **Reasons for exclusion.**
- 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.2 Fundamental Rights – **Equality.**
- 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

#### Keywords of the alphabetical index:

Constitutional review, restricted / Election, proportional representation.

#### Headnotes:

Under Article 38.II of the Federal Constitution, a citizen's political and electoral rights are suspended when he or she becomes subject to criminal proceedings potentially leading to imprisonment, when the arrest warrant is issued.

Nonetheless, the Mexican State practices the principle of presumption of innocence and the Constitution itself grants this right. Therefore, in such cases, unless an alleged offender is actually incarcerated or a judicial sentence specifically determines the suspension of political rights as a punishment (Article 38.III and 38.VI), he or she should not be disenfranchised.

#### Summary:

- I. On 11 December 2006, Mr José Gregorio Pedraza went to the corresponding electoral authority to arrange his inscription on the electoral register and the expedition of his voter I.D. card. The electoral authority

determined that Mr Pedraza's request was inadmissible because he was subject to criminal proceedings, and so he was disenfranchised under Article 38.II of the Federal Constitution.

II. Mr Pedraza challenged this decision in the Electoral Court through a Proceeding for the Protection of the Political and Electoral Rights of Citizens. The Electoral Court ruled that the relevant election management body should have included him in the electoral register and sent him his voter I.D. card.

The opinion was presented by Chief Electoral Justice María del Carmen Alanis Figueroa. The decision was based on the fact that the applicant's political rights should not have been suspended, as he was on bail or temporary release. The Electoral Court considered Article 25 of the International Covenant on Civil and Political Rights (hereinafter, the "ICCPR"), which establishes that every citizen should be able to participate in the conduct of public affairs, should have the right to vote and be elected, and have access, on general terms of equality, to public service in his or her country. Any restriction to these prerogatives should be reasonable and not impair their effectiveness. In addition, General Comment 25.14 ICCPR states that "persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote."

The Electoral Court also considered, *inter alia*, the Supreme Court's thesis P. XXXV/2002 which establishes that the presumption of innocence is a principle which is implicitly contained within the Federal Constitution. Thus, Article 14.2 of the Constitution states that no one can be deprived of their liberty or rights, unless a judicial sentence specifically stipulates it. Moreover, it clearly derives from Articles 21 and 102.A of the Federal Constitution, that convicted persons are not obliged to prove the legality of their actions, as they have no responsibility to prove his innocence. It is the Public Prosecution Office of the Federation which has the duty to request arrest warrants against those suspected of crimes and to procure and submit evidence to prove their liability.

The interpretation of the Court tried to give pre-eminence to the fundamental rights of citizens rather than limiting them, striving towards the principle *in dubio pro reo*.

#### Cross-references:

- no. 2002-18-01, 06.03.2003, Constitutional Court of Latvia, *Bulletin* 2003/1 [LAT-2003-1-003];
- no. SUP-JDC-20/2007, 28.02.2007, Judgment of the Electoral Court of the Federal Judiciary of Mexico, *Bulletin* 2010/3 [MEX-2010-3-001].

#### Languages:

Spanish.



*Identification: MEX-2011-1-005*

**a) Mexico / b) Electoral Court of the Federal Judiciary / c) High Chamber / d) 26.06.2009 / e) SUP-RAP-175/2009 / f) The right to reply: media and electoral matters / g) Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico / h) CODICES (Spanish).**

#### Keywords of the systematic thesaurus:

- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
- 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
- 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

#### Keywords of the alphabetical index:

Election campaign, media coverage / Defamation, press / Right to reply.

#### Headnotes:

Under Article 233.3 of the Federal Electoral Code of Mexico, political parties, pre-candidates and candidates have the right to reply (as established in Article 6 of the Mexican Constitution) if information presented in the media allegedly distorts facts or situations related to their activities.

#### Summary:

I. On June 2009, the Party of the Democratic Revolution and Mr Alberto Picasso Barroel, candidate for Congress of the 8<sup>th</sup> Federal Electoral District (state of Nuevo León), challenged the decision of the Federal Electoral Institute which had denied the right to reply of the applicants, who alleged that *El Norte* (a newspaper) had violated the above prerogative by distorting certain facts about their activities.

II. The Electoral Court's opinion was presented by Electoral Justice Manuel González Oropeza. Through its appellate jurisdiction, the Electoral Court of the Federal Judiciary considered that the demand was legally founded on the basis of Article 6 of the Constitution and Article 233.3 of the Federal Electoral Code, which allow political parties and candidates to exercise the right to reply when they may have cause to allege distortion of facts or situations, related to their activities, by the media.

The newspaper report referred to a candidate for the federal Congress and to the political party supporting him, and was issued during the election campaign period. The right to reply in electoral matters becomes a political right in such situations, and is related to the right to accurate information. This prerogative is of high significance, as the electorate needs access to accurate information for its decision-making during elections and because it is directly connected to the right to respect for one's honor and reputation.

The Electoral Court accordingly held that the applicants should have had a right to reply to questions published by the above newspaper, through special administrative procedure. *El Norte* had reported the following erroneous matters:

1. That Mr Alberto Picasso had been expelled from the Autonomous University of Nuevo León because he had a false academic degree.
2. That he was a candidate of the Party of the Democratic Revolution of the 9<sup>th</sup> Federal Electoral District (rather than the 8<sup>th</sup>).

Through this decision, the Electoral Court of Mexico was not only trying to protect the applicants'right to dignity, but also to safeguard democratic principles allowing voters to access accurate information about candidates and avoiding defamatory practices.

The Justices of the Court also considered that cases involving the right to reply in electoral matters should be resolved quickly and expeditiously. If this right is exercised long after the disclosure of incorrect information, it does not have the same effect on the electorate. Consequently, when the right to reply in electoral matters may have been breached, the administrative special procedure should be privileged in order to guarantee an expeditious due process.

#### Cross-references:

Constitutional Court of Serbia:

- no. 79/2010, 15.07.2010 *Bulletin* 2010/3 [SRB-2010-3-009].

#### Languages:

Spanish.



#### Identification: MEX-2012-1-002

**a) Mexico / b) Electoral Court of the Federal Judiciary / c) High Chamber / d) 09.03.2011 / e) SUP-JRC-028/2011 / f) / g) Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico / h) CODICES (Spanish).**

#### Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies**.

3.13 General Principles – **Legality**.

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press**.

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation**.

#### Keywords of the alphabetical index:

Reply, right / Censorship, prior.

#### Headnotes:

The right of reply protected by Article 6 of the Constitution cannot be restricted to allow for prior censorship or any further limitations not established by the Constitution. Although a state or local Electoral Institute can issue guidelines to protect and enforce the right of reply, these should not impose additional

restrictions, at the risk of being revoked due to their unconstitutionality.

#### *Summary:*

I. On 16 January 2011 a local newspaper published an article titled “Aguirre lies again” referring to Angel Aguirre, a candidate of a coalition named “Guerrero Unites Us” (hereinafter, the “Coalition”) for governor of the State of Guerrero. That day the Coalition filed a request before the Electoral Institute of the State of Guerrero (hereinafter, the “Institute”) in order to invoke the right to reply in accordance with Article 203 of the Law of Electoral Institutions and Procedures of the State of Guerrero (hereinafter, “State Electoral Law”). On 20 January 2011 the Institute issued Guidelines to Guarantee and Enforce the Right of Reply (hereinafter, the “Guidelines”). On 23 January 2011 the Coalition initiated a trial of constitutional electoral review against the Guidelines, which was referred on 25 January 2011 to the Electoral Court of the Federal Judiciary. The Coalition argued that the Guidelines contravened Article 6 of the Constitution as well as the Law on Printing Offenses.

II. In order to properly address the constitutionality of the Guidelines, the Electoral Court first analysed questions related to the freedom expression, specifically pertaining to the right of reply and prior censorship. To that end, the Court considered relevant criteria established by international instruments such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. In addition, the Court’s analysis of the interplay of the right of reply and prior censorship drew upon the case-law of the European Court of Human Rights and the Inter-American Court of Human Rights, as well as case-law of the Constitutional Court of Spain. In addition, the Electoral Court considered the interpretation provided by the Supreme Court of Justice of the prohibition of prior censorship, which implies that the State cannot submit expressive or communicative activities of individuals to a permission granted by the authority in advance since it enables the authority to deny it for reasons of content.

All things considered, the Electoral Court concluded that restrictions on the exercise of the right of reply, which is guaranteed by Article 6 of the Constitution, have to be in accordance with the cases and conditions envisaged in Article 1 of the Constitution. Thus, although the Electoral Court recognised the competence of the Institute to issue the Guidelines, in its current version the Guidelines were proven unconstitutional inasmuch as they imposed more restrictions than Article 6 Constitution and Article 203 of State Electoral Law contemplated. Moreover, the

Electoral Court concluded that it did not need to examine whether the Guidelines complied with the Law on Printing Offenses, since the unconstitutionality of the Guidelines had already been established. Consequently, the Electoral Court revoked the Guidelines.

III. Electoral Justice Flavio Galván Rivera issued a dissenting opinion as he considered that the trial of constitutional electoral review before the Electoral Court of the Federal Judiciary was not the adequate legal recourse to challenge the Guidelines. Electoral Justice Galván Rivera was of the view that the claim should have been referred as an appeal to the State Electoral Court of Guerrero.

Electoral Justice Manuel González Oropeza issued a concurring opinion due to the fact that he considered that both the Electoral Court of the Federal Judiciary and the State Electoral Court of Guerrero are competent to solve the claim, since the State Electoral Courts can judge on matters of constitutionality and legality.

#### *Supplementary information:*

Project presented by: Electoral Justice María del Carmen Alanis Figueroa.

#### *Cross-references:*

- *Bulletin* 1999/3 [ESP-1999-3-023];
- *Bulletin* 1998/1 [ECH-1998-1-003];
- *Special Bulletin – Leading cases ECHR* [ECH-1991-S-004];
- Inter-American Court of Human Rights, “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) v. Chile, 05.02.2001;
- Inter-American Court of Human Rights, *Ricardo Canese v. Paraguay*, 31.08. 2004;
- *Gaweda v. Poland*, no. 26229/95, 14.03.2002, European Court of Human Rights (Former Section I).

#### *Languages:*

Spanish.



## *Identification: MEX-2012-1-005*

**a) Mexico / b) Electoral Court of the Federal Judiciary / c) High Chamber / d) 23.11.2011 / e) SUP-JRC-292/2011 / f) / g) Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico / h) CODICES (Spanish).**

### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.1.3.2.3 Sources – Categories – Case-law – International case-law – **Other international bodies.**

#### **3.13 General Principles – Legality.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

### *Keywords of the alphabetical index:*

Reply, right / Censorship, prior.

### *Headnotes:*

The right of reply protected by Article 6 of the Constitution cannot be differentiated amongst individuals on the basis of their respective roles in electoral matters. Requiring that the right of reply should be first sought from the organ of the mass media that presented the message that affected the rights of the petitioner does not constitute a form of prior censorship.

### *Summary:*

I. On 9 March 2011 the High Chamber of the Electoral Court of the Federal Judiciary (hereinafter, the "Electoral Court") revoked the Guidelines to Guarantee and Enforce the Right of Reply (hereinafter, the

"Guidelines") issued by the Electoral Institute of the State of Guerrero (hereinafter, the "Institute"). In compliance with the decision of the Electoral Court, on 29 September 2011 the Institute issued a new version of the Guidelines. On 5 October 2011 the Party of the Democratic Revolution (hereinafter, the "PRD") appealed the new version of the Guidelines before the Electoral Court of the State of Guerrero (hereinafter, the "State Electoral Court"). The State Electoral Court found the appeal partially substantiated.

However, the PRD challenged the decisions of the State Electoral Court and filed an action for constitutional electoral review before the Regional Chamber of the Electoral Court. On 17 November 2011 the High Chamber asserted jurisdiction of the constitutional electoral review. In the complaint, the PRD contended that the State Electoral Court's decision unlawfully confirmed the Guidelines in that it excluded citizens, pre-candidates and leaders of political parties from exercising their right of reply in electoral matters, which contravenes Article 6 of the Constitution. The PRD also argued that the Guidelines favoured prior censorship inasmuch as they require that a formal request must first be made to the director or other person in charge of an organ of the mass media to exercise the right of reply in order to make a petition before the Institute. Additionally, the PRD contended that the terms for the procedure to exercise the right of reply before the Institute established in the Guidelines and modified by the State Electoral Court are excessive.

II. The High Chamber agreed with the arguments presented by the PRD that the Guidelines excluded citizens, pre-candidates and leaders of political parties from exercising their right of reply. Thus, the High Chamber deemed the Guidelines contrary to Article 6 of the Constitution and to Article 14 ACHR in that they unlawfully differentiated the right of reply in electoral matters.

However, the High Chamber did not agree with the PRD's contention that the requirement that a request regarding the right of reply must first be made directly to the director or other person in charge of the relevant organ of the mass media is a form of prior censorship. To arrive to that conclusion, the High Chamber considered the relevant international instruments and the national legislation and concluded that they all indicate that the right of reply should be first sought from the organ of the mass media that presented the message that affected a person's right to dignity or right to respect for one's honour and reputation. Finally, after carefully studying the time needed for each part of the procedure to exercise the right of reply before the

Institute, the High Chamber deemed that the term is adequate and reasonable.

Consequently, the Electoral Court revoked the judgment of the State Electoral Court and modified the Guidelines so as to include a provision that ensures that the leaders of political parties can exercise their right of reply in electoral matters.

#### *Supplementary information:*

Project presented by: Electoral Justice María del Carmen Alanis Figueroa.

#### *Cross-references:*

- *Bulletin* 1999/3, [ESP-1999-3-023];
- *Bulletin* 1998/1, [ESP-1998-1-003];
- *Special Bulletin – Leading cases ECHR* [ECH-1991-S-004];
- Inter-American Court of Human Rights, "The Last Temptation of Christ" (*Olmedo-Bustos et al.*) v. *Chile*, 05.02.2001;
- Inter-American Court of Human Rights, *Ricardo Canese v. Paraguay*, 31.08.2004;
- *Gaweda v. Poland*, no. 26229/95, 14.03.2002, European Court of Human Rights (Former Section I).

#### *Languages:*

Spanish.



## **Poland Constitutional Tribunal**

### **Important decisions**

*Identification:* POL-2009-2-001

**a) Poland / b) Constitutional Tribunal / c) / d) 30.09.2008 / e) K 44/07 / f) / g) Dziennik Ustaw (Official Gazette), 2008, no. 177, item 1095; Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy (Official Digest), 2008, no. 7A, item 126 / h) CODICES (Polish).**

#### *Keywords of the systematic thesaurus:*

- 3.10 General Principles – **Certainty of the law**.
- 3.11 General Principles – **Vested and/or acquired rights**.
- 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
- 5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights**.
- 5.1.5 Fundamental Rights – General questions – **Emergency situations**.
- 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

#### *Keywords of the alphabetical index:*

Terrorism, fight / Organised crime, fight / Aircraft, renegade, shooting down.

#### *Headnotes:*

When undertaking a "vertical" assessment of the compatibility between the elements of the legal system in critical areas such as the weight accorded to public security issues and the right to legal protection of the lives of particular individuals, including those on board a renegade aircraft, the Constitutional Tribunal unequivocally gives priority to values such as human life and dignity. These values constitute the foundation of European civilisation and outline the semantic content of humanism, a notion that is central to our culture (including legal culture).

The values are inalienable in the sense that they do not allow for any "suspension" or "forfeiture" in a particular context. Humanism is not an attitude to be followed

solely in times of peace and prosperity, but rather a value best measured during critical and sometimes extremely difficult situations. Any other conclusion is completely unacceptable from the perspective of the most rudimentary assumptions of our legal system.

The Tribunal noted that organised crime can be combated and regular wars conducted without the need for a total suspension or negation of fundamental human rights and freedoms. It is therefore also possible to fight terrorism without extensive intrusion into the fundamental rights of uninvolved parties, in particular their right to life.

#### *Summary:*

I. The abstract review, initiated by the First President of the Supreme Court, challenged the conformity of Article 122a of the Act of 3 July 2002 (the Aviation Law) with Articles 38, 31.3, 26 and 30 of the Constitution.

Questions arose over the conformity of the challenged provisions with the constitutional protection of life; human dignity, the constitutional principle of a democratic state ruled by law; and the goals and tasks of the Armed Forces of the Republic.

The applicant emphasised that the concept of a terrorist attack provides information about the specificity of the threat, but does not prejudge the nature of the legal values under threat. Human life may not be evaluated according to the criterion of chance of survival. If the Minister of National Defence ordered a renegade to be shot down, the passengers and crew would be unfairly used without their consent and knowledge.

In a written statement submitted to the Tribunal, the President of the Civil Aviation Authority stressed that the risk of endangering the life of civilians due to a terrorist attack is more or less equal to an analogous risk due to random technical failures, which, he suggested, undermines the necessity for the regulation of Article 122a of the Aviation Law.

II. The Tribunal decided that, from a purely pragmatic perspective, it could simply pronounce the disputed provision to be inconsistent with the principle of diligent legislation. It would then lose its binding force. However, taking this course of action would entail bypassing several constitutional issues of high significance which had arisen in this case.

The Tribunal found that there was no need for a reinterpretation of human rights protection standards in order to protect public safety from terrorist attacks. This opinion is shared by other Constitutional Courts, including the House of Lords, the Federal Constitutional Court of Germany and the Supreme Court of the USA.

#### 1. Protection of human life.

Although the legal protection of life is not unlimited, any limitations in this field must be interpreted particularly restrictively, in convergence with the criterion of "absolute necessity" developed in the case-law of the European Court of Human Rights. It is necessary to determine whether the violation of the protection of life is to be legalised by the legislator by a constitutional value, whether the violation may be justified on the grounds of constitutional values and whether the legislator respected the constitutional criteria for resolving such conflicts, such as the requirement of proportionality.

In view of the unusually general content of Article 122a of the Aviation Law as well as the unclear system of references and the delegation to a sub-statutory regulation of essential elements of an assessment undertaken while taking a decision on the destruction of the aircraft, it can be concluded that the statutory form of a regulation, required in such circumstances, has not been fully observed. The challenged regulation is not indispensable for the protection of a constitutionally protected legal value that does not stand lower in the constitutional hierarchy than the value sacrificed. Human life is not subject to evaluation on account of age, state of health of the individual, the expected life span or any other criteria. The mechanism prescribed in Article 122a has to be regarded, in most cases, as inadequate for the intended goal, exposing to certain death passengers and crew members, who are not aggressors, but victims.

#### 2. Protection of human dignity.

Human dignity should be recognised as a constitutional value, which is of fundamental significance to the axiological basis of current constitutional solutions. A democratic state ruled by law is a state founded on the respect for the individual and on the respect for, and the protection of life and human dignity. The recognition of both the inalienable dignity of a person as a constitutional principle and the right of every human being – irrespective of their qualification or psychophysical condition, constitutes the basis for regarding individuals as the holders of rights.

The application of the challenged legal provisions results in a "depersonification" and "reification" of those on board of a renegade aircraft who are not aggressors. The argument that they have found themselves in such a situation solely as a result of the unlawful activity of the perpetrators must be considered false; it is indirectly indicative of a failure by the state to fulfil its positive obligation to protect.

The legal provisions in question would not have resulted in such serious constitutional doubts if they had simply envisaged the shooting down of an aircraft with only perpetrators on board, since they decided of their own free will to die, simultaneously threatening the lives of innocent people.

### 3. Diligent legislation, democratic state ruled by law.

Finally, the legislator may not endow organs applying the law with excessive freedom to determine the subjective and objective scope of a legal norm. For a legal provision to conform to the constitutional principle of diligent legislation (and consequently with the principle of the democratic state ruled by law), it must be sufficiently precise to enable its uniform interpretation and application.

Among the prerequisites justifying the decision to destroy a civil aircraft with passengers on board are such ambiguous phrases as "state security considerations" or the necessity to ascertain that a civil aircraft has been used for "unlawful acts". Furthermore, it is doubtful, whether a sub-statutory act may regulate a decision-making mechanism, with the potential consequence of the loss of several hundreds of human lives.

### 4. Goals of the Armed Forces of the Republic.

The Tribunal decided not to adjudicate upon the conformity of the contested legal provisions with the constitutional goals of the Armed Forces of the Republic.

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- *Young, James and Webster v. the United Kingdom*, nos. 7601/76 and 7806/77, 13.08.1981; *Special Bulletin – Leading cases ECHR* [ECH-1981-S-002];
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- *Aksoy v. Turkey*, no. 21987/93, 18.12.1996; *Bulletin* 1996/3 [ECH-1996-3-017];
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- *Osman v. the United Kingdom*, no. 23452/94, 28.10.1998;
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- Israeli Supreme Court, Judgment HCJ 3239/02 of 05.02.2003 (*Marab v. The Commander of IDF Forces in the West Bank*).

**Languages:**

Polish.



**Identification:** POL-2009-3-003

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.06.2009 / **e)** K 54/07 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2009, no. 105, item 880; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2009, no. 6A, item 86 / **h)** CODICES (Polish).

**Keywords of the systematic thesaurus:**

2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms.**

3.6 General Principles – **Structure of the State**.

3.16 General Principles – **Proportionality**.

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence.**

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

5.3.36.3 Fundamental Rights – Civil and political rights – Inviolability of communications – **Electronic communications.**

**Keywords of the alphabetical index:**

Corruption prevention / Data, personal, protection / Data, personal, collecting, processing.

**Headnotes:**

The definition of corruption lacks the notion of “socially harmful reciprocity”. This could result in difficulties in establishing when corruption actually takes place.

When gathering personal data, the secret services should observe the criteria of necessity, subsidiarity and purposefulness. However, in the case of the Central Anti-corruption Bureau (hereinafter, the “CAB”), the process of gathering personal data does not even fulfil the criterion of necessity.

Inspections performed by the CAB are akin to a search under the Code of criminal procedure. However, there are no procedural guarantees covering inspections under the Act comparable to those included in the Code of criminal procedure relating to a search.

There is no statutory basis for establishing a special procedure for handing over information in a decree.

**Summary:**

I. A group of Members of Parliament initiated an abstract review, challenging the constitutional compliance of the Act of 9 June 2006 on the CAB (hereinafter, the “Act”), Journal of Laws 2006, no. 104, item 708, or alternatively, of Articles 1.3, 2.1, 5.2-3, 22.1-3, 22.4-7, 22.8-10, 31.3 and 40 of the Act, as well as that of Article 43.2 of the Personal Data Protection Act as amended by Article 178 of the Act, and of Paragraphs 3 and 6 of the Decree of the President of the Council of Ministers, issued under Article 22.9 of the Act.

The constitutional provisions at issue here were Article 2 of the Constitution (democratic state ruled by law), Article 7 of the Constitution (rule of law), Article 10 (separation of powers), Article 20 of the Constitution (social market economy), Article 22 of the Constitution (economic activity freedom limitations), Article 30 of the Constitution (human dignity), Article 31.3 of the Constitution (limitations of constitutional rights), Article 32.1 of the Constitution (equality before the law), Article 42.1 of the Constitution (*nullum crimen sine lege*), Article 47 of the Constitution (legal protection of private life), Article 50 of the Constitution (inviolability of the home), Article 51 of the Constitution (personal data protection), Article 92.1 of the Constitution (delegations to issue ministerial decrees) and Article 202.1 of the Constitution (Supreme Chamber of Control). Also at issue were Articles 7.1, 8 and 18 ECHR, Article 20 of the Criminal Law Convention on Corruption, the preamble and Articles 5, 6 and 7 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

The Act gives the CAB competences which are reminiscent of the police and prosecution. It stipulates that the CAB is competent to act, in terms of certain crimes regulated in other criminal legislation, if there is a link between the crime and corruption.

The Act contains a legal definition of corruption. It differs from the definition contained in the Criminal Law Convention on Corruption in that it defines several types of corruption in the same redaction unit of the Act, using multiple subordinate clauses.

The competences of the CAB are shared in part with the Supreme Chamber of Control. The head of the CAB is subordinate to the President of the Council of Ministers.

The Act empowers the CAB to gather, process and store personal data, including sensitive personal data on for example ethnic and racial origins and sexual history. The Act also excludes certain competences of the General Inspector of Personal Data Protection relating to the activity of the CAB.

It also empowers the CAB to carry out controls and inspections.

The Act provides a delegation for the President of the Council of Ministers to issue a decree concerning the transfer of personal data and its surveillance by the CAB.

II. The provisions regulating tasks of the CAB, and the provisions on "links with corruption" do not expand the scope of criminal prosecution by comparison to the situation prior to the entry into force of the Act. The only goal of those provisions was a systematic distinction of the competence of the CAB within the pre-existing legal order.

The definition of corruption within the Act applies both to public and private law entities. It lacks a concept of "socially harmful reciprocity" of corruption, which might lead to difficulties in establishing when corruption actually takes place. This is especially difficult in the case of private law entities, where many actions, such as concluding agreements, are not socially harmful, but might be viewed as corruption, according to the definition. The Tribunal was of the view that the definition was too-long and grammatically inconsistent. It also contained vague notions such as "property, personal or other benefit", as well as logical errors.

The mere fact that the competences of the CAB are shared in part with the Supreme Chamber of Control is not enough to render the provisions regulating the structure of the CAB unconstitutional. The subordination of the head of the CAB to the President of the Council of Ministers is a solution applied in several other countries and may enhance the effectiveness of the CAB by eliminating other channels of influence on the head.

According to the jurisprudence of the Tribunal, when gathering personal data, the secret service must observe the criteria of necessity, subsidiarity and purposefulness. However, in the case of the Act, the process of gathering personal data by the CAB does not even fulfil the criterion of necessity, and the obligatory verification of the data by the Bureau is much too long (10 years). The Act does not provide a mechanism to stop the data being used by unauthorised personnel or for purposes contrary to the law.

The differentiation of controlled entities into two groups (public finance sector and entrepreneurs) does not infringe the constitutional rule of equality before the law. All entities, whether public finance or entrepreneurial, share the same relevant characteristics.

The claimants had not proved sufficiently the infringement of the constitutional freedom of economic activity by the provisions of the Act concerning controls performed by the CAB.

It was noted that inspections performed by the CAB bear a resemblance to a search under the Code of criminal procedure (the limitation of constitutional freedoms and rights occurs in both cases to a similar extent). However, there are no procedural guarantees relating to an inspection in the Act comparable to those included in the Code of criminal procedure for searches. In particular, there is no statutory guarantee ensuring the appropriate use of data gathered during an inspection and to safeguard against access by unauthorised personnel.

The exclusion of certain competences of the General Inspector of Personal Data Protection is not unconstitutional. Similar exclusions exist in relation to other secret services, and the claimants did not provide proof of unconstitutionality of the exclusion with regard to the CAB only.

The decree of the President of the Council of Ministers issued under Article 22.9 of the Act provides a special procedure whereby state organs hand over information to the CAB, based upon an agreement between the organ and the CBA, without the necessity to file a relevant request in writing. The Tribunal declared Paragraphs 3 and 6 of the decree unconstitutional, due to a lack of a statutory basis for establishing a special procedure of handing over information in a decree. Such a procedure might lead to unlimited access to the information by unauthorised personnel.

The Tribunal pronounced the provisions of Article 1.3 (definition of corruption), Article 22.4-7 (collection of personal data, including sensitive personal data), Article 22.8-10 (statutory delegation to issue decrees on personal data protection) and Article 40 (inspections carried out by the CAB) of the Act, as well as Paragraphs 3 and 6 of the respective ministerial decree unconstitutional. They will lose their legal effect 12 months from the publication of the judgment in the Journal of Laws. It pronounced the provisions of Article 2.1 (tasks of the CAB), Article 5.2-3 (organisation of the CAB), Article 22.1-3 (personal data collection in general), Article 31.3 (controls carried out by the CAB) of the Act, as well as Article 43.2 of the Personal Data Protection Act as amended by Article 178 of the Act (challenge to the General Inspector of Personal Data Protection over certain matters) to be constitutionally compliant. The judgment was issued by the Tribunal sitting in a panel of five judges. One dissenting opinion was made.

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- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 188;
- Judgment P 2/00 of 20.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 32;
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- *Kopp v. Switzerland*, no. 23224/94, 25.03.1998; *Bulletin* 1998/1 [ECH-1998-1-005];
- *Amann v. Switzerland*, no. 27798/95, 16.02.2000;
- *Rotaru v. Romania*, no. 28341/95, 04.05.2000;
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- *Leempoel & S.A. Ed. Ciné Revue v. Belgium*, no. 64772/01, 09.11.2006;
- *Ryabov v. Russia*, no. 3896/04, 31.01.2008;
- *Ilia Stefanov v. Bulgaria*, no. 65775/01, 22.05.2008;
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- no. 1 BvR 2378/98, 1084/99 of 03.03.2003, *Bulletin* 2004/1 [GER-2004-1-002].

#### European Commission:

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#### Languages:

Polish.



## *Identification: POL-2010-3-006*

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.11.2010 / **e)** K 32/09 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2010, no. 229, item 1506; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2010, no. 9A, item 108 / **h)** CODICES (Polish).

### *Keywords of the systematic thesaurus:*

2.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.

2.1.1.3 Sources – Categories – Written rules – **Community law**.

2.2.1.6.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Primary Community legislation and constitutions**.

3.1 General Principles – **Sovereignty**.

3.3 General Principles – **Democracy**.

4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies**.

4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.

4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.

### *Keywords of the alphabetical index:*

European Union, Treaty of Lisbon / Treaty, domestic law, effect / Normative act.

### *Headnotes:*

The incurring of international liabilities and the management of them do not result in the loss or limitation of the sovereignty of the state, but rather serve to confirm it. Likewise, membership of the European institutions does not constitute a limitation on the sovereignty of the state, but rather serves as its manifestation.

The provisions of the Treaty of Lisbon, which had come into question, should strike a balance between preserving the subjectivity of the Members States and that of the European Union. The guarantees of that balance in the Constitution are “normative anchors”, which serve to protect the sovereignty of the state, in the form of Articles 8.1, 90 and 91 of the Constitution.

The values expressed in the Constitution and the Treaty of Lisbon determines the axiological identity of Poland and the European Union. The draft of economic, social and political systems contained in the Treaty, which stipulates the respect for dignity and freedom of the individual, as well as respect for the

national identity of the Member States, is fully consistent with the basic values of the Constitution, confirmed in the Preamble of the Constitution, which includes the indication of historical, traditional and cultural context that determines national identity, which is respected in the EU within the meaning of Article 4.2 of the Treaty on European Union.

Neither Article 90.1 nor Article 91.3 may constitute the basis for conferring the competence to enact legal acts or to make decisions which would be inconsistent with the Constitution on an international organisation or international institution. In particular, the provisions indicated may not be used to confer competences in such a way that they would prevent the Republic of Poland from functioning as a sovereign and democratic state.

Some of the attributes of sovereignty are exclusive power of jurisdiction over the territory of a particular state and its citizens, the conduct of foreign policy, decision-making over war and peace, freedom to recognise other states and governments, the maintenance of diplomatic relations, decision-making over military alliances and membership of international political organisations, and conduct of independent financial, budget and fiscal policies.

Article 90 of the Constitution should not be interpreted in such a way as to exhaust its meaning after one application. Such an interpretation would arise from the assumption that conferral of competences on the European Union in the Treaty of Lisbon is a “one-off” occurrence and would pave the way for further conferral, bypassing the requirements specified in Article 90. Such an understanding of Article 90 would also deprive that part of the Constitution of the characteristics of a normative act.

### *Summary:*

I. A group of Senators (hereinafter, the “applicant”) lodged an application to determine the conformity of Article 1.56 of the Treaty of Lisbon, to the extent it amends Article 48 of the Treaty on European Union in conjunction with Articles 2.12, 2.13 and 289 of the Treaty of Lisbon, as regards Article 2 A.2, Article 2 B.2, and Article 2 F, which have been inserted in the Treaty on the Functioning of the European Union, and the new wording of Article 308 of the Treaty on the Functioning of the European Union, with Article 8 and Article 90.1 of the Constitution (no. K 37/09).

An application challenging the constitutionality of other provisions of the Treaty of Lisbon was lodged by a group of Deputies of the lower house of Parliament (the Sejm) in no. K 32/09.

II. The President of the Constitutional Tribunal decided that cases K 32/09 and K 37/09 should be examined in full bench, under the common reference number K 32/09.

After a break in the hearing and deliberations, due to the exit of the representative of the group of Deputies and his further absence, the Tribunal resolved to discontinue the proceedings with regard to the examination of the application by the group of Deputies, due to the applicant's absence from the hearing.

The applicant challenged the constitutionality of the competences of EU organs in the light of the qualified majority voting regime in the Council, the simplified revision procedures as well as that of the flexibility clause, introduced by the Treaty of Lisbon. In the applicant's opinion, the relevant Treaty regulations allow the EU to enhance its competence beyond what is permitted by the condition of transfer of competences, enshrined in Article 90 of the Constitution. The applicant also suggested that the provisions of the Constitution had been infringed by the lack of legislative participation of adequate constitutional organs as a precondition for the amendment of primary EU law.

The Constitutional Tribunal stated that a distinction should be drawn between limitations of sovereignty, arising from the will of the state and in accordance with international law, and infringements of sovereignty. Although states remain the subjects of the integration process, maintaining "the competence of competences", the new rules of qualified majority voting, the simplified revision procedures and the flexibility clause introduced by the Treaty of Lisbon do not impinge upon the Constitution.

One may speak of an axiological identity of Poland and of the EU, due to values expressed in the Polish Constitution and in the Treaty of Lisbon. However, the transfer of competences under Article 90 of the Constitution may not lead to a situation whereby Poland ceases to function as a sovereign and democratic state. The "normative anchors" safeguarding Polish sovereignty and democracy are Articles 8.1, 90 and 91 of the Constitution. Attributes of sovereignty include the conduct of foreign policy or independent fiscal policies.

The transfer of competences by Poland to the EU should not be treated as a one-off occurrence. Rather, each transfer of competences should conform to Article 90 of the Constitution.

The Tribunal discontinued the proceedings relating to legislative negligence which consisted in this case of an alleged lack of a specific regulation as regards the mechanism of cooperation between the Council of

Ministers and the *Sejm* and the Senate in matters related to Poland's membership of the European Union. It may not be effective to state the unconstitutionality of statutory omission or negligence, with regard to the consequences of binding Poland with an international agreement, such as the Treaty of Lisbon, due to Article 27 of the Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969. There is also a clear line of authority showing that the Constitutional Tribunal does not have the competence to review the constitutionality of legislative negligence.

III. The Tribunal issued this decision in plenary session. One dissenting opinion was raised.

#### Cross-references:

#### Constitutional Tribunal:

- Resolution W 7/94 of 10.05.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 23; *Bulletin* 1994/2 [POL-1994-2-007];
- Procedural decision K 3/95 of 07.03.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 5;
- Judgment K 32/00 of 19.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 3, item 50;
- Judgment SK 8/00 of 09.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 7, item 211;
- Judgment K 2/02 of 28.01.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 1A, item 4; *Bulletin* 2003/2 [POL-2003-2-013];
- Judgment K 11/03 of 27.05.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 5A, item 43;
- Judgment K 24/04 of 12.01.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 1A, item 3; *Bulletin* 2005/1 [POL-2005-1-002];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 5A, item 49; *Bulletin* 2005/1 [POL-2005-1-006];
- Judgment SK 25/02 of 08.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 10A, item 112;
- Judgment U 5/04 of 18.07.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 7A, item 80;
- Judgment K 31/06 of 03.11.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 10A, item 147;
- Judgment K 54/05 of 12.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 3A, item 25;

- Judgment K 35/06 of 02.09.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 7A, item 120;
- Procedural decision Ts 189/08 of 14.05.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 3B, item 202;
- Judgment SK 31/08 of 02.06.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 6A, item 83;
- Judgment Kp 5/08 of 16.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 11A, item 170.

Austrian Constitutional Tribunal:

- Decision (*Beschluss*) SV 2/08 *et al.* G 80/08 *et al.* of 30.09.2008.

Czech Constitutional Court:

- no. Pl. ÚS 19/08, 26.11.2008.

Federal Constitutional Court of Germany:

- nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, 20.06.2009; *Urteil; Bulletin* 2009/2 [GER-2009-2-019];
- no. 2 BvR 2661/06, 06.07.2010, *Beschluss*.

Hungarian Constitutional Court:

- no. 143/2010, (VII. 14.) AB.

Latvian Constitutional Court:

- no. 2008-35-01, 07.04.2009; *Bulletin* 2009/2 [LAT-2009-2-002].

Court of Justice of the European Union:

- C-45/86, 01.12.1994, *Commission v. Council*, [1987] *European Court Reports* 1493;
- Opinion TS 2/94, 28.03.1996, (Accession by the Community to the European Convention on Human Rights).

Languages:

Polish, English (translation by the Tribunal).



*Identification:* POL-2012-1-001

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.07.2011 / **e)** K 11/10 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 160, item 964; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 6A, item 60 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

- 2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 3.17 General Principles – **Weighing of interests**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
- 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
- 5.4.22 Fundamental Rights – Economic, social and cultural rights – **Artistic freedom**.

*Keywords of the alphabetical index:*

Symbol, nazi / Symbol, communist.

*Headnotes:*

The criminalisation of preparation, distribution or publication of materials promoting a totalitarian regime or inciting hatred based on national, ethnic, race or religious differences is admissible, provided that criminal law regulations are sufficiently precise that they do not constitute unjustified interference with the freedom of speech or allow for the use of a broader interpretation.

*Summary:*

I. A group of MPs challenged the constitutionality of Article 1.28 of the Act of 5 November 2009 amending the Penal Code, the Code of Criminal Procedure, the Executive Penal Code, the Penal Fiscal Code and certain other acts (Journal of Laws Dz. U. no. 206, item 1589, as amended). This provision criminalised the producing, recording, importing, purchasing, storing, possessing, presenting, transporting or sending for the purpose of dissemination of printed materials, recordings or other objects comprising the content specified in Article 256.1 of the Criminal Code or bearing fascist, communist or other totalitarian symbols.

The applicant argued that this regulation constituted a disproportionate restriction of the freedom of expression and violated the principle of specificity of criminal provisions and the principle of appropriate legislation. Furthermore, the circumstances eliminating unlawfulness (Article 256.3 of the Penal Code) had been regulated inappropriately.

II. The Constitutional Tribunal reviewed the constitutionality of the amended Article 256 of the Criminal Code (i.e. of the added §§ 2 and 3) and discontinued proceedings as to the remaining Article 256.4 of the Criminal Code. Article 256.1 of the Criminal Code had not been challenged by the applicant and so constitutional review of the consistency of Article 256.2 of the Criminal Code, to the extent it criminalises conduct covered by Article 256.1 of the Criminal Code with Article 54.1 of the Constitution in conjunction with Article 31.3 of the Constitution, was inadmissible.

Freedom of speech is a value which is subject to particular protection. Interference with it by means of the regulation of criminal law requires precision and caution from both the legislator and the courts.

If there is a term lacking sufficient specificity in a criminal law provision, the legislator should be expected to provide the utmost precision in the description of the characteristics of that act. The use of the phrase "printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols" in a criminal law provision infringes the principle of specificity of criminal law provisions. It is not known whether a symbol of communism will be considered to be a red flag, or whether this would have to be a red flag with a sickle and hammer, or a T-shirt with an image of Che Guevara. These comments also apply to objects bearing fascist symbols.

The excerpt of Article 256.2 of the Penal Code (which contained terms lacking sufficient specificity) was not accompanied by sufficient procedural guarantees. Instituting criminal proceedings in haste in cases concerning "fascist, communist or other totalitarian symbols", even if the outcome of the proceedings proved positive for the suspect (the accused), could lead not only to unnecessary interference with the rights of the individual but also a chilling effect on public debate. It could also strengthen extremist political factions which use the examples of the state's repressive methods to gain new supporters.

The Constitutional Tribunal noted that the lack of sufficient specificity in the excerpt from Article 256.2 of the Penal Code was not compensated for by circumstances eliminating unlawfulness. However, Article 256.3 of the Penal Code was found to be in

compliance with Article 54.1 in conjunction with Article 31.3 of the Constitution.

Account was also taken of Article 20.2 of the ICCPR, which stipulates that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". It was noted that the international law-maker was specifying, in an incomplete way, the scope of propagating hatred in the context of communist ideology; public propagation and incitement of hatred based on social class differences have been the basis of the official ideology or political programme of extreme left-wing factions in many countries.

Carrying out the assessment of conformity of the challenged provision to the higher-level norm for the review formulated in Article 54.1 of the Constitution made it unnecessary for the Tribunal to present its views on the conformity of the provision to the higher-level norms from an international law perspective, as the allegations formulated on the basis of those norms were identical and the applicant did not go beyond citing the content of the higher-level norm.

#### Cross-references:

#### Constitutional Tribunal:

- Judgment K 24/00 of 21.03.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 51;
- Judgment SK 22/02 of 26.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 97, *Bulletin* 2004/1 [POL-2004-1-004];
- Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, o. 5A, item 39, *Bulletin* 2004/2 [POL-2004-2-015];
- Judgment P 8/04 of 18.10.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 9A, item 92;
- Judgment SK 30/05 of 16.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 2, *Bulletin* 2006/1 [POL-2006-1-002];
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32, *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment P 3/06 of 11.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 121;
- Judgment P 10/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128, *Bulletin* 2007/2 [POL-2007-2-003];
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26, *Bulletin* 2008/1 [POL-2008-1-001];

- Judgment SK 43/05 of 12.05.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 4A, item 57;
- Judgment P 50/07 of 13.05.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 4A, item 58;
- Judgment Kp 3/09 of 28.10.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 9A, item 138, *Bulletin* 2010/1 [POL-2010-1-002];
- Judgment Kp 8/09 of 03.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 164;
- Judgment SK 52/08 of 09.06.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 5A, item 50;
- Judgment SK 25/08 of 22.06.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 5A, item 51;
- Judgment K 19/06 of 04.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9A, item 96.

Federal Constitutional Court of Germany:

- no. 1 BvR 680/86, 03.04.1990;
- no. 1 BvR 681/86, 03.04.1990;
- no. 1 BvR 150/03, 01.06.2006;
- no. 1 BvR 204/03, 23.03.2006;
- no. 1 BvR 2150/08, 04.11.2009, *Bulletin* 2009/3 [GER-2009-3-030].

Constitutional Court of Hungary:

- no. 14/2000 AB, 09.05.2000, *Bulletin* 2000/2 [HUN-2000-2-002].

European Court of Human Rights:

- *Vajnai v. Hungary*, no. 33629/06, 08.07.2008.

*Languages:*

Polish, English (translation by the Tribunal).



## Portugal Constitutional Court

### Important decisions

*Identification:* POR-1993-1-007

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.02.1993 / **e)** 174/93 / **f)** / **g)** *Acordãos do Tribunal Constitucional* (Official Digest), Vol. 24, 57-175 / **h)**.

*Keywords of the systematic thesaurus:*

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach.**

*Keywords of the alphabetical index:*

Concordat / School, non-religious / Education, religious / Religion, compulsory subject.

*Headnotes:*

The principle of the separation of state and church is enshrined in the Constitution as part of freedom of religion; the state must therefore remain neutral in religious matters. It must not act in a sectarian manner, nor even give itself the right to organise education and culture along religious lines or to organise and support denominational state education. In other words, a democratic state governed by the rule of law may not impose a particular theory of humanity, the world and life on its citizens.

The principles of the separation of state and church and non-denominational state education must not, however, preclude all co-operation between the state and churches or other religious communities. The state even has a responsibility to engage in such co-operation, in view of the positive dimension of religious freedom and its duty to co-operate with parents in the education of their children, but must do so within the limits imposed by the principles of state religious neutrality and non-denominational state education.



Although Catholic religion and moral standards are taught as a school subject by primary school teachers themselves, this is not the state's responsibility, despite a symbolic value that might suggest otherwise. First, the subject is taught only by those teachers who agree and have been nominated by the church; second, such instruction is not wholly prohibited by the principle of separation; finally, it does not require the teacher in question to impart a particular theory of humanity, the world and life based on the principles of the Christian faith in the teaching of other subjects.

The teaching of Catholic education, moral standards and religion, which is part of the teacher training syllabus, is an optional subject for which the Catholic Church is responsible, and its inclusion in the syllabus does not have to be approved by the relevant organs of each training college.

#### *Summary:*

A group of national MPs asked the Constitutional Court to declare a number of legal rules set out in two Government orders (*Portaria* no. 333/86 of 2 July and *Portaria* no. 831/87 of 16 October) unconstitutional, with universal binding force, on the grounds of an alleged violation of several provisions of the Constitution, particularly the constitutional principle of the separation of church and state, owing to:

- a. the teaching of Catholic religion and moral standards as a school subject by primary teachers themselves;
- b. the extension of this subject to state higher education institutions;
- c. training for teachers in the teaching of Catholic religion and moral standards, the inclusion of such training among lecturers' duties and their appointment by the state on the proposal of the Catholic Church.

By 7 votes to 6, the Court decided that the legal rules at issue were not contrary to the Constitution.

#### *Supplementary information:*

In particular, the two Government orders (*Portaria* no. 333/86 of 2 July and *Portaria* no. 831/87 of 16 October) at issue in this judgment contain implementing provisions for Legislative Decree no. 323/83, the constitutionality of which had been confirmed by Judgment no. 423/87, analysed above [POR- 1987-R-001].

#### *Languages:*

Portuguese.

*Identification:* POR-1998-1-001

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.04.1998 / **e)** 288/98 / **f)** / **g)** *Diário da República* (Official Gazette), 91 (Series I-A), 18.04.1998, 1714 (2) – 1714 (35) / **h)**.

#### *Keywords of the systematic thesaurus:*

- 1.3.4.6.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility**.
- 3.17 General Principles – **Weighing of interests**.
- 4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

#### *Keywords of the alphabetical index:*

Abortion.

#### *Headnotes:*

Inasmuch as the Constitutional Court is responsible for reviewing the constitutionality and legality of national referenda before they take place, it must also ensure that the subject of a referendum is, in substance, constitutional: deciding whether the question posed in a referendum is lawful is thus part of the process of reviewing the constitutionality of the referendum. Ultimately, the majority principle must be reconciled with the principle of constitutionality.

Under Article 24.1 of the Constitution, human life is inviolable. The judgment resolves the question in three stages.

The issue of whether to decriminalise abortion may be regarded purely as a matter of criminal policy: the legislative authority may choose whether or not to make abortion a criminal offence because, while life *in utero* may constitute legal property (thus entailing potential conflict with other rights of the woman in question), it is not protected by the right to life enshrined in Article 24.1 of the Constitution.

At the same time there is the secondary consideration that, as well as guaranteeing every individual a basic (subjective) right to life, Article 24.1 also extends to the

(objective) protection of life developing in a mother's womb (*life in utero*); there is thus a constitutional obligation to protect that life. However, the protection of the human embryo cannot be as substantial (nor can it be ensured by the same methods) as the protection of the subjective right to life inherent in every individual person from birth onwards.

The ordinary legislative process must provide ways of protecting human life in the womb while at the same considering the various interests at stake and balancing the constitutional protection of legal property against other rights and values, according to the principle of the weighing of interests.

In other words, the need to strike a balance between the protection of the human embryo and a woman's other rights, including her right to develop freely as a person (in terms of autonomy and personal self-determination and the freedom to plan her own destiny), particularly in association with the right to motherhood as a conscious choice, may justify the legislative option of decriminalising the termination of pregnancy in the first 10 weeks. Any conflicts of constitutionally protected legal property can be resolved by the legislature and, if need be, there is legislative scope, in conformity with the Constitution, for deciding whether or not to make the deliberate termination of pregnancy a criminal offence.

Third – even if abortion is deemed illegal – it does not necessarily imply that a positive response to the question asked in the referendum would be unconstitutional because, in terms of constitutional law, criminal law controls must be a last resort for the application of cultural, economic, social and health measures, not a substitute for such measures. Therefore, given that the constitution does not require abortion to be deemed an offence, there is a constitutional legislative option to attach or not to attach criminal sanctions to the deliberate termination of a pregnancy, by the woman's choice, within the first ten weeks, as envisaged in the draft referendum under consideration. It is also the case that reasonably well-off women who wish to have abortions can do so with impunity in clinics elsewhere in Europe, whereas poorer women who find themselves obliged to have an abortion not only run the risks associated with illegal medical treatment but also face the threat of criminal sanctions.

Notwithstanding, the Court stipulated a number of legislative measures and formal conditions to be observed if the response to the referendum were positive: for example, a requirement that the woman seeking an abortion shall have a consultation, including a personal interview, with a specialised counselling service; and a guarantee that she be given time to consider her decision.

### **Summary:**

According to Article 115.8 of the Constitution (as revised in 1997), the President of the Republic must submit referendum proposals referred to him by the Assembly of the Republic, or by the Government, to the Constitutional Court for preliminary review to ensure that they are constitutional and lawful. The resolution referred by the Assembly of the Republic to the President in this case frames the question to be asked in the national referendum as follows: "Do you agree that the deliberate termination of pregnancy should cease to be a criminal offence if it is carried out, by the woman's choice, within the first ten weeks of pregnancy, at a legally recognised medical establishment?"

Since its 1989 revision, the Portuguese Constitution has included a provision for national referenda. Under Article 115, the President of the Republic may ask the electorate to express its will directly in a referendum, the outcome of which shall have the force of law.

The constitutional revision of 1997 gave the Constitutional Court the task of examining in advance the constitutionality and legality of national, regional and local referenda, including the electoral conditions under which they are held.

In this case, the Constitutional Court ruled on whether the subject of the question to be asked in the referendum was unconstitutional – i.e. whether either of the two possible responses might require legislation that infringed constitutional principles or provisions.

In its final decision, the Court declared the referendum both constitutional and lawful, on the following grounds:

- a. the proposal to hold a referendum had been approved by the competent body;
- b. the subject of the referendum was an important question of national interest which had to be decided by the Assembly of the Republic through the adoption of legislation;
- c. the subject of the referendum in this case did not fall outside the general scope of referenda;
- d. the fact that the question at issue in the referendum had to be the subject of legislation which was still under consideration (and that the relevant bill had already been submitted for a vote in a general debate in the Assembly), did not prevent it from being the subject of a referendum;
- e. the referendum addressed a single issue, by means of a single question, without any qualification, introduction or explanatory comment, and could thus be answered with yes or no;
- f. the question asked met the criteria of objectivity, clarity and exactitude;

- g. the referendum proposal was in accordance with the formal requirements of the Organic Law on referenda in force at the time;
- h. the fact that only registered electors within the national territory could vote in the referendum was in accordance with electoral requirements;
- i. the Constitutional Court has jurisdiction to decide whether the referendum question presented the electorate with a dilemma of which one outcome might suggest an unconstitutional legal solution;
- j. neither an affirmative nor a negative response to the question necessarily committed the government to an unconstitutional legal solution.

*Supplementary information:*

The problem of abortion has twice been referred to the Constitutional Court, in both cases on points concerning the law approved by the Assembly of the Republic in 1984, amending certain articles of the Criminal Code and allowing abortion to be carried out in certain circumstances.

In Judgment no. 25/84, on proposed legislation referred to it by the President of the Republic for preliminary review, the Court did not declare the provisions in question unconstitutional. In Judgment no. 85/85, in a review of legislation already enacted, it upheld its previous interpretation and did not declare the new Criminal Code provisions on the deliberate termination of pregnancy to be unconstitutional.

The Court delivered a majority judgment, with six judges dissenting.

*Languages:*

Portuguese.



*Identification:* POR-2002-3-008

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 19.11.2002 / **e)** 474/02 / **f)** / **g)** *Diário da República* (Official Gazette), 292 (Series I-A), 18.12.2002, 7912-7921 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

5.4.15 Fundamental Rights – Economic, social and cultural rights – **Right to unemployment benefits.**

*Keywords of the alphabetical index:*

Legislative omission, partial / Civil servant, unemployment, benefit, difference in treatment.

*Headnotes:*

A constitutional provision in respect of which unconstitutionality by omission is pleaded must be sufficiently precise and concrete for the Court to be able to determine what legal measures are necessary to implement it without having to give a decision on possible different policy choices. Hence, since the Constitution gives Parliament virtually unlimited possibilities, the Court could not find a violation of the duty to legislate on the basis of solely legal criteria. Consequently, since a political opinion cannot be the basis of a judicial finding of unconstitutionality by omission, it becomes impossible to reach such a finding.

A finding of unconstitutionality by omission therefore presupposes a concrete and specific case of violation of the Constitution, established on the basis of a sufficiently precise rule, which the ordinary legislature has not rendered enforceable in due time. Moreover, a finding of unconstitutionality by omission can also be based on constitutional provisions recognising social rights, provided the constitutional requirements are met.

*Summary:*

The *Provedor de Justiça* asked the Court to assess and review the unconstitutionality resulting from the lack of the requisite legislative measures for the rule contained in Article 59.1.e of the Constitution to be fully implemented in respect of public servants.

The Constitutional Court noted that, under the terms of Article 283 of the Constitution, a case of unconstitutionality by omission existed where:

1. a particular constitutional provision was not complied with;
2. that provision was not enforceable in itself;
3. the legislative measures necessary in the specific case were lacking or inadequate; and

4. that lack was the cause of failure to comply with the Constitution.

Accordingly, it was important to consider whether the constitutional provision concerning the right to material assistance in the event of unemployment met the requirements for finding a case of unconstitutionality by omission, even if that right was a social right and should not be regarded as analogous to rights, freedoms and guarantees. The material assistance referred to in Article 59.1.e of the Constitution must necessarily take the form of a specific benefit directly related to the situation of involuntary unemployment. This benefit must form part of the social security system and could only be established by means of legislation.

This was therefore a specific legislative obligation contained in a sufficiently precisely worded provision. That was of course without prejudice to the ordinary legislature's wide margin of appreciation. Parliament was required to provide a welfare benefit for those who found themselves involuntarily unemployed, but, in return, it could choose among the different forms of organisation and among the different criteria for fixing the amount of that benefit. Lastly, it should be noted that Article 59 of the Constitution was applicable to all workers, including, obviously, public administration workers.

Consequently, it could be concluded that the Constitution imposed on Parliament a specific and concrete obligation to provide a benefit corresponding to material assistance to workers – including public administration workers – who found themselves involuntarily unemployed, failing which an action might be brought for unconstitutionality by omission.

Although public administration workers, and more specifically those who were recruited to a post by appointment or by administrative contract, were generally not entitled to unemployment benefit, because they were not affiliated to the general social security scheme, some of them were now entitled to unemployment benefit under special legislation. This did not apply to those who were recruited under a fixed-term contract and those who, by way of an exception, were employed under an individual contract. Subject to these exceptions, public administration workers recruited to a post by appointment or by administrative contract were not yet entitled to unemployment benefit or to any other specific benefit in the event of involuntary unemployment, because these workers could not join the general social security scheme.

In the instant case, the result was a partial omission, given that Parliament had implemented a constitutional provision which required it to secure the right to material assistance to workers who found themselves

involuntarily unemployed, but it had only secured that right to some of them, as public administration workers generally were not included. This partial omission was in itself sufficient for a finding of unconstitutionality by omission. Furthermore, if one took into consideration the time which had already elapsed since the Constitution came into force, the obvious conclusion was that sufficient time had elapsed for the legislative task in question to be accomplished.

The Constitutional Court found, therefore, that the Constitution had been violated in view of the failure to take the legislative measures required for the implementation of the right provided for under Article 59.1.e of the Constitution, in relation to public administration workers.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2004-3-008

**a) Portugal / b) Constitutional Court / c) Plenary / d) 06.10.2004 / e) 589/04 / f) / g) Diário da República (Official Gazette), 259 (Serie I-A), 04.11.2004, 6549-6557 / h) CODICES (Portuguese).**

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

#### *Keywords of the alphabetical index:*

Association, international, establishment, procedure / Organisation, non-governmental, aim pursued.

#### *Headnotes:*

The term “international associations” does not denote the international legal persons to which the Civil Code relates, for the purpose of determining the applicable law. The term can only cover legal persons under domestic law (national or foreign). The word “association” must be understood in the sense given to it by the Portuguese legal system, i.e. legal persons whose purpose is not to make profits for distribution to the members. With regard to the word “international”,

the term “international associations” is used to denote associations formed under a state legal system with international aims of a scientific, religious or other nature, which, in all probability, will pursue their activities in more than one state.

The term “international associations” therefore denotes legal persons under domestic law (national or foreign) which carry on their activities at international level. They are legal persons similar to those defined in public international law as “non-governmental organisations” (NGOs), although the term may sometimes not altogether correspond to this reality. International associations are non-profit-making bodies (unlike transnational companies). They are set up outside of any intergovernmental agreement by a group of persons (private or public, natural or legal), pursue very different aims and seek to influence or correct the action of states and “international organisations”.

Article 46.1 of the Constitution is narrow in scope, stipulating that “citizens have the right to form associations freely and without prior authorisation, provided that the associations are not intended to promote violence and that their objectives are not contrary to the criminal law”. In other words, the setting up of associations is not subject to any authorisation, except in the case of associations intended to promote violence and whose aims are contrary to the criminal law. The constitutional provision governs the positive freedom to form an association without any constraint and, further still, clearly rules out any administrative interference consisting in making the setting up of associations dependent on the approval of a public body. The text of the Constitution thus places an absolute ban on making the promotion and setting up of associations, whatever their nature and framework, subject to a system of authorisation (in the sense of an “administrative decision by virtue of which a person is able to exercise a right or legal powers” or a “decision whereby an administrative body allows a person to exercise a right or a pre-existing power”).

### **Summary:**

The *Provedor de Justiça* (Ombudsman) applied to the court for a finding of unconstitutionality having general binding force in respect of the legislative provision making the promotion and setting up of “international associations” subject to authorisation by the government, given that this governmental authorisation restricted freedom of association viewed as a positive right of association. Article 46.1 of the Constitution stipulates clearly that citizens may form associations without requiring any authorisation, provided such associations do not encourage violence and their aims are not contrary to the criminal law. These two conditions are the only limits which the Constitution sets on freedom of association.

First of all, the provision was unconstitutional because it was generally accepted that only the lack of any constraint at the time of forming associations made it possible to preserve that “progressive” or “negotiable” element which was the basis for the self-determination of associations. This self-determination of associations, viewed as the lack of any external limits to the formation of groups, was itself a requirement of the pluralist dynamics of contemporary liberal societies.

Even those who accepted the possibility of public-authority involvement at the setting-up stage of associations would acknowledge that such involvement could never take the form of a system of prior administrative authorisation that was not linked to a set of legally defined premises. In the case in point, such involvement could perhaps be based on the idea that international associations must not serve as a pretext for para-diplomatic activities which could affect the conduct of the Portuguese state’s foreign policy. But the requirement of prior authorisation in order to be able to achieve that aim was a manifestly disproportionate restriction. This did not mean that there was total freedom of association and, accordingly, that all conditions introduced by the ordinary legislature were necessarily unconstitutional, as the setting of constitutive conditions could not be confused with a system of prior authorisation. Notwithstanding the fact that these conditions were legitimate in view of the specific nature of certain associations – the possibility of having different constitutive conditions depending on the type of association must not be ruled out -, the constitutional ban on prior authorisation applied to all forms of association.

Even if international associations, to which the provision in question related, were recognised as being of a “special nature”, one failed to see how this “special nature” could justify a system of prior authorisation by the government, which, moreover, did not serve any objective purpose and had no basis that could be readily perceived in the interpretation of that provision, and for which a sufficient constitutional basis was lacking. In fact, this idea made it impossible to interpret the impugned provision in a manner consistent with the Constitution.

Three judges voted against the finding of unconstitutionality.

### **Supplementary information:**

The Court affirmed the large body of Portuguese constitutional case-law on freedom of association. It also based its decision on international texts providing for freedom of association (Articles 20 and 23.4 of the Universal Declaration of Human Rights, Article 11.1 ECHR, Article 16 of the Inter-American

Convention on Human Rights, Article 22.1 of the International Covenant on Civil and Political Rights, Articles 10 and 11 of the African Charter of Human and Peoples' Rights and the Charter of Fundamental Rights of the European Union) and on the case-law of the European Court of Human Rights (concerned mainly with defining the negative aspect of freedom of association).

*Languages:*

Portuguese.



*Identification:* POR-2005-2-007

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.07.2005 / **e)** 376/05 / **f)** / **g)** *Diário da República* (Official Gazette), 159 (Series II), 19.08.2005, 11950-11967 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

4.8.7.3 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Budget.**

*Keywords of the alphabetical index:*

Political party, subsidy / Region, autonomous, power.

*Headnotes:*

Only since 1979 have the subsidies paid to political parties been regarded as a means of financing the pursuit of their specific aims, and it was not until after 1998 that the subsidies acquired the exclusive character of a means of funding the activity of political parties, hence the performance of all their social and political functions.

Parliamentary groups have gained a legal and political significance in that their functions have turned them into indispensable instruments for ensuring the proper functioning of modern legislative assemblies. Indeed, the legislative or other work done by parliaments is entirely conceived on the basis of parliamentary groups.

Concerning the legal nature of parliamentary groups, even if these are considered to be "organs of the political parties" (or "independent public entities", "public law associations" or "private law associations vested with public functions"), and to be legally associated as party organs and as State organs, it must be acknowledged that their activity serves a variety of functions. Accordingly public funding, besides allocating the resources needed to carry out most of their party-political activities, should allow this very process to further specifically parliamentary activity – technically, substantively and legally distinct.

It is evident from all consideration of the nature of parliamentary groups that the performance of parliament's functions is made possible and effective through the decisive contribution of their activity in a legislative assembly. Moreover, even if parliamentary groups and representations have a relationship of political dependence with the parties, they are invariably recognised as possessing a functional independence within the parliamentary institution based on parliamentary powers in their own right.

*Summary:*

I. The Minister of the Republic for the Autonomous Region of Madeira had requested a preventive verification of the constitutionality of the provisions made in the regional legislative decree on "Modification of the institutional structure of the legislative assembly", considering that the sums of money allocated in accordance with those provisions constituted subsidies paid by the legislative assembly of the Autonomous Region of Madeira to the parties represented within it. The Minister contended that:

- a. the subsidies took the form of public funding of parties as they were for the pursuit of party objectives;
- b. such funding should comply with the rule prohibiting regional parties;
- c. insofar as they constituted funding of political parties and had direct bearing on their legal and constitutional status, the sums of money referred to in the provisions at issue were a matter within the exclusive remit of the national parliament;
- d. it was in any event doubtful that there existed any regional peculiarities or specificities warranting such a significant difference in treatment between the parliamentary groups of the regional legislative assembly and those of the national parliament and consequently justifying a departure from the conditions required by the principle of equality;
- e. nor did the regional enactment at issue contain any patent substantive justification for legislative provision not on an equal footing with that which

obtained at a national level and not contemplating such positive discrimination as might be desirable for political parties with limited parliamentary representation.

As to the payment of subsidies by the legislative assembly, the arrangement whose constitutionality was challenged had the following characteristics:

- a. a subsidy paid to parties with only one sitting member and to parliamentary groups to enable them to pay for the use of offices staffed by selected, appointed, licensed and qualified personnel, taking the form of an annual amount separate from expenditure on social charges for the staff members of the offices of parties and parliamentary groups, which expenditure was defrayed directly by the regional legislative assembly;
- b. a monthly subsidy paid to the parliamentary delegations in respect of expenses incurred for assistance, contacts with the electorate and other activities carried out under the respective mandates.

II. The Constitutional Court did not find the impugned provisions at variance either with the constitutional framework defining the machinery of self-government and administrative autonomy, particularly as concerned the legislative powers which had been assigned to the autonomous regions, or with the principle of equality. Furthermore, given the constitutional legislator's decision to vest legislative assemblies of autonomous regions and, correspondingly, their component parliamentary groups, with the power of a legislative body as provided by the Constitution for the national parliament "subject to the necessary adaptations", naturally affected by the political and administrative statute of self-government granted to the regions, it must be accepted that the legislator of the autonomous regions had a degree of discretion for normative and constitutive purposes.

However, since regulation of the matters at issue was essentially dependent on the policy options taken by the constitutionally empowered legislator in establishing the levels of the subsidies, founded on the legislator's assessment of the scope for collecting revenue and defraying official expenses or of the expediency of borrowing, from the standpoint of proportionality, the Constitutional Court's review in these matters could only be at a manifest level.

In conclusion, the Constitutional Court decided not to declare unconstitutional the provisions at issue, made in the regional legislative decree on "Modification of the institutional structure of the legislative assembly" passed by the legislative assembly of the Autonomous Region of Madeira on 17 May 2005.

### *Languages:*

Portuguese.



### *Identification:* POR-2007-2-007

**a) Portugal / b) Constitutional Court / c) Plenary / d) 14.08.2007 / e) 442/07 / f) / g) Diário da República (Official Gazette), 175 (Series I), 11.09.2007, 6451-6471 / h) CODICES (Portuguese).**

### *Keywords of the systematic thesaurus:*

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 4.10.7 Institutions – Public finances – **Taxation**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
- 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

### *Keywords of the alphabetical index:*

Tax, authority, powers / Taxpayer, guarantee / Personal data, electronic treatment / Civil servant, taxation, information of superior / Income tax, calculation / Privacy, protection / Banking secrecy / Fundamental right, protection, effectiveness.

### *Headnotes:*

There are sufficient concrete reasons for the requirement that the finance director notify the superior of a public servant (or of any public-service employee) of any decision to assess the latter's taxable income (by indirect methods) in tax situations where the taxpayer, though showing external signs of wealth, has not submitted an income-tax return. To distinguish the situation of such a public servant or public service employee from that of other taxpayers is neither arbitrary nor unreasonably discriminatory. Therefore, the statutory requirement does not conflict with the equality principle.

The basis of banking confidentiality was reinforced by recognition of personality rights and by treating banking confidentiality in terms of protection of privacy and not just as a contractual matter between bank and client. The right to confidentiality is strengthened in that, although the basic right to respect for privacy (Article 26.1 of the Constitution) includes the right to confidentiality of one's personal banking data, the special rules governing rights, freedoms and guarantees become applicable. Three types of right are encompassed by the right to respect for personal and family privacy – the right to be left alone, the right to anonymity and the right to self-determination in information matters. The third one (the right not to make public facts or conduct indicative of one's personality or lifestyle) is the most significant and carries the most weight when the constitutionality of banking confidentiality comes under challenge.

Nonetheless, bringing a bank's financial data on the individual client within the scope of the right to privacy raises issues in that the right to privacy might be thought to encompass only the circumstances of private life, thus excluding, in principle, financial assets. However, in the specific case of data and documents held by banks, and above all as regards debit transactions on accounts, it is neither solely nor particularly the knowledge as such of the financial situation which is a possible invasion of privacy. At a time when bank-account activity, notably by means of credit cards, has grown hugely in volume and become commonplace, such knowledge allows a full and accurate picture to be gained of the account holder's lifestyle.

Thus it is mainly as a guarantee protecting non-financial personal information (which otherwise would be indirectly revealed) that banking confidentiality must be given constitutional protection and brought under the right to respect for privacy established in Article 26.1 of the Constitution. Such inclusion raises problems only with regard to legal persons, mainly commercial companies.

The scope of protection of a fundamental right differs from that of the protection afforded in actual practice. The latter results from weighing interests and values connected with privacy against other interests likewise protected by the Constitution but conflicting with them. Banking confidentiality is a matter that falls within community life, in principle lying outside the strictly private sphere, and even if it is understood as a protected area it is only marginally so. Thus not only is banking confidentiality an aspect of confidentiality open to restriction, breach of it at the behest of the tax authorities is only a slight interference with the protected sphere.

In addition, the principle of fair apportionment of the tax burden entitles the authorities to make tax investigations, the extent of which can on no account be limited by banking confidentiality. Even in a system which (like the Portuguese one) is heavily based on guarantees, there are no constitutional grounds for making data which is, in principle, covered by confidentiality a "safe haven" from the tax authorities. Access to such data is a restriction on a fundamental right. In some circumstances, it is legitimised by the public authorities' obligation to preserve other constitutionally protected rights. The important task for the legislature is to establish mechanisms whereby – to the degree compatible with the main objectives of waiving banking confidentiality – protection continues to be given to those interests that are regarded as coming under the constitutional protection accorded to privacy.

#### *Summary:*

The President of the Republic had sought precautionary review of the constitutionality of provisions in Articles 2 and 3 of the parliamentary decree amending the Tax Act, the code of tax procedure and the general rules governing tax offences.

The first constitutionality issue stemmed from the first rule, last section. This provided that final decisions on taxable income were to be communicated not only to the public prosecutor but also, in cases involving public servants or public-service employees, to the supervising authority, for purposes of investigation within its field of responsibility. The issue arose in the context of situations where a taxpayer showed external signs of wealth but had not submitted a tax return. It was then for the taxpayer to show that income declared corresponded to actual earnings and that, because the external signs of wealth derived from another source, no income tax was payable in respect of them. The question here was whether the tax legislation laid down a set of rules for public servants and public-service employees in their capacity as taxpayers that differed from the rules applying to private citizens in general. The Constitutional Court held that, as far as the actual tax relationship was concerned, there was absolute equality of treatment between such persons and other taxpayers. It could thus be concluded that public servants and public-sector employees had the same rights and the same obligations with regard to the methods of determining income. It was therefore after the tax relationship – once the process of assessing taxable income by indirect methods had been concluded and a final decision, whether administrative or judicial, had been taken on the matter – that the rules now introduced a special feature: in the case of private citizens generally the decision was to be communicated only to the public prosecutor, whereas in the case of a

public servant or public-service employee it was also to be communicated to the supervising authority. In the Constitutional Court's view no discrimination against the persons concerned arose from this provision, which did not contravene the equality principle in so far as that principle prohibited arbitrariness and unjustified differentials. Consequently the provision was not unconstitutional.

The second constitutional issue had to do with the rule whereby banking confidentiality could be lifted in the event of an administrative or judicial appeal from the taxpayer, provided there was good reason for it. The request from the President of the Republic was based on the following constitutional principles: the right to respect for privacy (Article 26.1 of the Constitution), the right to a court (one aspect of Article 20 of the Constitution when viewed as a corollary of the rule of law as established in Article 2 of the Constitution), the right of petition (Article 52 of the Constitution), the right of members of the public to appeal against any administrative decision detrimental to them (Article 268.4 of the Constitution), the proportionality principle (Articles 2 and 18 of the Constitution) and the principle of administrative good faith (Article 266 of the Constitution).

The Constitutional Court held that, quite apart from the vagueness of the overall defence safeguards which it offered, the provision in question allowed the administrative authorities a further waiver of banking confidentiality on grounds which were unduly wide and subject to few conditions.

In addition to interfering with the right to privacy, as was inevitable when confidentiality was lifted without the data subject's consent, this undermined the right of administrative or judicial appeal, and the legislator had not provided for any precautionary or attenuating measure which could be applied without sacrificing the desired objective. In other words, precisely when solid and effective guarantees for the taxpayer were most needed, the necessary measures had been most neglected.

By infringing the principle of a fair hearing, the rules at issue on the lifting of banking confidentiality substantially affected the taxpayer's guarantees of being able to challenge decisions by the tax authorities. Although the right of administrative or judicial challenge was not restricted directly or head on, the inequitable lifting of confidentiality, together with the underlying factors, to a large extent deprived those rights of effect.

The Constitutional Court accordingly held that Article 2 of the Constitution and its corollaries (Articles 20.1, 20.4 and 268.4 of the Constitution) had been contravened.

In addition, weighing up the various interests led to the conclusion that the lack of a requirement to obtain the taxpayer's explicit consent constituted an especially disproportionate and unjustifiable interference with the interest legally protected by the right to privacy: although the lifting of banking confidentiality could not be said to be an inevitable consequence of appeal (since the authority could always find the appeal to be ill-founded), the fact was that, by his own action, the taxpayer immediately and in one fell swoop forfeited what, ultimately, the right was intended to give him, namely control over disclosure of his personal data. Even if the authority decided not to lift confidentiality, the taxpayer lost all power of decision since the mere fact of his submitting an appeal transferred it entirely to the authority. The view must therefore be taken that there was undue and arbitrary interference with the taxpayer's self-determination regarding information.

The greatest interference with the rules deriving from the proportionality principle as broadly construed arose with regard to proportionality in the strict sense. The arrangements for exercising the power to lift confidentiality were unduly detrimental to the guarantee of a proper hearing and the right to respect for privacy in that they were not confined to what was "necessary to safeguard other rights or interests protected by the Constitution", contrary to Article 18.2 of the Constitution and were disproportionate.

Thus the approach adopted provided neither procedural fairness nor a fair hearing with regard to the lifting of banking confidentiality. That alone would justify a finding of unconstitutionality. But this defect, which was reflected in disregard of the right to detailed and appropriate procedural rules, had even more serious effects in the event of an administrative or judicial appeal, basically because it confronted the taxpayer with a constitutionally unacceptable dilemma: either he risked losing his privacy or he lost an important means of protecting his rights and interests. Instead of striking a harmonious balance between the two alternatives so as to retain the main advantages of both, the amendments "compelled" the taxpayer to choose between the two.

On this second issue the Constitutional Court thus found to be unconstitutional the provisions of the code of tax procedure as amended by the parliamentary decree, on the grounds of infringement of Articles 2, 18.2, 20.1, 20.4, 26.1 and 268.4 of the Constitution.

#### *Languages:*

Portuguese.



### *Identification: POR-2009-2-009*

**a) Portugal / b) Constitutional Court / c) First Chamber / d) 09.07.2009 / e) 359/09 / f) / g) Diário da República** (Official Gazette), 214 (Series II), 04.11.2009, 44970 / **h) CODICES** (Portuguese).

### *Keywords of the systematic thesaurus:*

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.

### *Keywords of the alphabetical index:*

Marriage, equality / Homosexuality, couple.

### *Headnotes:*

The Constitution's acceptance of the historical concept of marriage as a union between two persons of different sexes does not mean that the Constitution can be interpreted as directly requiring recognition of marriages between persons of the same sex. However, the Constitution does not prevent the legislative authorities from legally recognising unions between persons of the same sex, or considering those unions to be the same as marriages.

### *Summary:*

The petitioners lodged an appeal against a ruling of the Lisbon Court of Appeal that confirmed the decision of a lower court which denied them the possibility of entering into matrimony with each other. They began by alleging that various provisions of the Civil Code are materially unconstitutional, as well as the existence of an unconstitutionality by omission because the law does not provide for the possibility of marriage between persons of the same sex.

They based their position on the principle of equality enshrined in the Constitution. They made specific reference to the prohibition of discrimination based on sexual orientation, and the right to found a family and to marry under terms of full equality. They added that marriage is an instrument for exercising the right to personal identity and the development of personality, with respect for the protection of the privacy of personal life.

In its arguments, the Public Prosecutors' Office (PPO) emphasised that it was inappropriate to begin by arguing the existence of an unconstitutionality by omission because this argument is incompatible with the concrete-review nature of the present case. The PPO then went on to point out that the *infra-constitutional* legislative authorities are under no obligation to accept the various sociological concepts of "family" on an entirely equal footing, in such a way that every type of family would have to be granted exactly the same degree of legal recognition. In the PPO's opinion, if the Constitutional Court were to uphold the appeal, it would have to hand down an "additional decision" which would expand upon the legal institution of marriage from a jurisprudential perspective.

The PPO went on to say that this type of "additional decision" is the appropriate format for the restoration of the constitutional principle of equality where this has been breached. However, it must be used sparingly; its excessive use may not be compatible with the constitutional prohibition on the performance of materially legislative functions by a jurisdictional body. As it is possible for any of a variety of different sets of legal rules to be fully compatible with the principles laid down by the Constitution, in such a case it would then be necessary for the legislative authorities to take the matter into consideration or adopt appropriate legislative measures.

The petitioners argued that the rule set out in Article 1577 of the Civil Code, whereby marriage can only be contracted between "persons of different sexes" is unconstitutional to the extent that it prohibits marriage between persons of the same sex. The petitioners did not allege that the rule allowing persons of different sexes to marry is unconstitutional. Their position was that persons of the same sex should be allowed to marry – a requirement that they deduced directly from the Constitution. In their view, a situation had arisen where the regulation that was needed to implement a constitutional requirement did not exist. However, to pose the issue in these terms is to define it as a question of unconstitutionality by omission. Under the Constitution, private individuals do not have the powers to raise such questions.

Nevertheless, the Constitutional Court decided to hear the appeal, as the Lisbon Court of Appeal in its decision had effectively applied the challenged rule in a manner that the petitioners considered unconstitutional. However, the Constitutional Court emphasised that the petition, the structure of which resembled an allegation of the existence of an unconstitutionality by omission, necessarily had to restrict itself to the rule that was actually applied in an allegedly unconstitutional sense. The Ruling therefore emphasised that within the scope of the present appeal, the Court was not only precluded

from adding rules needed to implement a hypothetical finding that the appeal should be upheld, but was also unable to evaluate the conformity with the law of other rules derived from the legal treatment of marriage, such as those concerning the effect of the latter.

The Constitutional Court also took the view that the crux of the question posed in the appeal was not whether the Constitution allows the creation of a system of homosexual marriage, but rather whether it requires the institution of marriage to be configured so as to include unions between persons of the same sex. In analysing this question the Court felt that importance should be attached to the fact that the text of Article 36.1 and 36.2 of the Constitution (which enshrine the right to found a family and to marry on terms of full equality) has remained unchanged since the original version of the Constitution was passed in 1976. At that historic moment, when the Constitution handed the ordinary legislative authorities the task of writing the rules on the "requirements for" and effects of marriage, Article 1577 of the Civil Code already stated that "marriage shall be a contract entered into by two persons of different sexes". If the constitutional legislative authorities had wanted to change the legal configuration of marriage by ordering their counterparts to pass legislation permitting persons of the same sex to marry, they would have stated it explicitly. The petitioners placed special emphasis on the amendment to Article 13.2 of the Constitution (on the principle of equality) which was introduced by the sixth revision of the Constitution (2004), and which expressly prohibits discrimination based on "sexual orientation". However, the Court felt that the addition of sexual orientation only means that the legal order is "indifferent" to somebody's sexual orientation. The Court noted that the petitioners' argument does not deal with the issue as to why, in 2004, the constitutional legislative authorities did not complete the supposed imposition of homosexual marriage. One cannot simply assume that they thought it unnecessary to include an express normative reference to that end.

The Court also noted that the petitioners were working on the assumption that extending marriage to persons of the same sex would not entail a redefinition of the legal redefining the legal order, but a simple removal of the restriction of marriage to persons of different sexes. However, the fact that marriage is expressly mentioned in the Constitution, although it is not defined, indicates that those drafting the Constitution had no intention of overturning the common concept, which is rooted in the community and accepted by the civil law. The Court confirmed the opinion of several authors, who were of the opinion that the Constitution's acceptance of the historical concept of marriage as a union between two persons of different sexes does not mean that the Constitution can be interpreted as directly requiring

recognition of marriages between persons of the same sex. However, the Constitution does not prevent the legislative authorities from legally recognising unions between persons of the same sex, or considering those unions to be the same as marriages. The Ruling says that the fact that the Court accepts that the marriage contemplated by Article 36 must be entered into by persons of different sexes does not imply an endorsement by the Court of the notion that Article 36 possesses the scope of a guarantee, so that the constitutional rule limits itself to definitively accepting the concept of marriage that was in force in the civil law at a particular point. Institutional guarantees should not be viewed in this way; neither should the ordinary law (as opposed to the Constitution itself) be viewed as the parameter for gauging the extent of constitutional protection. The Court did not therefore accept that the form of marriage which is protected by the Constitution necessarily entails petrifying the existing civil-law definition of marriage and excluding the legal recognition of other ways in which people share their lives. The Court referred to the comments it had made in an earlier Ruling, to the effect that the historical/cultural implementation of the content of the idea of the dignity of the human person falls within the remit of the legislative authorities. Within the framework of the bodies that exercise sovereign power, they are primarily responsible for the creation of the legal order and for its dynamics.

The Court also pointed out that the history of constitutionalism is marked by the progressive constitutionalisation of human rights, and that it is possible to observe the way in which the thinking of the majority has evolved since the time when rights such as the right to vote were reserved for citizens who were adult, male and land-owners. However, the process of incorporating such rights into a Constitution is based on the concern to ensure that the constitutional legislator catalogues them, rather than the rights becoming part of a process ordered by a court. A key consequence of accepting the sovereignty of the people is the enshrining of the system of the separation of powers. With it also comes acceptance of decisions issued by impartial and independent bodies, such as the courts, as well as acceptance that the reform of the legal order is in the hands of bodies that represent the will of the people.

The Court recognised the necessity of accepting that the changes the petitioners were seeking involves a far-reaching revision of the existing civil-law concept of marriage, but stressed that this did not mean that this concept had to be imposed at constitutional-law level. One could interpret the institutional guarantee format as an obligation on the part of the legislative authorities to create rules establishing a functional content for same-sex unions which is equivalent to that of marriage.

However, these rules do not necessarily entail an extension of the institution of marriage to persons of the same sex. Any other conclusion would presuppose that the legislative authorities – but not the Court – opt for a concept that views marriage as a simple private relationship.

#### *Supplementary information:*

The Ruling includes two dissenting opinions. The author of one of the opinions explains that he hesitated over the solution adopted by the majority but could not see any arguments in its favour other than traditional ones that he felt were unacceptable. The second dissenting Justice said that she agreed with the notion that determining whether the challenged rule is in breach of the principle of equality is a question to which the answer is to be found in the concept of marriage that is adopted. She considered that marriage is not “a social institution that is presented to spouses as possessing a relatively stable meaning – that of a union between man and woman, which is particularly based on its function in the reproduction of society”, and which constitutes “a specific means of involving one generation in creating and raising the following one, and the only such means that ensures that a child enjoys the right to know and be educated by his or her biological parents”. On the contrary, the author of the second dissenting opinion felt that the constitutional rule means that everyone has the right to marry on terms of full equality, i.e. everyone has the right to gain access, without any differentiation, to the legal (and symbolic) meaning of the act of entering into a marriage undertaken by two persons who want to found a family by fully sharing their lives. The dissenting Justice said that she had arrived at this conclusion in the absence of sufficient material grounds for differentiation, which she had been unable to find.

#### *Cross-references:*

The Ruling makes extensive reference to comparative jurisprudence, including that of the European Commission of Human Rights and the Court of Justice of the European Communities.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2010-1-003

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 23.02.2010 / **e)** 75/10 / **f)** / **g)** *Diário da República* (Official Gazette), 60 (Series II), 26.03.2010, 15566 / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers**.

5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment**.

#### *Keywords of the alphabetical index:*

Abortion, punishment, exclusion, conditions / Abortion, responsibility / Abortion, information session, prior, obligation / Abortion, number, containment, measures / Value, constitutional, objective / Right, constitutional, protection, form, choice.

#### *Headnotes:*

In the first stages of pregnancy, the minimum content of the duty to protect intrauterine life, which falls to the State, does not require that reasons from a predetermined list be given in order to be able to put an end to that life.

The Court reaffirmed earlier jurisprudence to the effect that intrauterine life falls within the scope of the constitutional protection of the right to life, but only as an objective constitutional value. It emphasised that this only implies the existence of a duty to protect; the Constitution does not predetermine a specific form of protection. It is up to the legislator to choose one, while respecting not only the prohibition on insufficiency (the guarantee of minimum protection), but also the prohibition on excess (to the extent that it affects other constitutionally protected assets). Penal sanctions constitute the form of penalty which does the most injury to those assets and can only be used when the protection required by the Constitution has to be so efficient that these sanctions are the only method of achieving it. In the present case, the requirements for appropriateness and necessity are not met, due to the specific nature of the conflict posed by the decision whether to abort: an “inner”, existential conflict within the personal sphere of someone who is simultaneously causing and suffering the injury. Within this singular framework, it can be argued that in the early stages of pregnancy, the State would fulfil its duty to protect by promoting a decision which is considered but for which the pregnant woman carries the ultimate responsibility, rather than threatening her with criminal sanctions.

In the Constitutional Court's opinion, the operative discipline of the Law in question fulfilled in an effective fashion the imperative to protect. It was not clear that there was any position of indifference or neutrality towards the decision the pregnant woman is called on to make. Even if its dissuasive purpose is not expressly stated, only the desire to try to protect not only the woman's health, but also prenatal life, makes it possible to comprehend the procedures that are required for an abortion to occur. For criminal sanctions not to ensue there must be an obligatory session in which the pregnant woman must be informed about the conditions which the State can make available in the form of support for her to go ahead with her pregnancy and the child's birth.

In order to determine whether the duty to protect prenatal life has been fulfilled, an examination is needed of all the infra-constitutional rules that exist in this respect, not just the specific rules governing abortions in the first ten weeks of pregnancy. Heed must be taken too of a wide variety of normative regulations and public benefits and services in the fields of sex education, family planning and support for mothers and the family, all of which are the objects of numerous pieces of legislation which are listed in the Ruling, in their role as protective instruments and factors aimed at a containment of the number of abortions.

#### *Summary:*

I. This case involved two requests for the successive abstract review of the Law that provides for an "exclusion of unlawfulness in cases of abortion". Under this Law, an abortion performed at the woman's choice during the first ten weeks is not punishable, provided that it is carried out by or under the direction of a doctor, at an official or officially recognised health establishment, after an obligatory appointment designed to provide the pregnant woman with access to information which is of relevance to enable her to make a free, aware and responsible decision, followed by a minimum reflection period of three days.

The core issue was the norm within the Law which stated that "Abortions performed by a doctor, or under his direction, at an official or officially recognised health establishment and with the consent of the pregnant woman are not punishable when: (...) conducted at the woman's choice, within the first ten weeks of pregnancy".

The Constitutional Court received two petitions asking it to consider the constitutional compliance of various aspects of the Law with the Constitution. One was submitted by a group of thirty-three Members of the Assembly of the Republic; the other was submitted by

the President of the Legislative Assembly of the Madeira Autonomous Region (RAM). The President of the Court decided that the latter request should be incorporated within the former.

Both petitions pointed out a number of defects in the Law, involving both formal and material unconstitutionality.

The allegations of formal unconstitutionality included the view that a legislative act had been passed on the basis of a referendum when the latter did not possess binding efficacy, and that the Assembly of the Republic did not possess the legitimacy to pass it because the electoral manifestos of the two largest parties with seats in the Assembly had promised that they would only agree to change the rules governing abortion if they were directed to do so by a referendum.

II. The Court did not accept the validity of these arguments. The legal rules governing referenda State that the legislative organ with the competence to publish the legislative measure whose normative purpose corresponds to an affirmative answer to the proposal that has been submitted to the electorate is only prevented from doing so in the same parliamentary session if two conditions are met. Firstly the referendum must be binding, and secondly the negative answer must prevail. With regard to the second of the two alleged formal defects, the Court noted that the mechanisms which the Constitution typifies for the exercise of the sovereignty that lies with the people do not include any which would make it viable to control any failure to respect commitments made to the electorate by invalidating acts which do not comply with the content of the electoral manifesto that was approved by voters.

It was alleged that the Law suffered from the following material defects: it removed penalties for abortions performed at the woman's choice during the first ten weeks of gestation, without requiring her to give any reasons to justify her decision; it completely excludes the male progenitor from both the responsibility for the process and the making of the decision to abort; the information that is to be given to the pregnant woman with a view to her decision is selectively biased; it means that human life is totally unprotected for the first ten weeks, and it requires the State to contribute to the elimination of human lives, for example via the National Health Service (SNS) and the inherent social benefits and services; whereas abortion is now acknowledged to be an act that entails a risk to the woman's physical and mental health, the regime created by the Law releases the State from its function of providing solidarity and protecting physical and mental health; and the Law leaves it to a Ministerial Order to determine the information that is given to the pregnant woman in order

to help her make her decision (the minimum reflection period of three days is counted from the moment at which this information is provided). This is unconstitutional because fundamental rights are at stake.

In its Ruling the Court considered that all these partial questions led to the central question of whether, and to what extent, it is permissible not to use penal sanctions as an instrument for protecting intrauterine life.

The Court also rejected the petitioners' allegations that the minimum reflection period of three days is insufficient, and that the woman's right to physical and mental health, the right to freedom and the principle of proportionality are all violated. It also rejected the allegations to the effect that the male progenitor has no part in the decision-making process, that doctors who are conscientious objectors in relation to abortions are not allowed to take part in the obligatory information session, and that the information provided in that session is regulated by Ministerial Order.

The issue in the petition by the President of the Legislative Assembly of the Madeira Autonomous Region (RAM) was the organisational/formal validity of the normative contents of the Law. The petitioner argued the existence of a breach of legislative, administrative, financial and regional autonomy, and of the autonomous regions' constitutional and legal right to be consulted before legislation is passed.

The Court did not recognise the petitioner's legitimacy to base his request on the violation of the dignity of the human person and the inviolability of human life. It held that this dimension of the question did not entail any "breach of the autonomous regions' rights". The petitioner argued that the normative measure he was challenging obliged medical staff to perform abortions, and that this matter fell within the region's areas of competence, given that the Political/Administrative Statute of the Madeira Autonomous Region states that "health" is a matter of regional interest.

The Court considered that the legal regime created by the Law is situated at the level of a redefinition of the scope of protection offered by a norm which creates a criminal offence, and that the regime therefore addresses a matter which lies within the exclusive legislative competence of the Assembly of the Republic. The Legislative Assembly of the Madeira Autonomous Region retains its generic regulatory competence over all matters that do not conflict with the provisions of the Law, and there is thus no breach of regional autonomy. The right of autonomous regions to prior consultation has not been breached here, because the preconditions for the existence of such a breach do not exist, given that the nature and object of the legal rules governing abortion concern the whole country.

III. The Ruling is accompanied by five dissenting opinions, whose authors justify their positions in great depth. However, the present summary, which covers two review requests, does not allow enough space for a detailed account. The Ruling itself debates the question posed by the petitioners, as to whether the Law breaches the Constitution, the Universal Declaration of Human Rights and the European Convention on Human Rights. It deals extensively with the solutions offered in comparative law.

#### Cross-references:

The following Rulings, which the Court had already handed down in relation to this subject, are also of interest:

- no. 25/84, 19.03.1984;
- no. 85/85, 29.05.1985;
- no. 288/98, 17.04.1998, *Bulletin* 1998/1 [POR-1998-1-001];
- no. 578/05, 28.10.2005; and
- no. 617/06, 15.11.2006, *Bulletin* 2006/3 [POR-2006-3-002].

#### Languages:

Portuguese.



#### Identification: POR-2010-1-004

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.04.2010 / **e)** 121/10 / **f)** / **g)** *Diário da República* (Official Gazette), 82 (Series II), 28.04.2010, 22367 / **h)** CODICES (Portuguese).

#### Keywords of the systematic thesaurus:

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

#### Keywords of the alphabetical index:

Marriage, couple, same-sex / Homosexuality, couple, marriage / Marriage, as a symbolic institution.

### **Headnotes:**

The essential core of the constitutional guarantee applicable to marriage is not damaged by abandoning the rule that spouses must be of different sexes; and extending the ability to marry to persons of the same sex does not conflict with the recognition and protection of the family as a "fundamental element of society".

It can be argued that at the time when the Constitution was drafted and in the light of the social reality and legal context in which it emerged, the form of marriage it represents was between two persons of different sexes. However, it is also possible to conclude that those drafting the Constitution did not adopt any measures which would prevent the institution of marriage from evolving. As the right to enter into marriage was configured as a fundamental right, the legislator cannot remove it from the legal order. Marriage is perceived as a legal institution intended to regulate situations in which persons live together, in recognition of its importance as a basic form of social organisation. However, the Constitution does not define the profile of the elements that make up the legal institution of marriage; instead, it expressly charges the legislator with maintaining the necessary link between the law and social reality. The Court therefore took the view that, at each given moment in history, the ordinary legislator is charged with understanding the dominant concepts and enshrining them in the legal order.

### **Summary:**

I. The President of the Republic asked the Constitutional Court to conduct a prior review of the constitutionality of norms contained in a Decree of the Assembly of the Republic which was sent to him for enactment and which permitted civil marriage between persons of the same sex. The request underlined the view that according to the Portuguese constitutional jurisprudence set out in Ruling no. 359/2009, the legislature is not obliged under the Constitution to allow same-sex marriages, and that an outright ban and provision for a different regime are both legitimate. The point was made in the request that historically the constitutional concept of marriage is one of a union between two persons of different sexes, and that there were grounds for doubt as to the material constitutionality of the norms in question, as they could potentially run counter to the essence of the institutional guarantee which is innate in the concept of marriage that is accepted by the Constitution.

II. The Court noted that marriage benefits from the 'institutional guarantee', which prevents the legislator from making arbitrary changes to the essential characteristics of a legal institution. However, it is not permissible to use an "institutional" way of thinking to

reverse the sense of the guarantee and impose the preservation of the institution, in its existing form, from actions taken by the legislator, unless there is a direct conflict between those actions and the determination of the meaning of the fundamental right in question within the axiological framework of the system of fundamental rights. The establishment of a situation in which two people live together as a couple is a key structural element of the concept of marriage, without which the concept loses its character. However, this does not apply to the sexual diversity of persons who want to make up a couple and to submit themselves to the rules governing wedlock. The only factor for which that sexual diversity is indispensable would be participation in a "couple" relationship at a sexual level to lead to the birth of children who are biologically common to members of the couple, a purpose which is not a requirement under the Constitution or the ordinary law. The situation in which two people are joined together as a couple, in a relationship that is characterised by sharing and mutual assistance, on a common life path governed by the law, of a permanent nature, is also available to two persons of the same sex. This means that the legislator is not precluded from giving this means of freely developing one's personality the form that currently applies to the protection of relations between persons of different sexes, thus enabling interested parties to adopt the marriage format for themselves. The extension of marriage to same-sex spouses does not conflict with the recognition and protection of the family as a "fundamental element of society", inasmuch as the Constitution loosened the bond between the formation of a family and marriage, and offered its protection to the distinct family models which exist in modern social life. Moreover, attributing the right to marry to persons of the same sex does not affect the freedom to enter into wedlock enjoyed by persons of different sexes, nor does it change the rights and duties which apply to those persons as a result of their marriage, or the representation or image which they or the community may attribute to their matrimonial status.

The Court excluded the hypothesis of a breach of the principle of equality from the grounds for its decision. It said that the fact that the legislator is bound by this principle does not preclude the freedom to shape legislation; the legislator is responsible for identifying or qualifying the factual situations that will serve as the points of reference which are to be treated in the same, or different, ways. However, the Court then stressed that while there is no doubt that from a biological, sociological or anthropological perspective, a lasting union between two persons of the same sex and a lasting union between two persons of different sexes are different realities, from the legal point of view there are material grounds for treating them in the same way. It is reasonable for the legislator to be able to favour the symbolic effect and optimise the anti-discriminatory

social effect of the normative handling of this issue by extending the protection offered by the unitary framework of marriage to both these unions.

The Court therefore decided not to hold the norms before it unconstitutional.

III. The Ruling is accompanied by seven concurring opinions and two dissenting opinions. Three of the former argue that the Constitution not only permits same-sex marriage, but in fact requires it.

One of the dissenting opinions is essentially based on the view that making marriage between persons of the same sex fit within the current constitutional concept of marriage is only possible if one accepts the existence of a “constitutional mutation” that has made the difference between the spouses’ genders irrelevant to the Constitution. This constitutional mutation could only operate if the constitutional legislator were to make and clearly adopt an express, prior choice within the overall framework of a constitutional revision, and could only be justified with reference to a change in the essential core of the guarantee enshrined in the Constitution; justification cannot derive from the prohibition on discrimination based on sexual orientation. This, in the author’s view, would constitute an unlawful result.

The second dissenting opinion underlines the view that the solution adopted in the Ruling represents a constitutional revision or mutation with regard to marriage, undertaken by the Constitutional Court itself, in violation of the constitutional principle of the separation of powers. According to the dissenting Justice, the constitutional concept of marriage is not a descriptive or factual one, nor is it a mere concept whose intention is to proclaim a constitutional programme. In a rigid, “continental-type” constitutional system such as the Portuguese system, and in the light of the constitutional-law parameters, it cannot be considered to be an open concept. The author of the opinion also suggested that the extension of the normative concept of marriage to encompass both homosexual and heterosexual unions is not the only possible solution to the need to respect the principle of human dignity, the right to privacy, the right to equality, and the ability to enjoy general rights and freedoms without discrimination, especially those based on gender or sexual orientation.

#### Cross-references:

The Ruling contains extensive references to international documents – in particular the Universal Declaration of Human Rights – and the comparative jurisprudence from various European Union countries, other European countries, and other non-European common-law countries.

See Ruling no. 359/2009, *Bulletin* 2009/2 [POR-2009-2-009]. It concerned a concrete review case initiated by a homosexual couple who had been denied the possibility of marriage on the basis of the applicable provisions of the Civil Code. The norm in question was not held to be unconstitutional.

#### Languages:

Portuguese.



# Romania

## Constitutional Court

### Important decisions

*Identification:* ROM-1996-3-001

a) Romania / b) Constitutional Court / c) / d) 19.11.1996 / e) 140/1996 / f) / g) *Monitorul Oficial al României*(Official Gazette), 324/04.12.1996; *Curtea Constituțională, Culegere de decizii și hotărâri* 1995-1996 (Official Digest), 709 / h).

*Keywords of the systematic thesaurus:*

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

*Keywords of the alphabetical index:*

Public figure, status.

*Headnotes:*

The right to freedom of expression implies the right to unrestricted expression of any opinion or comment but also the duty to provide evidence in support of statements relating to an alleged offence committed by a person exercising a public function and to refrain from insults.

*Summary:*

During an ex-post review, the Constitutional Court ruled on a complaint that certain provisions of the Criminal Code concerning insults to authority were unconstitutional.

Article 16.1 of the Constitution, which sets out the principle of equality before the law, states that: "Citizens are equal before the law and public authorities, without any privilege or discrimination".

Regarding the principle of equality before the law, one of the fundamental rights of the citizen, namely the right to freedom of expression, including the freedom of the press, was dealt with in the aforementioned decision.

According to the Constitution, freedom of expression must not be prejudicial to the dignity, honour, privacy of person, and the right to one's own image.

These constitutional guarantees apply to all citizens equally, whether or not they exercise a public function.

In a trial relating to the aforementioned limits to freedom of expression, the question was raised whether freedom of expression could be limited in cases where statements were made concerning a person exercising a public function or who is identified with the authority on behalf of which he or she performs the duties pertaining to that function.

In the case of public authorities, particularly those consisting of a single person (eg. the President), the authority itself cannot be dissociated from the person who symbolises it and on behalf of which he or she performs his or her functions, under the conditions provided for in law.

The core of freedom of expression is the freedom to express opinions or comments which can also relate to simple facts. The limits on acceptable allegations are much broader when they relate to a politician than when they relate to other citizens, given the politician's role in society and the fact that, by its very nature, politics concerns everybody. However, this does not mean that the content and presentation of certain allegations can be used to damage the reputation of a politician by claiming that he or she is the perpetrator of certain imagined offences for which there is no evidence and no factual basis.

This is why the Constitutional Court ruled that opinions on political or moral issues or other comments could not constitute facts likely to damage the reputation of a person exercising a public office, but that insults or statements referring to unproven offences were an exception not covered by freedom of expression.

*Languages:*

Romanian.



# Slovakia

## Constitutional Court

### Important decisions

*Identification:* SVK-2008-2-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Senate / **d)** 26.06.2008 / **e)** II. ÚS 111/08 / **f)** / **g)** Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky (Official Digest) / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments.**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

3.9 General Principles – **Rule of law.**

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights.**

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

*Keywords of the alphabetical index:*

Extradition, torture / Extradition, information about receiving state / Extradition, competence / Obligation, international, state / Treaty, on human rights, direct applicability.

### Headnotes:

Under Slovak extradition legislation, there are two stages to decision-making on extradition. The first is done by ordinary (criminal) courts, and the second by the Minister of Justice. The ordinary legislation in literal terms and in literal interpretation only allows the Minister to take account of important human rights. In practice, however, the ordinary courts must also take human rights into account and carry out the "substantial grounds for believing" test. This duty derives from the principle that the courts are in the first place protectors of human rights; also from the direct applicability of the Constitution and human rights-treaties; and from the fact that decision-making by the Minister cannot be considered as an effective legal remedy.

### Summary:

I. The Constitutional Court was considering a complaint by an Algerian citizen who was detained in Slovakia for the purpose of extradition to Algeria, where he had been sentenced *in absentia* to life imprisonment for criminal acts related to terrorism and for the criminal act of falsification and use of false documents. The ordinary courts (regional court, Supreme Court) allowed his extradition, but because of the wording (and literal interpretation) of the code of criminal procedure, the Supreme Court refused to take human rights into account. The complainant stated that if extradited he would be exposed to the risk of ill-treatment. In his view, this matter should have been evaluated by ordinary courts. The complainant submitted this complaint after the decisions of the courts, but before the case could be referred to the Minister of Justice. The complainant claimed the violation of his fundamental right not to be subjected to torture or to cruel, inhuman or degrading treatment (as guaranteed by Article 16.2 of the Constitution and by Article 3 ECHR), which was allegedly caused by the procedure and decision of the Supreme Court. The Constitutional Court deferred the execution of the challenged decision using an interim measure.

II. In its decisions on merits, the Constitutional Court stressed that all courts are under a duty to protect human rights and fundamental freedoms of individuals against the intervention of public power.

III-treatment is prohibited in absolute terms by Article 16.2 of the Constitution, and by Article 3 ECHR. Neither the Constitution nor the ECHR contains a limitation clause on these rights. The Constitutional Court has repeatedly emphasised the categorical nature of the prohibition of ill-treatment in its findings III. ÚS 7/01, I. ÚS 4/02, III. ÚS 86/05, III. ÚS 194/06, and II. ÚS 271/07. The Constitutional Court has also pointed out the binding force of the Convention against Torture

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and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, the "Convention against Torture"), and the International Convention on Civil and Political Rights (hereinafter, "ICCPR").

The Constitutional Court stated that it is within the jurisdiction of the Slovak Republic to extradite the requested individual (the extradition is assumed by the European Court of Human Rights itself), and because the matter deals with extradition to Algeria, it is also necessary to take into consideration the bilateral agreement between the Slovak Republic and the Republic of Algeria.

The fundamental human rights of any extradited person may be breached by a foreign public power. The extraditing state must therefore consider the human rights aspect of the extradition in a robust albeit sensitive manner. From that perspective, the type of act which the person subject to extradition may have committed is irrelevant, as is the particular criminal act for which he has been sentenced when the issue is about extradition for the purpose of serving that sentence.

Article 3 of the Convention against Torture, which is binding on the Slovak Republic, provides that "no State Party shall... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The *Soering* Judgment of 1989 is part of European heritage and standard in the protection of human rights. In the *Soering* case, the European Court of Human Rights stated that the requested state is also responsible for potential violations of Article 3 ECHR outside its territory. The opposite would be contrary to the principle that provisions of the Convention should be interpreted and applied so as to make its safeguards practical and effective. The Constitutional Court stated that Article 3 of the Convention against Torture thus becomes part of the Article 3 ECHR. Similarly according to Ordinary Comment no. 20 of the Committee concerning prohibition of torture and cruel treatment or punishment (Article 7 ICCPR), state parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. The Constitutional Court stated that Article 16.2 of the Constitution also includes a prohibition on extradition where there are substantial grounds for believing that the person concerned would risk being subjected to ill-treatment. This prohibition is therefore valid within the Slovak Republic under Article 16.2 of the Constitution, Article 3 of the Convention against Torture, Article 3 ECHR and Article 7 ICCPR. The Constitutional Court also referred to the recent European Court of Human Rights Judgment *Saadi v. Italy*. The Constitutional Court

maintained that it is absolutely necessary for the Slovak Republic to responsibly perform the "substantial grounds for believing" test, and specified the state authorities of the Slovak Republic that have this duty.

The Supreme Court stated in its reviewed decision that the consideration of human rights does not fall within its extradition competence. According to the Constitutional Court, in the Slovak Republic, with its mixed model of extradition procedural law, decision-making on extradition is divided between the ordinary courts and the Minister of Justice. The regional court and the Supreme Court form two instances in decision making on the permissibility of extradition. If the courts decide that extradition is permissible, the Minister of Justice either allows it, or he may refuse it if human rights are endangered. Considering the tradition of international public law, as well as the practical requirements, the internal bodies for extradition as part of international relations are the executive power bodies – in this case, the Minister of Justice.

The Constitutional Court examined the question of whether ordinary courts were under a duty to evaluate the permissibility of extradition from a human rights perspective. The Constitutional Court stated that the traditional permissibility conditions of extradition (substantive extradition law), which courts are required to evaluate according to the Code of Criminal Procedure, are enlarged by the human rights perspective by the direct application (*lacunae legis* in the ordinary law) of the Constitution and human rights treaties. In a state governed by the rule of law, courts are in the first place protectors of human rights because of their independence and because they are bound only by law.

The Constitutional Court expressed the opinion that the basic element of the *ordre public* in the Slovak Republic is the respect for human rights in line with European standards. From the *ordre public* and its systematic incorporation into the Criminal Procedure Code, it is clear that this is not only binding on the Minister of Justice, but also on the ordinary courts.

The Constitutional Court took the stance that a decision by the Minister of Justice cannot be considered an effective legal remedy after decisions of the ordinary courts according to Article 3 in connection with Article 13 ECHR. Under the Code of Criminal Procedure, the Minister alone may consider human rights, his or her decision may be political, there is no access to the Minister for complainants, and there is no procedure for the Minister's decision-making. Neither is there any need to divulge the reasons behind the decision. Only a court decision could constitute such a remedy (*Chahal v. United Kingdom*). Thus, both ordinary courts and the Minister are obliged to take human rights into account.

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The expressed legal opinions are supported by foreign case-law, for example by the Constitutional Court of the Czech Republic (I. ÚS 752/02 [CZE-2004-3-013], III. ÚS 534/06), and the Spanish Constitutional Court.

The Constitutional Court finally stated that the Supreme Court, by failing to perform the "substantial grounds for believing" test, by criticising the procedure of the Regional Court (which partially evaluated the human rights context of extradition), and by ignoring the possibility of infringement of the complainant's human rights violated the procedural component of Article 16.2 of the Constitution and Article 3 ECHR. The Constitutional Court maintained that ordinary courts must review the case, evaluate the relevant information, perform the "substantial grounds for believing" test, take into account the documents submitted by the complainant, and, possibly at their own initiative obtain other documents. These could have been obtained from the U.N. High Commissioner for Refugees, the Slovak Helsinki Committee, the Slovak National Center for Human Rights, Amnesty International, Human Rights Watch, reports of the United States Department of State, as well as the comments by the U.N. Committee against Torture relating to Algeria.

The Constitutional Court examined the bilateral agreement between Algeria and the Czechoslovak Socialist Republic as to legal assistance in civil, family and criminal cases. The Constitutional Court stated under the wording of the agreement, extradition is not permissible if the legal order of either party forbids it. If ordinary courts establish that a complainant may face the threat of ill-treatment, then extradition is not permissible because the Slovak legal order does not allow it.

The Constitutional Court noted how sensitive the issue of the value (public good) of the Slovak Republic's citizens' security was. The purpose of extradition is to prevent perpetrators from fleeing justice. According to the Code of Criminal Procedure, if a decision was made in extradition proceedings that the extradition was not permissible and the Minister had not allowed the extradition, the Ministry of Justice would have submitted the case, in accordance with the legal order for criminal prosecution, to the Attorney Ordinary's Office of the Slovak Republic.

#### *Supplementary information:*

It must be emphasised that the Constitutional Court did not decide whether the complainant should be extradited. It simply decided that criminal courts must carry out the "substantial grounds for believing" test. The Supreme Court subsequently decided that the complainant could not be extradited.

#### *Cross-references:*

- See also *Bulletin* 2004/3 [CZE-2004-3-013].

#### *Languages:*

Slovak.



#### *Identification:* SVK-2009-2-001

- a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 11.02.2009 / **e)** PL. ÚS 6/08 / **f)** / **g)** Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky (Official Digest) / **h)** CODICES (Slovak).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates**.

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

#### *Keywords of the alphabetical index:*

Prisoner.

#### *Headnotes:*

Election deposits to both the national and the European Parliament at the present level is constitutionally acceptable. Preventing those serving prison sentences from exercising the right to stand for election does not breach the Constitution. Preventing prisoners from exercising the right to vote in elections to both the national and the European Parliament is not in conformity with the Constitution, but preventing them from voting in elections to local and regional councils is constitutionally acceptable.

### Summary:

The Prosecutor General filed a petition with the Constitutional Court challenging the duty of political parties to pay a sum of money (election deposit) as a necessary precondition to stand for election to the European Parliament or to the national Parliament. It was suggested in the petition that the system of deposit infringed the principle of equality, the right to stand for election and the right to vote. It was also argued that it hampered the principle of free competition of political parties.

The rationale behind the Prosecutor General's argument that the election deposit restricts the right to stand, the principle of equality and thus the right to vote was that only citizens supported by economically strong political parties could participate in political competition. This also affects the right to vote and violates the principle of equality because it prevents the electorate from voting for candidates not supported by rich parties. Lack of resources does not automatically mean lack of voters. The final election results themselves show how each political party is represented, so every political party should have the possibility of being elected. The minimum vote clause (electoral threshold) is a sufficient measure to secure the integrity and functionality of both the national and the European Parliament. There is no need for an election deposit in this sense.

Under the Law on Elections the electoral threshold is 5% and if a political party gains at least 2% of the vote, the government repays the election deposit.

The Court found the election deposit to both the European and the national Parliament to be in conformity with the Constitution. The Court took the position that the principle of free competition is not absolute and the right to stand for election may be subject to legitimate restriction. The official explanation for the governmental bill stated as a reason for election deposits the bad experience with the previous system of candidacy based on verifying the number of members or supporters of non-parliamentary political parties. This aim of the election deposit (to eliminate the previous problems) was not considered as legitimate by the Court.

Nevertheless, election deposits have several other purposes. Contribution to election expenses is not legitimate, due to the public interest in democratic elections. Securing integrity and functionality was not fully accepted as a legitimate aim, because less intrusive means (such as a minimum vote clause) are available. The Court found that the main and fully acceptable legitimate aim for election deposits is to prevent political parties that are not serious contenders from participating in the elections. The deposit should

serve as a motivating factor for political parties which genuinely wish for power and which have a real chance of success, as opposed to parties which merely wish to publicise themselves or undermine others. The Court also took into consideration the sum of money required as election deposit. Election deposit for the European Parliament is 1670 Euro, which the Court found completely acceptable. The deposit for the national Parliament is 16 600 Euro, which the Court considered to be almost too much, but still acceptable.

The Prosecutor General also challenged provisions preventing those serving prison sentences from exercising their right to vote or the right to stand for election to the European Parliament, national Parliament, or local and regional councils. He suggested that these provisions resemble the penal sanction of losing political rights, which is no longer part of the Slovakian legal order. He went on to observe that whilst service of a prison sentence may prevent a prisoner from carrying out public office, it should not prevent him/her from competing for such office or supporting a candidate for such office through voting. From the technical point of view, there are no obstacles to the exercise of the right to vote in prison. Ultimately laws adopted by Parliament are also binding on prisoners.

The Court decided that preventing prisoners from exercising the right to stand for any type of election conforms to the Constitution. This prevention is implicit in their restriction of personal liberty. For practical reasons prisoners cannot compete in electoral campaigns. Candidacy for and membership of Parliament cannot be practically exercised by prisoners. The Court also pointed out that under Article 81a.f of the Constitution, a prison sentence will result in a Member of Parliament losing his mandate. Thus it is a *minore* and *maius rationale* to prevent prisoners from exercising the right to stand for election.

The Court decided that preventing prisoners from voting in election to national and the European Parliament is not in conformity with the constitutional right to vote, with basic electoral principles, the principle of a state governed by the rule of law and the principle of democracy. The Court noted that there is no legitimate aim for such restriction. The territory of the Slovak Republic is one constituency for the parliamentary elections. There are no obstacles to organizing these elections in prison. Ultimately Parliament adopts laws which are binding on everyone under Slovakian jurisdiction including prisoners. The Court adopted a similar approach to elections to the European Parliament. It pointed out that the European Parliament has some effect on prisoners. The Court applied the European Court of Human Rights decision *Hirst v. United Kingdom* in this part of its reasoning.

The Court decided that denying prisoners the right to vote for both local and regional elections conforms to the Constitution, principally because while serving their sentences, prisoners are not part of their local community and local governments does not affect their lives in prison.

#### *Supplementary information:*

A dissenting opinion was expressed regarding the part of the decision relating to election deposits by Justice Mészáros. He stressed that post-totalitarian countries should be more careful when restricting political rights. This is the reason for Article 31 of the Constitution. Preventing political parties that are not "2 serious contenders" is not a legitimate aim. All registered parties fulfil the criteria for elections. Their level of success in Parliament should be a matter of popularity rather than sponsorship. Election deposits are not helpful to small and non-parliamentary parties. Although the European Court of Human Rights allows for election deposits, a margin of appreciation should have been applied in this case. Although some Eastern European Constitutional Courts have recently upheld election deposits [UKR-2002-1-002, EST-2002-2-006, EST-2003-2-001, ROM-2008-1-001], the dissenting judge concurred with the opposite stance of the Czech Constitutional Court in PL. ÚS 42/00 [CZE-2001-1-001].

#### *Cross-references:*

European Court of Human Rights:

- *Hirst v. The United Kingdom* (no. 2) [GC], no. 74025/01, 06.10.2005, *Bulletin* 2004/1 [ECH-2004-1-003].

Foreign case-law:

- *Bulletin* 2002/1 [UKR-2002-1-002];
- *Bulletin* 2002/2 [EST-2002-2-006];
- *Bulletin* 2003/2 [EST-2003-2-001];
- *Bulletin* 2008/1 [ROM-2008-1-001];
- *Bulletin* 2001/1 [CZE-2001-1-001].

Languages:

Slovak.



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2004-1-001

- a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 03.03.2004 / **e)** CCT 03/2004 / **f)** Minister of Home Affairs v. National Institute for Crime Prevention and the Re-integration of Offenders and Others / **g)** / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

- 3.17 General Principles – **Weighing of interests**.
- 3.18 General Principles – **General interest**.
- 4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls**.
- 4.9.9.1 Institutions – Elections and instruments of direct democracy – Voting procedures – **Polling stations**.
- 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

*Keywords of the alphabetical index:*

Vote, prohibition / Prisoner, right to vote.

*Headnotes:*

The Court held that the Minister of Home Affairs had failed to justify the limitation on the prisoners' right to vote and therefore declared the challenged provisions invalid. The limitation based on cost and logistical constraints was not supported by the evidence. Moreover, the majority rejected the government's argument that making special provision for convicted prisoners to vote would, in the context of the alarming level of crime in South Africa, send an incorrect message that the government was "soft" on crime. The fear that the public may misunderstand the government's attitude to crime is no basis for depriving prisoners of their fundamental rights.

### **Summary:**

Section 19.3 of the Constitution entitles every citizen to the right to vote. Provisions were introduced into the Electoral Act 73 of 1998 (the Act) which in effect deprive convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in the elections.

The National Institute for Crime Prevention and the Re-Integration of Offenders and two prisoners serving sentences without the option of a fine brought an application to the Cape High Court challenging the Constitutionality of these provisions. The Minister of Home Affairs (the Minister), the Electoral Commission (the Commission) and the Minister of Correctional Services were the respondents in the matter.

The changes introduced into the Act curtail the right of convicted prisoners to vote in elections in two ways: convicted prisoners serving sentences of imprisonment without the option of a fine are precluded from registering as voters whilst they are in prison. Convicted prisoners who on the day of the elections are serving a sentence of imprisonment without the option of a fine are precluded from voting.

The applicants contended that the challenged provisions are inconsistent with the founding provisions of the Constitution which are absolute and not subject to limitation. This contention was rejected by Chaskalson CJ writing for the majority. Chaskalson CJ held that the right to vote, which is vested in all citizens, is informed by these founding values. However, it is still subject to the limitation clause in Section 36 of the Constitution. This Section provides for the limitation of the rights in the Bill of Rights only in terms of a law of general application and to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The Minister advanced cost and logistical constraints as the rationale for limiting the right to vote. Chaskalson CJ held that there was nothing on the facts to suggest that expanding arrangements to include the affected prisoners would place an undue burden on the resources of the Commission.

It was also contended on behalf of the Minister that making special arrangements for convicted prisoners to vote would, in the context of the alarming level of crime in South Africa, send an incorrect message to the public that the government is "soft" on crime. The majority held that a fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of the fundamental rights that they retain despite their

incarceration. The majority further held that in the circumstances the Minister failed to justify the limitation and that the challenge on the constitutionality of the legislation on the ground that it infringes the right to vote must be upheld.

In a dissenting judgment, Ngcobo J held that the right to vote is not absolute and can be limited provided that limitation is proportionate. The government has a legitimate purpose in pursuing a policy of denouncing crime and to promote a culture of the observance of civic duties and obligations. Furthermore the limitation of the right is temporary as it only applies whilst prisoners are serving their sentence. Despite this however, Ngcobo J found that the Act should have made a distinction between prisoners who had been finally sentenced, and those who were awaiting the outcome of the appeal. The latter could still have their convictions overturned and it is therefore unjustifiable to deprive them of the right to vote. To this extent alone he finds the provisions unconstitutional.

In another dissenting judgment, Madala J held that the suspension of the right to vote is temporary. This temporary removal of the right is in keeping with the objective of balancing individual rights with the values of society. It is anomalous to afford the right and responsibility of voting to persons who have no respect for the law. Accordingly, Madala J held that the limitation was justifiable.

### **Cross-references:**

- *August and Another v. Electoral Commission and Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC); *Bulletin* 1999/1 [RSA-1999-1-002];
- *Sauvé v. Canada* (Chief Electoral Officer) 2000 2 FC 117, 2002 SCC 68; *Bulletin* 2002/3 [CAN-2002-3-003];
- *Sauvé v. Canada* (Attorney General) [1993] 2 S.C.R. 438.

### **Languages:**

English.



***Identification:*** RSA-2004-2-007

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 04.08.2004 / **e)** CCT 23/04 / **f)** Samuel Kaunda and Others v. The President of the Republic of South Africa and Others / **g)** / **h)**.

***Keywords of the systematic thesaurus:***

- 1.3.5.14 Constitutional Justice – Jurisdiction – The subject of review – **Government acts.**
- 3.4 General Principles – **Separation of powers.**
- 3.19 General Principles – **Margin of appreciation.**
- 4.16 Institutions – **International relations.**
- 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals.**
- 5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

***Keywords of the alphabetical index:***

Policy, foreign, government, discretionary power / Constitution, direct application, extraterritorially / Diplomatic protection, right / Jurisdiction, territorial / Territoriality, diplomatic protection.

***Headnotes:***

All citizens are entitled in terms of Section 3.2 of the Constitution to the rights, privileges and benefits of citizenship. This amounts to an entitlement to request the government for protection against wrongful acts of a foreign state. The government has a corresponding obligation to consider the request and deal with it consistently with the Constitution.

***Summary:***

The applicants in this matter were 69 South African citizens held on various charges in Zimbabwe. In fear of extradition from Zimbabwe to Equatorial Guinea, where they were accused of plotting a coup, the applicants contended that they would not get a fair trial and, if convicted, that they stood the risk of being put to death. Therefore the relief sought aimed at orders compelling the government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea and to take steps to ensure that their rights to dignity, freedom and security of the person and fair conditions of detention were at all times respected and protected in Zimbabwe and Equatorial Guinea.

The decision of the Court was delivered by Chaskalson CJ with whom Langa DCJ and Mosenike, Skweyiya, van der Westhuizen, and Yacoob JJ concurred. Concurring judgments were delivered by Ngcobo and Sachs JJ. A dissenting judgment was delivered by O'Regan J, with whom Mokgoro J concurred.

All the judgments recognised that as a nation South Africa has committed itself to uphold and protect fundamental rights which are the cornerstone of its democracy. South Africa recognises a common citizenship and all citizens are entitled, in terms of Section 3.2 of the Constitution, to the rights, privileges and benefits of citizenship. A privilege and benefit of South African citizenship is an entitlement to request the South African government for protection against wrongful acts of a foreign state. The government has a corresponding obligation to consider the request and deal with it consistently with the Constitution. The difference between the majority and the dissenting judges concerned the nature and extent of this obligation.

The majority held that decisions as to whether, and if so, what protection is given, is an aspect of foreign policy which is essentially the function of the executive. However, the exercise of all public power is subject to constitutional control. This also applies to an allegation that government has failed to respond appropriately or at all to a request for diplomatic protection. In dealing with a dispute that may arise in that regard, however, courts must give particular weight to the government's special responsibility for and particular expertise in foreign affairs. The South African government has a wide discretion in deciding how best to deal with such matters.

Government's stated policy concerning the conditions of detention and the conduct of trials of nationals in foreign countries is to ensure that all South Africans citizens are detained in accordance with international law standards, have access to their lawyers and receive a fair trial. The majority held that these policies are not inconsistent with international law or any obligation that government has under the Constitution.

In a separate judgment, Ngcobo J found that the right of citizenship includes the right of a citizen to request diplomatic protection from the government when any of his or her rights are violated or threatened with violation. Diplomatic protection is one of the benefits, if not a right, of citizenship. Diplomatic protection is an important weapon in the arsenal of human rights protection. The government is under a constitutional duty to provide diplomatic protection to South African nationals abroad in terms of Section 3.2.a of the Constitution read with Section 7.2 of the Constitution. Diplomatic protection invariably implicates foreign

relations, which is within the province of the executive. Therefore states are allowed a wide discretion in deciding whether, when and how to grant diplomatic protection. This does not mean that the judiciary cannot review the decision of the executive refusing diplomatic protection.

In a dissenting judgment O'Regan J (with Mokgoro J concurring) held that there is a duty, in terms of Section 3.2 of the Constitution, for the state to provide diplomatic protection to its nationals in order to prevent the violation of their fundamental human rights under international law. It was held that because the duty can only be carried out by the government in its conduct in foreign relations, it must be afforded a wide degree of latitude to determine how the duty ought to be discharged. Given that there was ample evidence that the applicants might find themselves in Equatorial Guinea and that they were at risk of receiving an unfair trial which might result in the death sentence, O'Regan J found that it was appropriate to issue a declaratory order holding that the government is under a duty to afford diplomatic protection to the applicants to protect them from egregious violations of international law.

Sachs J concurred in the main judgment, while agreeing with the additional points of substance in the separate judgments.

#### Cross-references:

- *R v. Cook* [1998] 2 SCR 597, *Bulletin* 1998/3 [CAN-1998-3-003];
- *Mohamed and another v. President of the Republic of South Africa and Others* (Society for the Abolition of the Death Penalty in South Africa and another Intervening) 2001 (3) SA 893 (CC); 2001 (7) *BCLR* 685 (CC); *Bulletin* 2001/2 [RSA-2001-2-007].

#### Languages:

English.



## Switzerland Federal Court

### Important decisions

*Identification:* SUI-1997-2-004

**a)** Switzerland / **b)** Federal Court / **c)** First public law Chamber / **d)** 19.03.1997 / **e)** 1P.173/1996 / **f)** G. and others v. the Council of the Canton of Solothurn / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 123 I 152 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.4.6.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility**.

3.16 General Principles – **Proportionality**.

3.17 General Principles – **Weighing of interests**.

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members**.

4.7.4.1.3 Institutions – Judicial bodies – Organisation – Members – **Election**.

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy**.

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates**.

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

5.2.3 Fundamental Rights – Equality – **Affirmative action**.

5.3.4.1 Fundamental Rights – Civil and political rights – **Electoral rights**.

*Keywords of the alphabetical index:*

Election, candidate / Referendum request, nullity / Discrimination, positive, appropriate measures.

#### Headnotes:

Section 85.a of the Federal Judicial Organisation Act (remedies for infringement of political rights); declaration of the nullity of Solothurn's request for a

referendum ("Initiative 2001") to ensure that men and women have equal rights to be represented in cantonal authorities.

Relationship between sentence 1 and 2 of Article 4.2 of the Federal Constitution. Prohibition of discrimination constitutes a relative limitation of the obligation to practise equality; it rules out disproportionately unequal treatment of the sexes (recitals 3a and 3b).

Requirement to weigh up interests while examining the admissibility of positive measures to bring about sexual equality (recitals 3b- 3d).

Consequences of the system proposed in the request for a referendum, which requires absolutely and without further qualification that the ratio of women to men in the parliament, government and courts should be equivalent to the ratio in the population as a whole (recital 4).

Examination of this measure according to the proportionality principle (recitals 5-7). The suggested quota is a disproportionate breach of the prohibition of discrimination enshrined in sentence 1 of Article 4.2 of the Federal Constitution (recital 7). Insofar as it applies to authorities elected by the people, it violates the general and equal right to vote and be elected, which is guaranteed by the constitutional law of the Confederation (recital 8).

#### *Summary:*

The request for a referendum ("Initiative 2001") to ensure that men and women had equal rights to be represented in cantonal authorities was designed to bring about an amendment to the Constitution of the Canton of Solothurn, requiring that the ratio of women to men in the parliament, government and cantonal courts should be equivalent to the ratio in the population as a whole. The request was declared void by the cantonal parliament on the grounds that it violated the Federal Constitution and the matter was not, therefore, put to a referendum.

The appellants filed a public-law appeal with the Federal Court; they asked that the cantonal parliament's decision be set aside and that the people of the Canton of Solothurn be invited to vote on this initiative. The appeal was declared admissible but was dismissed by the Federal Court.

Pursuant to Article 4.2 of the Federal Constitution, men and women are equal before the law (sentence 1); the law provides for their equality, particularly in the domains of the family, education, and work (sentence 2). This article seeks to create *de facto* social

equality between men and women and hence to promote equal opportunities. Every person must have the same opportunities to become involved in the community. If there is a contradiction between the principles of the two sentences in Article 4.2 of the Federal Constitution, it shall be resolved by a weighing of the interests at stake.

In this case, the request for a referendum was designed to improve opportunities for women but conflicted with the principle of equality between men and women. Women represent 50.74% of the population of the Canton of Solothurn. The referendum request under dispute would have had harsh consequences for parliamentary elections as well as for elections to the courts; it would have applied to any new election of judges. It sought not only to offer equal opportunities but also to create equality in the results and hence went beyond the aims of the Constitution.

In order to attain a proportional ratio of men and women in the parliament, government and courts, measures other than those proposed are more appropriate. Political parties can encourage women's involvement by choosing and by supporting female candidates. Furthermore, women are free to vote for female candidates and to stand as candidates themselves. There has been a clear increase in women's involvement in politics in recent years. Regarding proportionality, it should also be noted that the referendum request made no provision for exceptions and did not take into account the qualifications required for the various posts. Finally, it threatened the general and equal right to vote and to be elected. It would have removed the right of certain male or female candidates to be elected and the people would not have been able to make a free choice once the maximum number of representatives of a particular sex had been reached.

#### *Languages:*

German.



*Identification:* SUI-2012-1-002

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 21.11.2011 / **e)** 1C549/2010 / **f)** Alternative Die Grünen party of Zug Canton and others v. Great Council and State Council of Zug Canton / **g)** Arrêts du Tribunal fédéral (Official Digest), 137 I 305 / **h)** CODICES (German).

**Keywords of the systematic thesaurus:**

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi.**

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

**Keywords of the alphabetical index:**

Equality, effective / Equality between men and women, commission / Parliament, inaction / Parliament, obligations.

**Headnotes:**

Appeal against the failure to renew the Commission for Equality between Men and Women in Zug Canton. Article 8.3 of the Federal Constitution (equality between men and women) and Article 29.1 of the Federal Constitution (guarantee of a fair trial), Paragraph 5.2 of Zug Cantonal Constitution (equality between men and women), Article 2 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The National Parliament's decision not to renew the Commission has no legislative or revocatory force; failure to examine the request for annulment (recital 1).

Examination of the request to force Zug Canton to lay down the legal bases for such a Commission; case-law and doctrinal statement on denial of justice or unjustified delays in issuing an order. The appellants must plausibly establish that the Cantonal legislature is required to take sufficiently decisive action. Capacity to act and to appeal (recital 2).

The obligation to guarantee effective equality between men and women is laid down in Article 8.3 of the Federal Constitution and Paragraph 5.2 of Zug Cantonal Constitution, as well as in the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; recital 3). The Confederation and Cantons are required to discharge this duty under constitutional law and public international law, until such time as this goal has been achieved; they have discretionary powers solely vis-à-vis the means of carrying out this duty (recital 4). Zug Canton is obliged to provide an alternative to the former Commission and

to determine by whom, how and with what resources the equality mission should be implemented in the future. On the other hand, it is not required to maintain an equality commission or to set up an office for the purpose (recital 5).

**Summary:**

In 1998, Zug Cantonal Parliament set up a Commission for Equality between Men and Women. The Commission's terms of reference and budget were limited to four years and were then regularly extended until the end of 2010. The Zug Cantonal Council of State presented Parliament with a proposal for extending this institution's term of office under a new title, assigning it wider powers for a period of eight years. Parliament rejected this proposal in October 2010, thus putting an end to the activities of the Commission for Equality between Men and Women.

A number of associations and private individuals lodged public-law appeals with the Federal Court asking it to set aside the Parliamentary decision and to force Zug Canton to continue the activities geared to ensuring equal rights between men and women by creating the requisite legal bases. The Federal Court rejected the appeal within the meaning of the recitals to the extent that it was admissible.

The Federal Court heard and determined the appeals against the Cantonal legislative measures. In the instant case, the Cantonal Parliament refused to set up a new Commission for Equality between Men and Women or to issue any new legal provisions. This Parliamentary order is not a legislative measure, nor does it have revocatory force vis-à-vis any legal provisions.

The question therefore arises of the extent to which Zug Canton can be required to retain its provisions on the Commission for Equality between Women and Men or to lay down new provisions geared to ensuring such equality. The Federal Court has in the past dealt with several similar cases of appeals against alleged denials of justice involving inaction on the part of Cantonal Parliaments. The Federal Court has hitherto left the question open whether and under what conditions appeals against legislative inaction are possible. The Law on the Federal Court includes explicit provisions on denial of justice arising from inaction by a court or administrative body; individuals can therefore plead infringement of Article 29.1 of the Federal Constitution securing the right to a fair trial. On the other hand, the Law on the Federal Court comprises no regulations on inaction on the part of the legislature; individuals therefore cannot, in this case, adduce denial of justice or unjustified delays in issuing an order. They can, however, demonstrate that the legislature is duty-bound

to act. In this hypothesis, a Federal or conventional law provision is needed in order to require Parliament, in sufficiently practical and clear manner, to adopt legislative provisions. Whether or not such a duty really exists is a question of substantive law.

Article 8.3 of the Federal Constitution secures equality between women and men as follows: Men and women have equal rights. The law provides for legal and factual equality, particularly in the family, during education, and in the workplace. Men and women have the right to equal pay for work of equal value. This means that the Constitution mandates authorities at all levels (Confederation, Cantons and municipalities) to ensure gender equality and take the requisite steps to achieve genuine equality in social realities. Banning discrimination is insufficient: the utmost must be done to combat prejudice and stereotyping, thus eliminating all forms of prejudice. However, the Constitution does not specify how these goals are to be achieved, but leaves extensive room for manoeuvre to the legislature regarding its choice of methods.

This constitutional mandate to guarantee effective equality is specified and clarified by the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). States Parties undertake to conduct, by all appropriate means and without delay, a policy geared to eliminating discrimination against women and to ensure the effective application of these principles. The Convention clarifies these aims in specific fields such as political and public life, education and vocational guidance, social security, health and economic and social life. Moreover, it provides for such practical measures as prohibiting dismissals on the grounds of pregnancy or marital status. Many of the obligations set out in the Convention are general in nature, leaving the States Parties wide discretionary powers. In view of the special nature of the Convention, its various provisions are exempt from the traditional distinction between directly applicable rights and State obligations.

It is clear from the Federal Constitution, the Zug Cantonal Constitution and the Convention that the Confederation and the Cantons are mandated to guarantee equality between men and women, and that they are bound by this mandate until the relevant goal has actually been achieved. The authorities therefore have discretionary powers solely vis-à-vis the means of achieving this goal. At the Federal level, the Federal Law on equality between women and men provides for a Gender Equality Office to promote the achievement of gender equality in all fields, endeavouring to eliminate all forms of direct or indirect discrimination. The Cantons have set up similar institutions. There are, however, other possibilities for promoting equality between men and women and combating all forms of

discrimination. Special officials in the various departments of the Cantonal administration could help guarantee equality in their specific fields. Staff working in a legislative section could be detailed to analyse the specific problems and ensure the effective implementation of equality. Some of these approaches could be used by the executive without the help of Parliament.

For all these reasons, Zug Canton is not required to restore the former Commission for Equality between Men and Women or to set up a similar body. It is, however, obliged to resort to other solutions and to define the means of implementing the constitutional mandate. On the other hand, it would be contrary to the Federal and Cantonal Constitutions and the Convention to abandon any attempt to promote gender equality and combat all forms of discrimination against women.

#### *Languages:*

German.



# Court of Justice of the European Union

## Important decisions

*Identification:* ECJ-2005-1-008

a) European Union / b) Court of Justice of the European Communities / c) / d) 20.05.2003 / e) C-465/00, C-138/01 and C-139/01 / f) Österreichischer Rundfunk and others / g) *European Court Reports I-04989 / h) CODICES* (English, French).

*Keywords of the systematic thesaurus:*

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

3.26.1 General Principles – Principles of EU law – **Fundamental principles of the Common Market.**

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

*Keywords of the alphabetical index:*

Court of Auditors, employment data, access / Publication, interdiction / Salary / European Community, directive, direct application.

*Headnotes:*

1. The applicability of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data cannot depend on whether the specific situations at issue have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations.

2. The provisions of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in so far

as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures.

3. While the mere recording by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life, the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 ECHR.

To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way. It suffices to find that data relating to the remuneration received by an employee or pensioner have been communicated by the employer to a third party.

4. The interference with private life resulting from the application of national legislation which requires a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold, may be justified under Article 8.2 ECHR only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the State body in question but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine.

5. Articles 6.1.c, 7.c and 7.e of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data do not preclude national legislation requiring a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the State body in question but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the constituent power, that being for the national courts to ascertain.

6. Wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State.

Such a character may be attributed to Article 6.1.c of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, under which personal data must be [...] adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed', and to Article 7.c or Article 7.e of that directive, under which personal data may be processed only if *inter alia* processing is necessary for compliance with a legal obligation to which the controller is subject' or is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller [...] to whom the data are disclosed'.

#### *Summary:*

The Court had been requested by the Austrian Constitutional Court (*Verfassungsgerichtshof*) and the Austrian Supreme Court (*Oberster Gerichtshof*), respectively, to give a preliminary ruling on a number of questions, framed in substantially identical terms, on the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Each of the two courts was dealing with disputes concerning the obligation of public bodies subject to control by the Court of Auditors, the *Rechnungshof*, to communicate to the *Rechnungshof*, pursuant to the Federal Constitutional Law on the limitation of salaries of officials, the salaries and pensions exceeding a certain level paid by them to their employees and pensioners, together with the names of the recipients, for the purpose of drawing up an annual report to be transmitted to the National Council and the Parliaments of the *Länder* and made available to the public. In the proceedings before the *Verfassungsgerichtshof*, certain territorial communities, public undertakings and a statutory professional representative body, all subject to control by the *Rechnungshof*, had refused to communicate the information relating to the income of the personnel concerned, or had communicated the information, to various degrees, anonymously. In the proceedings before the *Oberster Gerichtshof*, two employees of a body subject to control by the *Rechnungshof* had lodged an application for interim measures seeking to

prevent the authority for which they worked from complying with such requests for communication.

The two referring courts thus asked the Court in substance whether the provisions of Community law, in particular the provisions on data protection, must be interpreted as precluding national legislation which requires a legal body to communicate data on the income of its staff members and a State body to collect and communicate those data, for the purposes of the publication of the names and income of those staff members.

The Court answered in the negative, stating however that, in view of the requirement of respect for private life laid down by the European Convention on Human Rights, it must be shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the *Rechnungshof* but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the constituent power, which was a matter for the national courts to ascertain.

#### *Cross-references:*

Constitutional Court of Austria:

- *Bulletin* 2003/3 [AUT-2003-3-004];
- *Bulletin* 2000/3 [AUT-2000-3-009].

#### *Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2005-1-009

- a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 22.05.2003 / **e)** C-462/99 / **f)** Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission, in the presence of Mobilkom Austria AG / **g)** European Court Reports I-05197 / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

3.26.2 General Principles – Principles of EU law – **Direct effect.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

**Keywords of the alphabetical index:**

Preliminary ruling, reference, obligation / Telecommunication, frequencies, distribution / Telecommunication, regulation / European Communities, directive, direct effect.

**Headnotes:**

In order to ensure that national law is interpreted in compliance with Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision, and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal which satisfies the criteria laid down in Article 5bis paragraph 3 of that directive against decisions of the national regulatory authority responsible for authorising the provision of telecommunication services. If national law cannot be applied so as to comply with the requirements of that article, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excludes its competence, has the obligation to disapply that provision.

Where a provision of a directive conferring rights on individuals has not been transposed into the national legal system, the obligation arising from a directive for the Member States to achieve the result envisaged therein and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure compliance with that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court which has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with Article 249.3 EC.

Where application of national law in accordance with the requirements of the directive is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure the application of which would, in the circumstances of the case, lead to a result contrary to that directive, whereas national law would comply with the directive if that provision was not applied (see paragraphs 38, 40, 42, operative part 1).

**Summary:**

Following a public call for tenders in the Republic of Austria, the first licence for the provision of digital mobile telecommunications services based on the DCS 1800 standard was granted to Connect Austria, for a fee of ATS 2.3 billion. Connect Austria was allocated a certain frequency cluster, which was to be increased when it had acquired 300,000 customers, with a prospective cover rate of 75%. By a decision based on Article 125.3 of the Austrian Law on Telecommunications, the Telecommunications Control Commission, acting in its capacity as national regulatory authority, granted Mobilkom, a company most of whose capital is held by the State, as an extension to its GSM 900 licence, an additional frequency cluster from the frequency band reserved for the DCS 1800 standard, in order to provide digital mobile telecommunications services using only base stations situated in the Land of Vienna.

Connect Austria contested that decision of the Telecommunications Control Commission before the *Verfassungsgerichtshof* (Constitutional Court). The *Verfassungsgerichtshof* dismissed the action [AUT-1999-1-002], finding that the contested decision had not harmed the applicant either through breach of a constitutionally guaranteed right or through application of an unlawful general rule. It considered, however, that Article 5bis paragraph 3 of Directive 90/837 is, in regard to the right to appeal against the decision of a national regulatory authority, sufficiently precise, for the purposes of the settled case-law of the Court of Justice, to have direct effect, since there must be an effective right of appeal to an independent body. The *Verfassungsgerichtshof* then found that, taking into account its limited possibilities of review, the action brought before it did not satisfy the requirements of that provision but that, by contrast, the power of review of administrative action enjoyed by the *Verwaltungsgerichtshof* (Administrative Court) was likely to satisfy the requirements of Community law. The *Verfassungsgerichtshof* therefore referred the appeal by Connect Austria against the contested decision to the *Verwaltungsgerichtshof*.

The *Verwaltungsgerichtshof* pointed out that the Telecommunications Control Commission is designated by the Austrian Law on telecommunications as the national regulatory authority as regards, *inter alia*, the allocation, removal and revocation of licences and the approval of transfers of and amendments to licences. It further explained that the Telecommunications Control Commission is an independent collegiate body consisting of three members, including a magistrate, appointed by the Federal Government, and that it takes decisions at first and last instance. Under Article 133.4 of the Federal Constitutional Law, appeals to the *Verwaltungsgerichtshof* alleging the unlawfulness of decisions of the Telecommunications Control Commission are inadmissible because their admissibility is not expressly provided for by that provision. It was in that context that the *Verwaltungsgerichtshof* asked, in particular, whether, in the light of Case C-54/96 Dorsch Consult [1997] *European Court Reports* I-4961, Article 40 *et seq.*, Article 5bis paragraph 3 of Directive 90/387 had direct effect, so that it should set aside Article 133.4 of the Federal Constitutional Law and declare itself competent to hear the action brought by Connect Austria against the contested decision. That formed the subject-matter of one of the preliminary questions referred to the Court of Justice of the European Communities in the present case.

#### Cross-references:

Constitutional Court of Austria:

- *Bulletin* 1999/1 [AUT-1999-1-002].

#### Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



# European Court of Human Rights

## Important decisions

*Identification:* ECH-2007-1-002

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 10.04.2007 / **e)** 6339/05 / **f)** Evans v. the United Kingdom / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests**.  
3.19 General Principles – **Margin of appreciation**.  
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

*Keywords of the alphabetical index:*

Motherhood, right / Procreation, medically assisted / Embryo, fertilised / Gamete, implantation, consent, withdrawal / *In vitro* fertilisation, consent, withdrawal.

#### Headnotes:

The notion of private life incorporates the right to respect for the decision to become or not to become a parent.

States have a wide margin of appreciation in deciding whether or not to enact legislation governing the use of *in vitro* fertilisation (hereinafter, “IVF”) treatment, as well as in determining the detailed rules in order to achieve a balance between the competing public and private interests.

The possibility conferred by legislation on a gamete provider to withdraw his consent to implantation of fertilised eggs in the uterus of his former partner, as a result of which she will be unable to have any children of her own, does not fail to strike a fair balance between the competing interests.

**Summary:**

I. In July 2000 the applicant and her partner J. started fertility treatment. In October 2000, during an appointment at the clinic, the applicant was diagnosed with a pre-cancerous condition of her ovaries and offered one cycle of IVF treatment prior to the surgical removal of her ovaries. During the consultation she and J. were informed that they would each need to sign a form consenting to the treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990, it would be possible for either of them to withdraw consent at any time before the embryos were implanted in the applicant's uterus. The applicant considered whether she should explore other means of having her remaining eggs fertilised, to guard against the possibility of her relationship with J. ending but J. reassured her that that would not happen. In November 2001 the couple attended the clinic for treatment, resulting in the creation of six embryos which were placed in storage. Two weeks later the applicant underwent an operation to remove her ovaries. She was told she would need to wait for two years before the implantation of the embryos in her uterus. In May 2002 the relationship between the applicant and J. ended and subsequently he informed the clinic that he did not consent to her using the embryos alone or their continued storage. The applicant brought proceedings in the High Court seeking, among other things, an injunction to require J. to give his consent. Her application was refused in October 2003, J. having been found to have acted in good faith, as he had embarked on the treatment on the basis that his relationship with the applicant would continue. In October 2004 the Court of Appeal upheld the High Court's judgment. Leave to appeal was refused.

II. In her application to the Court the applicant complained that domestic law permitted her former partner to withdraw his consent to the storage and use of the embryos, thus preventing her from ever having a child to whom she was genetically related. She relied in particular on Article 8 ECHR.

The Court accepted that "private life" incorporated the right to respect for both the decisions to become and not to become a parent. However, the applicant had not complained that she was in any way prevented from becoming a mother in a social, legal, or even physical sense, since there was no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created *in vitro* from donated gametes. Her complaint was, more precisely, that the consent provisions of the 1990 Act had prevented her from using the embryos she and J. had created together, and thus, given her particular circumstances, from ever having a child to whom she was genetically related. That more limited

issue, concerning the right to respect for the decision to become a parent in the genetic sense, fell within the scope of Article 8 ECHR. The dilemma central to the case was that it involved a conflict between the Article 8 ECHR rights of two private individuals: the applicant and J. Moreover, each person's interest was entirely irreconcilable with the other's, since if the applicant were permitted to use the embryos, J. would be forced to become a father, whereas if J.'s refusal or withdrawal of consent were upheld, the applicant would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities might adopt would result in the interests of one of the parties being wholly frustrated. The legislation also served a number of wider, public interests, such as upholding the principle of the primacy of consent and promoting legal clarity and certainty.

The Court considered that it was appropriate to analyse the case as one concerning positive obligations. The principal issue was whether the legislative provisions as applied in the case struck a fair balance between the competing public and private interests involved. In that regard, the findings of the domestic courts that J. had never consented to the applicant using the jointly created embryos alone were accepted.

The issues raised by the case were undoubtedly of a morally and ethically delicate nature. In addition, there was no uniform European approach in the field. Certain States had enacted primary or secondary legislation to control the use of IVF treatment, whereas in others that was a matter left to medical practice and guidelines. While the United Kingdom was not alone in permitting storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the moment of implantation, different rules and practices were applied elsewhere in Europe. It could not be said that there was any consensus as to the stage in IVF treatment when the gamete providers' consent became irrevocable. While the applicant contended that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entailed that her Article 8 ECHR rights should take precedence over J.'s, it did not appear that there was any clear consensus on that point either. In conclusion, therefore, since the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was no clear common ground amongst the Member States, the margin of appreciation afforded to the respondent State had to be a wide one and extend in principle both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it laid down in order to achieve a balance between the competing public and private interests.

The remaining question, therefore, was whether, in the special circumstances of the case, the application of a law which permitted J. effectively to withdraw or withhold his consent to the implantation in the applicant's uterus of the embryos created jointly by them struck a fair balance between the competing interests. The fact that it had become technically possible to keep human embryos in frozen storage gave rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which might be substantial, to intervene between the creation of the embryo and its implantation in the uterus. It was therefore legitimate and desirable for a State to set up a legal scheme which took that possibility of delay into account. The decision as to the principles and policies to be applied in this sensitive field was primarily for each State to determine. The 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate. It placed a legal obligation on any clinic carrying out IVF treatment to explain the consent provisions to a person embarking on such treatment and to obtain his or her consent in writing. That had occurred in the applicant's case, and the applicant and J. had both signed the consent forms required by the law. However, the Act also permitted the gamete providers to withdraw their consent at any time until the embryo was implanted in the uterus. While the pressing nature of the applicant's medical condition had required her to make a decision quickly and under extreme stress, she had known, when she consented to have all her eggs fertilised with J.'s sperm, that they would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted, and that, as a matter of law, J. would be free to withdraw his consent to implantation at any moment. While the applicant had criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the absolute nature of the law was not, in itself, necessarily inconsistent with Article 8 ECHR. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what had been described by the domestic courts as "entirely incommensurable" interests. Those general interests were legitimate and consistent with Article 8

ECHR. Given these considerations, including the lack of any European consensus on the point, the Court did not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically-related child with her. There had therefore been no violation of Article 8 ECHR.

#### *Cross-references:*

European Court of Human Rights:

- *Dudgeon v. the United Kingdom*, 22.10.1981, Series A, no. 45; *Special Bulletin – Leading cases ECHR* [ECH-1981-S-003];
- *X. and Y. v. the Netherlands*, 26.03.1985, Series A, no. 91;
- *X., Y. and Z. v. the United Kingdom*, 22.04.1997, *Reports of Judgments and Decisions* 1997-II;
- *Frette v. France*, no. 36515/97, *Reports of Judgments and Decisions* 2002-I;
- *Pretty v. the United Kingdom*, no. 2346/02, 29.04.2002, *Reports of Judgments and Decisions* 2002-III; *Bulletin* 2002/1 [ECH-2002-1-006];
- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, 11.07.2002, *Reports of Judgments and Decisions* 2002-VI; *Bulletin* 2002/3 [ECH-2002-3-008];
- *Odièvre v. France*, no. 42326/98, 13.02.2003, *Reports of Judgments and Decisions* 2003-III.

On this subject, see in the same *Bulletin* [IRL-2007-1-003].

#### *Languages:*

English, French.




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# **CO-OPERATION OF CONSTITUTIONAL COURTS IN EUROPE**



## **CHAPTER III**

### **INTERACTIONS BETWEEN EUROPEAN COURTS ON THE CASE-LAW OF CONSTITUTIONAL COURTS**



# Court of Justice of the European Union

## Important decisions

*Identification:* ECJ-1996-1-004

- a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 28.03.1996 / **e)** 2/94 / **f)** Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** European Court Reports 1996, I-01759 / **h)**.

*Keywords of the systematic thesaurus:*

1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between the EU and member states.**

1.3.5.2.1 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Primary legislation.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

*Keywords of the alphabetical index:*

European Communities, international agreement, conclusion, competence / CJEC, Court of Justice of the European Communities, prior opinion / Accession to the European Convention on Human Rights / European Communities, lack of competence in the current state of Community law.

*Headnotes:*

Article 3 B of the Treaty confers objectives and powers on the Community. Compliance with this principle of conferred powers is mandatory both for internal and international actions, which are ordinarily based on specific powers either expressed in or inferred from Treaty provisions. Whenever Community law has created powers for the Community institutions within its internal system to attain a specific objective, the Community is empowered to enter into the international commitments necessary to attain that objective, even in the absence of an express provision to that effect (cf. paragraphs 23-26).

Article 235 of the Treaty is designed to fill the gap where no specific provisions confer on the Community institutions express or implied powers to act, provided such powers are necessary to attain one of the objectives laid down by the Treaty. That provision cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the Treaty provisions as a whole and in particular, by those that define the Community tasks and the activities. At all events, it cannot be used to adopt provisions whose effect would, in substance, be to amend the Treaty without following the procedure provided for that purpose (cf. paragraphs 29-30).

Fundamental rights form an integral part of the general principles of law observed by the Community's Court. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they have acceded. In that context, the European Convention on Human Rights, referred in Article F.2 of the Treaty on European Union, is of particular significance (cf. paragraphs 32-33).

As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. One reason is that there is no Treaty provision that confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field. Furthermore, such accession could not be effected by relying on Article 235 of the Treaty.

While respect for human rights is a condition of the lawfulness of Community acts, the Community's accession to the European Convention on Human Rights would mean a substantial change in the present Community system for the protection of human rights. This would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be constitutionally significant and would therefore go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment (cf. paragraphs 34-36 and operative clauses).

***Summary:***

I. In its opinion delivered on 28 March 1996, the Court of Justice pronounced the competence of the European Community to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

II. The Court, firstly, recalled that the Community must act within the limits of its powers. In fact no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.

Thus, this raises the question of reliance on Article 235 of the Treaty, namely whether the lack of powers of action ordained by the Treaty can be supplied to the extent that such powers appear necessary to enable the Community to carry out its functions to attain one of the Treaty objectives. However, the Court held that this provision could not serve as a basis for widening the scope of Community powers beyond the general framework created by the Treaty provisions as a whole.

In this case, while respect for human rights was a condition of the lawfulness of Community acts, the Community's accession to the European Convention on Human Rights would mean a substantial change in the present Community system for the protection of human rights. This would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be constitutionally significant and therefore, beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

The Court therefore concluded that as Community law stood, the Community had no competence to accede to the Convention.

***Languages:***

German, English, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese.

***Identification:*** ECJ-2001-1-014

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 17.12.1998 / **e)** C-185/95P / **f)** Baustahlgewebe GmbH v. Commission of the European Communities / **g)** European Court Reports 1998, I-8417 / **h)** CODICES (English, French).

***Keywords of the systematic thesaurus:***

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.

3.20 General Principles – **Reasonableness**.

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file**.

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time**.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

***Keywords of the alphabetical index:***

Fact, complex, examination / Competition, rules, violation / Procedure, suspension / Evidence, presentation, delay / Document, utility / Evidence, new.

***Headnotes:***

1. Under Article 168A EC and Article 51.1 of the Statute of the Court of Justice, in appeals the Court of Justice has jurisdiction only to verify whether a breach of procedure adversely affecting the appellant's interests was committed before the Court of First Instance and must satisfy itself that the general principles of Community law have been complied with.

Those principles include the right of everyone to a fair trial, provided for in Article 6.1 ECHR, and in particular the right to a fair trial within a reasonable period (cf. points 18-21).

2. In an appeal, the Court of Justice has no jurisdiction to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the Rules of Procedure relating to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value to be attached to the evidence produced. Save where the clear sense of that evidence has been distorted, that appraisal

does not constitute a point of law which is subject, as such, to review by the Court of Justice (cf. point 24).

3. The structure of the Community judicial system justifies, in certain respects, the Court of First Instance – which is responsible for establishing the facts and for undertaking a substantive examination of the dispute – being allowed sufficient time to investigate actions calling for a close examination of complex facts. However, that task does not relieve the Community Court established especially for that purpose of the obligation to observe reasonable time-limits in dealing with cases before it.

The reasonableness of the duration of the proceedings before the Court of First Instance must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and the competent authorities (cf. points 29, 42).

4. Where proceedings before the Court of First Instance, relating to the existence of an infringement of the competition rules, have lasted for around five years and six months, the requirements concerning completion within a reasonable time are not satisfied, even if account is taken of the relative complexity of the case, if it has been established that:

- the proceedings were of considerable importance not only for the applicant (even if its economic survival was not directly endangered by the proceedings) and for its competitors, but also for third parties, in view of the large number of persons concerned and the financial interests involved;
- the applicant did not contribute in any significant way to the protraction of the proceedings;
- such duration was not justified either by the constraints inherent in proceedings before the Community judicature, associated in particular with the use of languages, or by exceptional circumstances, particularly where there was no stay of proceedings under Articles 77 and 78 of the Rules of Procedure of the Court of First Instance.

A procedural irregularity of that kind justifies, as an immediate and effective remedy, first, annulment of the judgment of the Court of First Instance in so far as it set the amount of the fine imposed for the infringement found and, second, determination of that amount by the Court of Justice at a level which takes account of the need to give the applicant reasonable satisfaction.

However, in the absence of any indication that the duration of the procedure had any impact on the outcome of the proceedings, such a procedural irregularity cannot give rise to annulment of the contested judgment as a whole (cf. points 30, 40, 43, 46-49, 141).

5. As regards the alleged infringement of the principle of prompt conduct of the procedure, neither Article 55.1 of the Rules of Procedure of the Court of First Instance nor any other provision of those Rules or of the Statute of the Court of Justice provides that the judgments of the Court of First Instance must be delivered within a specified period after the oral procedure (cf. point 52).
6. Pursuant to Article 48.1 of the Rules of Procedure of the Court of First Instance, the parties may offer further evidence in support of their arguments in reply or rejoinder but they must give reasons for the delay in offering such evidence.

Evidence in rebuttal or the amplification of the offers of evidence submitted in response to evidence in rebuttal from the opposite party in his defence are not covered by the time-bar laid down in the abovementioned provision. That provision concerns offers of fresh evidence and must be read in the light of Article 66.2, which expressly provides that evidence may be submitted in rebuttal and that previous evidence may be amplified (cf. points 71-72).

7. The general principles of Community law governing the right of access to the Commission's file in competition cases do not apply, as such, to proceedings before the Community judicature, these being governed by the Statute of the Court of Justice and by the Rules of Procedure of the Court of First Instance.

In particular, under Article 64.3.d and 64.4 of the Rules of Procedure of the Court of First Instance, measures of organisation of procedure may be proposed by the parties at any stage of the procedure and may include requesting the production of documents or any papers relating to the case.

Nevertheless, in order to enable the Court of First Instance to determine whether it is conducive to proper conduct of the procedure to order the production of certain documents, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (cf. points 90, 92-93).

8. It is clear from Article 168A EC, Article 51 of the Statute of the Court of Justice and Article 112.1.c of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by it. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (cf. point 113).
9. It is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of the fines imposed on undertakings for infringements of Community law (cf. point 129).

**Summary:**

An appeal was lodged with the Court pursuant to Article 49 of its Statute against the *Baustahlgewebe GmbH v. Commission* Judgment of the Court of First Instance of 6 April 1995 (T-145/89, Reports p. II-987).

On 2 August 1989 (Decision 89/515), the Commission had imposed fines on 14 welded steel mesh producers for breach of Article 85 EC.

The appellant, *Baustahlgewebe*, one of the firms affected by the decision, had brought an action in the Court for the annulment of the decision and, in the alternative, for a reduction of the fine to a reasonable level. The Court had partially upheld the appellant's claims and had reduced the fine from ECU 4.5 million to 3 million.

The appellant relied on several grounds in support of its appeal: breaches of the right to a hearing within a reasonable time and of the general principle of promptitude, of the requirement to provide reasons, of the principles applicable to assessing the evidence, of the right of access to all relevant documentation and of Article 15 of Regulation no. 17/62. The Court upheld only the complaint of breach of the right to a hearing within a reasonable time. It noted first that it had not been shown that the appellant had contributed significantly to prolonging the length of proceedings. Having then noted that Article 6.1 ECHR provided that "everyone is entitled to a fair and public hearing within a

reasonable time by an independent and impartial tribunal", and that it was a general principle of Community law that everyone was entitled to fair legal process (Opinion 2/94 of 28 March 1996, *Reports* p. I-1759 and *Kremzow* Judgment of 29 May 1997, C-299/95, *Reports* p. I-2629), the Court partially annulled the judgment of the Court of First Instance for breach of the right to a hearing within a reasonable time. It argued that although the latter had needed time to examine the complex facts of the case, this did not relieve it from the obligation of observing reasonable time-limits in dealing with cases before it. To decide what was reasonable a distinction had to be drawn between the oral and written proceedings. In this case, 32 months had elapsed between the end of the written proceedings and the decision to open the oral proceedings. Moreover, this period was not justified by any measure of organisation of procedure or of inquiry, or any other exceptional circumstance. The Court therefore partially annulled the decision of the Court of First Instance and reduced the fine by ECU 50 000, because of the excessive length of the proceedings.

**Languages:**

Dutch, English, French, Finnish, German, Italian, Portuguese, Spanish, Swedish.



**Identification:** ECJ-2003-1-009

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 04.02.2000 / **e)** C-17/98 / **f)** Emesa Sugar (Free Zone) NV v. Aruba / **g)** European Court Reports I-0665 / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

- 1.4.1 Constitutional Justice – Procedure – **General characteristics.**
- 1.4.9.4 Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings.**
- 1.4.13 Constitutional Justice – Procedure – **Re-opening of hearing.**
- 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**
- 4.17.1.4 Institutions – European Union – Institutional structure – **Court of Justice of the EU.**

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

*Keywords of the alphabetical index:*

Advocate General, conclusions, right to response / Applicant, right to response.

*Headnotes:*

Fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have cooperated or of which they are signatories. The European Convention on Human Rights referred to, moreover, in Article 6.2 EU has special significance in that respect.

Article 6.1 ECHR concerning the right of all persons, in adversarial proceedings, to a fair hearing does not preclude the Court from refusing a request for leave to submit written observations in response to the Opinion of the Advocate General.

First, within the judicial system established by the Treaty and by the Statute of the Court of Justice, as set out in detail in the Court's Rules of Procedure, the Opinion of the Advocate General by contrast with an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which derives its authority from that of, say, a Procureur General's department (or French *ministère public*) constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself, who takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to the Court.

*Summary:*

In a case referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), the plaintiff in the dispute to be determined by the national court, *Emesa Sugar (Free Zone) NV*, seeking to explain its position to the Court, sought leave to submit written observations in reply to the submissions of the Advocate General. There was provision for this neither in the Statute of the Court nor in its Rules of Procedure. The applicant maintained that it should be allowed to do so under the case-law of the European Court of Human Rights (ECHR) regarding the scope of Article 6.1 ECHR, and it referred in

particular to the judgment in *Vermeulen v. Belgium* (20 February 1996, *Reports of Judgments and Decisions* 1996 I, p. 224). The applicant argued that not being allowed to reply to the Advocate General's submissions would contravene its fundamental right to adversarial proceedings, as guaranteed by Article 6.1 ECHR. It maintained that European Court of Human Rights case-law in the matter applied to the Advocate General's submissions to the Court of Justice. The Court pointed out that, under its established case-law, fundamental rights were among the general legal principles whose observance it ensured and in that context the European Convention on Human Rights, as referred to in Article 6.2 EU, was of special significance.

The Court nonetheless took the view that Article 6.2 did not prevent its rejecting a request from a party to lodge written observations in reply to the Advocate General's submissions: first, in the judicial system established by the Treaty and by the Statute of the Court of Justice, as set out in detail in the Court's Rules of Procedure, the submissions of the Advocate General, unlike an opinion addressed to the judges or the parties by an authority outside the Court or deriving their authority from that of a prosecutor's department, constituted the individual reasoned opinion, expressed in open court, of a member of the Court of Justice itself, who publicly and individually took part in this way in the process by which the Court reached its decision and therefore in performing the judicial function entrusted to the Court.

Secondly, regard being had to the very purpose of adversarial proceedings, which was to prevent the Court from being influenced by arguments which the parties had been unable to discuss, the Court might of its own motion, or on a proposal from the Advocate General or at the request of the parties, reopen the oral proceedings in accordance with Article 61 of its Rules of Procedure, if it considered that it lacked sufficient information, or that the case must be dealt with on the basis of an argument which had not been debated between the parties.

Holding that Emesa's application did not relate to reopening of the proceedings, the Court rejected it.

*Languages:*

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish



*Identification:* ECJ-2008-3-018

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 07.07.2005 / **e)** C-208/03P / **f)** Le Pen v. Parliament / **g)** European Court Reports P I-6051 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law.**

*Keywords of the alphabetical index:*

Actions for annulment / Measures against which actions may be brought / Concept, measures producing binding legal effects / European Parliament, seat, vacancy, application of national rules.

*Headnotes:*

In order to determine whether an act may be the subject of a challenge in an action for annulment under Article 230 EC what should be taken into account is the substance of the act in question and the intention of its author; since the form in which an act or decision is adopted is in principle irrelevant. It cannot therefore be excluded that a written communication, or even a mere oral statement, are subject to review by the Court under Article 230 EC.

However, the assessment of a declaration by the President of the Parliament in a plenary session that the seat of a member is vacant cannot be made in breach of the rules and procedures governing the election of members of Parliament. Since no uniform electoral procedure for the election of Members of that institution had been adopted at the material time, that procedure continued to be governed, pursuant to Article 7.2 of the 1976 Act concerning the election of the representatives of the Assembly by direct universal suffrage, by the provisions in force in each Member State. Where, under the legislative provisions of a Member State ineligibility brings the term of office as a Member of Parliament to an end, that institution will have had no choice but to take notice without delay of the declaration by the national authorities that the seat was vacant – a declaration which concerned a pre-existing legal situation and resulted solely from a decision of those authorities.

It is clear from the wording of Article 12.2 of the 1976 Act, under which it was for the Parliament to ‘take note’ that a seat had fallen vacant pursuant to national provisions in force in a Member State, that the Parliament does not have any discretion in the matter. In that particular case, the role of the Parliament is not to declare that the seat is vacant but merely to take note that the seat is vacant, as already established by the national authorities, whereas in the other cases concerning, *inter alia*, the resignation or death of one of its members, that institution has a more active role to play since Parliament itself establishes that there is a vacancy and informs the Member State in question thereof. Furthermore, it was not for the Parliament – but for the competent national courts or the European Court of Human Rights as the case may be – to verify that the procedure laid down by the applicable national law or the fundamental rights of the person concerned were respected (see paragraphs 46–50, 56).

*Summary:*

The appellant, Mr Le Pen, had been declared ineligible following a criminal conviction in the French courts. The French authorities, taking note of the decree of disqualification adopted by the Prime Minister against the appellant, informed the European Parliament, and asked it to take note of this disqualification. The European Parliament considered it appropriate, on account of the irreversibility of the disqualification from office, to await the expiry of the time limit for appeal to the French *Conseil d'Etat* before taking note of the disqualification. On expiry of this time limit, on 23 October 2000, the President of the European Parliament noted the disqualification of the appellant.

The appellant asked the Court to annul the contested decision in the form of a declaration of the President of the European Parliament on his disqualification from holding office as a Member of the European Parliament. On 10 April 2005, the Court considered inadmissible his appeal for annulment of that decision.

The appellant therefore lodged an appeal against the Court’s decision. He disputed *inter alia* the viewpoint that the contested act could not, given that it was not intended to produce legal effects, be the subject of an action for annulment under Article 230, taking the contrasting view that the act concerned had altered his legal situation by depriving him of his elective office.

The Court dismissed the appeal, taking the view that the European Parliament’s obligation to “take note of” the vacancy already established by the national authorities did not give discretion to the Parliament, and was not therefore subject to review.

*Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



*Identification:* ECJ-2006-C-001

- a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 27.06.2006 / **e)** C-540/03 / **f)** Parliament v. Council / **g)** European Court Reports 2006, I-05769 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989**.

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

*Keywords of the alphabetical index:*

Family reunification, right / Alien, child, residence.

*Headnotes:*

The right to respect for family life within the meaning of Article 8 ECHR is among the fundamental rights protected in Community law. This right to live with ones close family results in obligations for the Member States. This may be negative when a Member State is required not to deport a person; or positive, when it is required to let a person enter and reside in its territory. Thus, even though the European Convention on Human Rights does not guarantee as a fundamental

right the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8.1 ECHR.

The European Convention on Human Rights and the Convention on the Rights of the Child and Article 7, read in conjunction with Article 24.2 and 24.3 of the Charter of Fundamental Rights of the European Union, stress the importance of family life to a child and recommend that States have regard to the childs interests. However, they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification (cf. paragraphs 52-53, 57-59).

Article 4.1 of Directive 2003/86 on the right to family reunification requires Member States in certain cases to authorise family reunification of certain members of the sponsors family, without being left a margin of appreciation. The same provision has the effect, in strictly defined circumstances, namely where a child aged over 12 years arrives independently from the rest of the family, of partially preserving the margin of appreciation of the Member States. This occurs by permitting them to verify whether he or she meets a condition for integration provided for by the national legislation in force on the date of implementation of the Directive.

This provision cannot be regarded as running counter to the right to respect for family life, set forth in Article 8 ECHR. The reason is that this right is not to be interpreted as necessarily embodying the obligation for a Member State to permit family reunification in its territory. The provision merely preserves the margin of appreciation of the Member States while restricting that freedom, to be exercised by them in compliance, in particular, with the principles set out in Articles 5.5 and 17 of the Directive, to examination of a condition defined by national legislation. In any event the necessity for integration may fall within a number of the legitimate objectives referred to in Article 8.2 ECHR.

As such, the final subparagraph of Article 4.1 of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way (cf. paragraphs 60-62, 76).

Article 8 of Directive 2003/86 on the right to family reunification, which authorises the Member States to derogate from the rules governing family reunification laid down by the Directive, does not have the effect of precluding any family reunification. Instead, it preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place under favourable conditions. This takes place after the sponsor has been residing in the host State for a period sufficiently long enough for it to be assumed that the family members will settle down well and attain a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not conflict with the right to respect for family life set out in particular in Article 8 ECHR as interpreted by the European Court of Human Rights (cf. paragraphs 97-98).

#### *Summary:*

I. In its Judgment of 27 June 2006, the Court dismissed an action brought by the European Parliament for the annulment of Article 4.1, final subparagraph, 4.6 and 4.8 of Directive 2003/86 on family reunification.

According to these provisions, Member States shall authorise the entry and residence, pursuant to the Directive of, in particular, the minor children, including adopted children, of the sponsor and his or her spouse. Also, Member States may require sponsors to have stayed lawfully in their territory for a period not exceeding two years, before having their family members join them.

II. The Court held that these provisions were in accordance with fundamental rights as recognised in the Community legal order.

In particular, it observed no incompatibility between the impugned provisions and the right to respect for family life as set out in Article 8 ECHR, in the Convention on the Rights of the Child and in the Charter of Fundamental Rights of the European Union. In particular, the Court stressed that these instruments created no individual right for the family members to be allowed to enter the State territory. Also, it could not be construed as denying states a certain margin of appreciation when considering requests for family reunification.

The Court dismissed the various arguments raised by the European Parliament, considering the way they were formulated. The Court reasoned that the derogations authorised by the impugned provisions do not conflict with the fundamental right to respect for family life, the obligation to have regard to the best

interests of children or the principle of non-discrimination on grounds of age. They are not contrary either in themselves or in expressly or implicitly, authorising the Member States to act in accordance with them.

#### *Languages:*

German, English, Danish, Spanish, Estonian, Finnish, French, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Dutch, Polish, Portuguese, Slovakian, Slovenian, Swedish, Czech.



#### *Identification: ECJ-2009-1-002*

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** First Chamber / **d)** 18.01.2007 / **e)** C-229/05 P / **f)** Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v. Council of the European Union / **g)** European Court Reports I-00439 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

2.3.4 Sources – Techniques of review – **Interpretation by analogy.**

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

#### *Keywords of the alphabetical index:*

Terrorism, fight / Protective measure / Judicial review.

#### *Headnotes:*

- Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights has special significance in that respect. The case-law of the European Court of Human Rights, as it currently stands, appears to indicate that an organisation which does not appear on the list of persons, groups and entities subject to the

restrictive measures laid down by Regulation no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism would not be able to establish that it has the status of a victim within the meaning of Article 34 ECHR and therefore would not be able to bring an action before that court.

Consequently, where the Community judicature concludes that such an organisation is not individually concerned within the meaning of Article 230.4 EC, as interpreted by the case-law, and its action for annulment is therefore inadmissible, there is no conflict between the European Convention on Human Rights and Article 230.4 EC.

2. The European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 ECHR.

In that respect, as regards Regulation no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, it is particularly important for that judicial protection to be effective because the restrictive measures laid down by Regulation no. 2580/2001 have serious consequences. Not only are all financial transactions and financial services thereby prevented in the case of a person, group or entity covered by the regulation, but also their reputation and political activity are damaged by the fact that they are classified as terrorists.

Under Article 2.3 of Regulation no. 2580/2001, read in conjunction with Article 1.4 to 1.6 of Common Position no. 2001/931, a person, group or entity can be included in the list of persons, groups and entities to which that regulation applies only if there is certain reliable information, and the persons, groups or entities covered must be precisely identified. In addition, it is made clear that the names of persons, groups or entities can be kept on the list only if the Council reviews their situation periodically. All these matters must be open to judicial review.

It follows that, where the Community legislature takes the view that an entity retains an existence sufficient for it to be subject to the restrictive measures laid down by Regulation no. 2580/2001, it must be accepted, on grounds of consistency and justice, that that entity continues to have an existence sufficient to contest

those measures. The effect of any other conclusion would be that an organisation could be included in the list of persons, groups and entities to which that regulation applies without being able to bring an action challenging its inclusion.

3. The provisions of the Statute of the Court of Justice, in particular Article 21, the Rules of Procedure of the Court of Justice, in particular Article 38, and the Rules of Procedure of the Court of First Instance, in particular Article 44, were not devised with a view to the commencement of actions by organisations lacking legal personality. In that exceptional situation, the procedural rules governing the admissibility of an action for annulment must be applied by adapting them, to the extent necessary, to the circumstances of the case. It is a question of avoiding excessive formalism which would amount to the denial of any possibility of applying for annulment even though the entity in question has been the object of restrictive Community measures.

#### *Summary:*

The question of the admissibility of actions for annulment brought by natural or legal persons comes up frequently in EU case-law. The current case was a significant example of this even though the facts were admittedly very specific.

As part of the anti-terrorism measures following the attacks of 11 September 2001, the Council of the European Union adopted a Series of measures, which included the inclusion of the Kurdistan Workers' Party (PKK) on a list of terrorist organisations, resulting in the freezing of its funds.

An action against that decision was brought before the Court of First Instance by Mr Osman Ocalan on behalf of the PKK and by Mr Serif Vanly on behalf of the Kurdistan National Congress (KNK), which is an association set up to promote Kurdish interests. By order of 15 February 2005, the Court of First Instance dismissed the action as inadmissible on the grounds that the KNK was not individually concerned within the meaning of Article 230.4 by the PKK's inclusion on the list of terrorist organisations, and that Mr Ocalan had failed to prove that he really represented the PKK, whose very existence was uncertain at the time of the facts.

Both applicants then lodged an appeal with the Court of Justice to have the order of the Court of First Instance set aside and their action declared admissible.

In support of its appeal, the KNK argued that the criteria for the admissibility of actions for annulment set by Article 230.4 were too restrictive and deprived the

applicants of their right to an effective judicial remedy within the meaning of Article 13 ECHR. The Court rejected this argument, relying precisely on the case-law of the European Court of Human Rights with regard to Article 34 ECHR. It found that the KNK could not be considered a victim of a violation of the Convention within the meaning of the Article referred to and could not therefore reasonably lodge an application with the Strasbourg Court. The Court therefore considered that the dismissal of the KNK's action for inadmissibility under Article 230.4 was compatible with the case-law of the European Court of Human Rights.

The PKK argued that the Court of First Instance had been wrong to find, in the light of the evidence brought before it, that the organisation had ceased all activity in 2002 and therefore that Mr Ocalan could not validly represent it. The Court set aside the judgment of the Court of First Instance on this matter and held that the inclusion of the PKK on the list of terrorist organisations proved that this organisation retained a sufficient existence and that it could therefore dispute the impugned decision by means of an action for annulment. The Court also stated that in exceptional circumstances such as these, namely where a Council decision was disputed by an organisation without legal personality, the procedural rules on actions for annulment needed to be adjusted.

#### Cross-references:

##### Court of First Instance:

- T-177/01, 03.05.2002, *Jégo-Quéré v. Commission*, *European Court Reports II-2365*;
- T-253/02, 12.07.2006, *Ayadi v. Council*, *European Court Reports II-2139*.

#### Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification: ECJ-2010-1-001*

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 12.02.2008 / **e)** C-2/06 / **f)** Willy Kempter KG v. Hauptzollamt Hamburg-Jonas / **g)** European Court Reports I-00411 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases**.

3.26.3 General Principles – Principles of EU law – **Genuine co-operation between the institutions and the member states**.

#### *Keywords of the alphabetical index:*

Preliminary ruling, effects / Cooperation, good faith, institutions, member States / *Res judicata*, review of administrative decision, obligation / Time limit, national procedural autonomy.

#### *Headnotes:*

1. In the context of a procedure before an administrative body for review of an administrative decision that became final by virtue of a judgment, delivered by a court of final instance, which, in the light of a decision given by the Court subsequent to it, was based on a misinterpretation of Community law, Community law does not require the claimant to have relied on Community law in the legal action under domestic law which he brought against the administrative decision. While Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final, specific circumstances may nevertheless be capable, by virtue of the principle of cooperation arising from Article 10 EC, of requiring such a body to review an administrative decision that has become final in order to take account of the interpretation of a relevant provision of Community law given subsequently by the Court. The condition – which is among those capable of providing the basis for such an obligation of review – that the judgment of the Court of Final Instance by virtue of which the contested administrative decision became final was, in the light of a subsequent decision of the Court, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling cannot be interpreted as requiring the parties to have raised before the national court the point of Community law in question. It is sufficient in that regard if either the point of Community law the interpretation of which proved to be incorrect in light of a subsequent judgment of the Court

was considered by the national court ruling at final instance or it could have been raised by the latter of its own motion. While Community law does not require national courts to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties, they are obliged to raise of their own motion points of law based on binding Community rules where, under national law, they must or may do so in relation to a binding rule of national law (see paragraphs 37-39, 44-46, operative part 1).

2. Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence (see paragraph 60, operative part 2).

#### *Summary:*

I. Kempfer KG (hereinafter, "Kempfer") exported cattle to various Arab countries and countries of the former Yugoslavia. In accordance with the rules in force at the time, the firm applied for and received export refunds from the Hauptzollamt (principal customs office). In the course of an inquiry, the principal revenue office, Freiburg, established that some of the animals had died during transport; the Hauptzollamt accordingly demanded repayment of the export refunds paid.

Kempfer brought various actions against that decision, but did not plead any infringement of Community law. However, those actions were all dismissed and the decision requiring repayment thus became final.

Subsequently, the Court of Justice delivered a judgment in which it ruled that the condition of proof that the animals had been exported to a non-member country could be applied only before the grant of the aid and not after it had been granted. Kempfer became aware of that decision in July 2002 and, accordingly, requested the Hauptzollamt to review and withdraw the recognition decision in issue, which the Hauptzollamt refused to do.

Kempfer therefore brought an action before the Finanzgericht Hamburg, which referred a number of questions to the Court of Justice. Those questions sought clarification of the obligations borne by the national authorities under Article 10 of the EC Treaty, as interpreted in the *Kühne & Heitz* Judgment of the Court of Justice.

II. In that judgment, the Court had ruled that "[t]he principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:

- i. under national law, it has the power to reopen that decision;
- ii. the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- iii. that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234.3 EC, and
- iv. the person concerned complained to the administrative body immediately after becoming aware of the decision of the Court".

In this case, the Court interpreted the last two conditions and ruled, first, that Kempfer could rely on the decision in *Kühne & Heitz* even though it had not raised any pleas based on Community law in its actions against the decision ordering repayment of the export refunds and, second, that Community law did not impose any specific time limit for making an application for review of a decision.

#### *Cross-references:*

Court of Justice of the European Communities:

- C-453/00, 13.01.2004, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, European Court Reports I-00837.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



## *Identification: ECJ-2010-1-007*

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 03.09.2008 / **e)** C-402/05 P and C-415/05 P / **f)** Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities / **g)** European Court Reports I-06351 / **h)** CODICES (English, French).

### *Keywords of the systematic thesaurus:*

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person**.

2.1.1.4.1 Sources – Categories – Written rules – International instruments – **United Nations Charter of 1945**.

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts**.

3.9 General Principles – **Rule of law**.

4.16 Institutions – **International relations**.

5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

### *Keywords of the alphabetical index:*

European Union, regulation, legal basis / Community law, act implementing resolutions of the United Nations Security Council / Terrorism, financing / Terrorism, restrictive measures / United Nations, Security Council, resolution, implementation by the EU.

### *Headnotes:*

1. To accept the interpretation of Articles 60 EC and 301 EC that it is enough for the restrictive measures laid down by Resolution 1390 (2002) of the United Nations Security Council and given effect by Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban to be directed at persons or entities present in a third country or associated with one in some other way, would give those provisions an excessively broad meaning and would fail to take any account at all of the requirement, imposed by their very wording, that the measures decided on the basis of those provisions must be taken against third countries.

Interpreting Article 301 EC as building a procedural bridge between the Community and the European Union, so that it must be construed as broadly as the relevant Community competences, including those

relating to the common commercial policy and the free movement of capital, threatens to reduce the ambit and, therefore, the practical effect of that provision, for, having regard to its actual wording, the subject of that provision is the adoption of potentially very diverse measures affecting economic relations with third countries which, therefore, by necessary inference, must not be limited to spheres falling within other material powers of the Community such as those in the domain of the common commercial policy or of the free movement of capital. Moreover, that interpretation finds no support in the wording of Article 301 EC, which confers a material competence on the Community the scope of which is, in theory, autonomous in relation to that of other Community competences.

Having regard to the purpose and subject-matter of that regulation, it cannot be considered that the regulation relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade, and it could not, therefore, be based on the powers of the Community in the sphere of the common commercial policy. A Community measure falls within the competence in the field of the common commercial policy provided for in Article 133 EC only if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned. Nor can that regulation be regarded as falling within the ambit of the provisions of the EC Treaty on free movement of capital and payments, in so far as it prohibits the transfer of economic resources to individuals in third countries. With regard, first of all, to Article 57.2 EC, the restrictive measures at issue do not fall within one of the categories of measures listed in that provision. Next, so far as Article 60.1 EC is concerned, that provision cannot furnish the basis for the regulation in question either, for its ambit is determined by that of Article 301 EC. As regards, finally, Article 60.2 EC, this provision does not include any Community competence to that end, given that it does no more than enable the Member States to take, on certain exceptional grounds, unilateral measures against a third country with regard to capital movements and payments, subject to the power of the Council to require a Member State to amend or abolish such measures.

2. The view that Article 308 EC allows, in the special context of Articles 60 EC and 301 EC, the adoption of Community measures concerning not one of the objectives of the Community but one of the objectives under the EU Treaty in the sphere of external relations, including the Common Foreign and Security Policy (hereinafter, the "CFSP"), runs counter to the very wording of Article 308 EC.

While it is correct to consider that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP, neither the wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC.

Recourse to Article 308 EC demands that the action envisaged should, on the one hand, relate to the operation of the common market<sup>1</sup> and, on the other, be intended to attain one of the objectives of the Community<sup>2</sup>. That latter concept, having regard to its clear and precise wording, cannot on any view be regarded as including the objectives of the CFSP.

The coexistence of the Union and the Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, constitute considerations of an institutional kind militating against any extension of that bridge to Articles of the EC Treaty other than those with which it explicitly creates a link.

In addition, Article 308 EC, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the EC Treaty as a whole and, in particular, by those defining the tasks and the activities of the Community.

Likewise, Article 3 EU, in particular its second paragraph, cannot supply a base for any widening of Community powers beyond the objects of the Community.

3. Article 308 EC is designed to fill the gap where no specific provisions of the EEC Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, inasmuch as it imposes restrictive measures of an economic and financial nature, plainly falls within the ambit *ratione materiae* of Articles 60 EC and 301 EC. Since those Articles do not, however, provide for any express or implied powers of action to impose such measures on addressees in no way linked to the governing regime of a third country such as those to whom that regulation

applies, that lack of power, attributable to the limited ambit *ratione personae* of those provisions, may be made good by having recourse to Article 308 EC as a legal basis for that regulation in addition to the first two provisions providing a foundation for that measure from the point of view of its material scope, provided, however, that the other conditions to which the applicability of Article 308 EC is subject have been satisfied.

The objective pursued by the contested regulation being to prevent persons associated with Osama bin Laden, the Al-Qaeda network or the Taliban from having at their disposal any financial or economic resources, in order to impede the financing of terrorist activities, it may be made to refer to one of the objectives of the Community for the purpose of Article 308 EC. Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the common foreign and security policy, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC.

Implementing such measures through the use of a Community instrument does not go beyond the general framework created by the provisions of the EC Treaty as a whole, because by their very nature they offer a link to the operation of the common market, that link constituting another condition for the application of Article 308 EC. If economic and financial measures such as those imposed by the regulation were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market.

4. The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that forms part of the very foundations of the Community.

With regard to a Community act which, like Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities

associated with Osama bin Laden, the Al-Qaeda network and the Taliban, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*, but rather to review the lawfulness of the implementing Community measure.

Any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

5. Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.

The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. Such immunity from jurisdiction for a Community measure, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the

implementation of resolutions of the Security Council adopted under Chapter VII of that Charter, cannot find a basis in the EC Treaty. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6.1 EU as a foundation of the Union. If Article 300.7 EC, providing that agreements concluded under the conditions set out therein are to be binding on the institutions of the Community and on Member States, were applicable to the Charter of the United Nations, it would confer on the latter primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

The Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the regulation at issue, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

6. The Community must respect international law in the exercise of its powers and a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

In the exercise of its power to adopt Community measures taken on the basis of Articles 60 EC and 301 EC, in order to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Community must attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

The Charter of the United Nations does not, however, impose the choice of a predetermined model for the implementation of resolutions adopted by the Security Council under Chapter VII, since they are to be given effect in accordance with the procedure applicable in

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that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

7. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, the Community authorities cannot be required to communicate, before the name of a person or entity is included for the first time in the list of persons or entities concerned by those measures, the grounds on which that inclusion is based. Such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation. Nor, for reasons also connected to the objective pursued by that regulation and to the effectiveness of the measures provided by the latter, were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

Nevertheless, the rights of the defence, in particular the right to be heard, were patently not respected, for neither the regulation at issue nor Common Position 2002/402 concerning restrictive measures against Osama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, to which that regulation refers, provides for a procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation and for hearing those persons, either at the same time as that inclusion or later and, furthermore, the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted.

8. The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR,

this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

Observance of the obligation to communicate the grounds on which the name of a person or entity is included in the list forming Annex I to Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature and also to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

Given that those persons or entities were not informed of the evidence adduced against them and having regard to the relationship between the rights of the defence and the right to an effective legal remedy, they have also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature and the latter is not able to undertake the review of the lawfulness of that regulation in so far as it concerns those persons or entities, with the result that it must be held that their right to an effective legal remedy has also been infringed.

9. The importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights.

With reference to an objective of public interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Osama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate. In this respect, the restrictive measures imposed by Regulation no. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban constitute restrictions of the right to property which may, in principle, be justified.

The applicable procedures must, however, afford the person or entity concerned a reasonable opportunity of putting his or its case to the competent authorities, as required by Article 1 Protocol 1 ECHR.

Thus, the imposition of the restrictive measures laid down by that regulation in respect of a person or entity, by including him or it in the list contained in its Annex I, constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities, in a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it.

#### *Summary:*

I. Mr Kadi and Al Barakaat International Foundation were designated by the Sanctions Committee of the United Nations Security Council as a person and an entity suspected of supporting terrorism. In accordance with the United Nations resolutions, the Council of the European Union adopted Regulation no. 881/2002 ordering the freezing of the funds of persons appearing on the list annexed to that regulation, which reproduces the list established by the United Nations Security Council.

Mr Kadi and Al Barakaat International Foundation, whose names were on that list, brought an action for annulment of the regulation before the Court of First Instance, claiming that the Council was not competent to adopt the regulation in question and that the regulation infringed a number of their fundamental rights, notably the right to property and the rights of the defence. The Court of First Instance rejected those pleas and held that, in principle, the Community judicature had no jurisdiction to review the validity of the contested regulation, since member States are required to comply with resolutions of the Security Council according to the terms of the Charter of the United Nations, an international treaty which takes precedence over Community law. Mr Kadi therefore appealed to the Court of Justice.

II. The Court of Justice held that the Community judicature has jurisdiction to review the lawfulness of a regulation implementing a decision of the United Nations Security Council. It emphasised, in that regard, that the review of lawfulness undertaken by the Community judicature concerns the Community measure designed to implement the international agreement in question and not the international agreement as such.

Furthermore, in the Court's view, the imposition of restrictive measures of an economic nature decided in the context of the CFSP offers a link to the operation of the common market that can justify the adoption of that regulation. The Court set aside the judgments of the Court of First Instance.

As for the substantive review of the contested measure in the light of fundamental rights, the Court observed that the regulation at issue made no provision for any procedure that would enable the persons concerned to know the grounds for their inclusion on the list and to put forward their views. It also observed that the Council had not informed the appellants of the evidence adduced against them. The Court thus considered that the freezing of funds constituted an unjustified restriction of Mr Kadi's right to property and therefore annulled the regulation in so far as it froze the funds of Mr Kadi and of Al Barakaat International Foundation.

#### *Cross-references:*

Court of First Instance:

- T-306/01, 21.09.2005, *Yusuf Al Barakaat International Foudation v. Council and Commission*, *European Court Reports II-3533*.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



*Identification:* ECJ-2010-3-018

- a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 17.02.2009 / **e)** C-465/07 / **f)** Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie / **g)** *European Court Reports 2009 I-921* / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Secondary legislation**.

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

*Keywords of the alphabetical index:*

Asylum, foreigner, subsidiary protection / Community law, interpretation / Interpretation, compatibility with the European Convention on Human Rights.

*Headnotes:*

1. The fundamental right guaranteed under Article 3 ECHR forms part of the general principles of Community law, observance of which is ensured by the Court. In addition, the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order. However, it is Article 15.b of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, which corresponds, in essence, to Article 3 ECHR.

By contrast, Article 15.c of that directive is a provision, the content of which is different from that of Article 3 ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights as they are guaranteed under the European Convention on Human Rights (see paragraph 28).

2. Article 15.c of Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2.e thereof, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an

application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

That interpretation is fully compatible with the European Convention on Human Rights, including the case-law of the European Court of Human Rights relating to Article 3 ECHR (see paragraphs 43-44, operative part).

*Summary:*

The dispute in the main proceedings was between two Iraqi nationals and the Dutch Minister of Justice, concerning the latter's refusal of their application for a permit to reside temporarily in the Netherlands. The Iraqi couple relied on facts relating to their personal situation, such as the fact that the husband, a Shiite Muslim, had worked for a British firm, that his uncle, employed by the same firm, had been killed by militia, and that a letter threatening 'death to collaborators' had been fixed to the door of the couple's home. Netherlands law provides that a residence permit be granted to a foreigner "for whom return to his country of origin would constitute an exceptional hardship in the context of the overall situation there". However, considering that the applicants had not adequately proved the distinct reality of their personal situation regarding the likelihood of serious individual threats to which they would be exposed if they were returned to their country of origin, the Dutch Minister had refused to grant the permit.

The asylum seekers invoked Article 15.c of Directive no. 2004/83/EC concerning minimum standards in relation to the conditions which nationals of third countries or stateless persons must fulfil in order to claim status as refugees or persons who otherwise need international protection. Under this provision in conjunction with Article 2.e of the same Directive, persons eligible for subsidiary international protection are those who cannot be regarded as refugees but "face a real risk of suffering serious harm", constituted by "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". Article 15 furthermore concerns two other instances of eligibility for subsidiary protection: "death penalty or execution" (Article 15.a) and "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin" (Article 15.b). The Dutch Minister responsible for the case considered that the eventualities mentioned by Article 15.c of the Directive and by Netherlands law, which were similar, required the same standard of proof as the one in Article 15.b which required a clear degree of individualisation of the threat

invoked. The Dutch Court to which the asylum seekers applied at first instance took the contrary view that the proof to be furnished in connection with the application of Article 15.c did not require the same degree of individualisation of the threat as did paragraph b of the same article, and set aside the orders issued by the Dutch Minister. The Court of appeal withheld judgment in order to request a preliminary ruling from the Court of Justice on the interpretation of Article 15.c of the Directive.

The Court replied firstly that Article 15.c was a provision whose substance differed from that of Article 3 ECHR, to which Article 15.b corresponded, and that it should therefore be interpreted independently but in a manner compatible with the European Convention on Human Rights. Secondly, the Court made a comparative examination of the three situations of serious harm referred to by Article 15.a, 15.b and 15.c of the Directive. It drew a distinction between these three categories of "serious harm": it found that the first two concerned a risk of individual threat, whereas the third, the one pleaded in the instant case by the asylum seekers, covered a more general risk of harm. This distinction prompted the Court to single out the case of harm referred to by Article 15.c from the first two cases: while the specificity of the risk of harm in the instances contemplated by Article 15.a and 15.b presupposed "a clear degree of individualisation", the same did not apply to the third type of harm constituted by "serious and individual threat to life or person". The Court in fact held that, this being so, where the degree of indiscriminate violence characterising the armed conflict taking place reached an exceptionally high level, the applicant's mere presence in the territory could be regarded as a real risk of subjection to the serious threat referred to in Article 15.c of the Directive.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2013-1-007

- a) European Union / b) Court of Justice of the European Union / c) Second Chamber / d) 22.12.2010 / e) C-279/09 / f) DEB / g) European Court Reports I-13849 / h) CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

#### *Keywords of the alphabetical index:*

Effective judicial protection, right / Legal aid to right, legal persons.

#### *Headnotes:*

1. The principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been affirmed in Articles 6 and 13 ECHR.

As regards fundamental rights, it is important, since the entry into force of the Treaty of Lisbon, to take account of the Charter of Fundamental Rights of the European Union, which, pursuant to the first subparagraph of Article 6.1 TEU, has the same legal value as the Treaties. Article 51.1 of the Charter states that its provisions are addressed to the Member States when they are implementing Union law.

In that connection, according to the explanations relating to Article 47 CFREU, which, in accordance with Article 6.1.3 TEU and Article 52.7 of the Charter, have to be taken into consideration for the interpretation of the Charter, Article 47.2 of the Charter corresponds to Article 6.1 ECHR (see paragraphs 29-32).

2. The principle of effective judicial protection, as affirmed in Article 47 CFREU, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation of the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicants capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings that must be paid in advance and whether or not those costs might represent an insurmountable obstacle to access to the courts.

With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings (see paragraphs 59-62, operative part).

#### *Summary:*

I. In its Judgment of 22 December 2010, the Court ruled on the interpretation of the principle of effective legal protection, as enshrined in Article 47 CFREU.

In the instant case, a company, DEB, wished to bring an action to establish that the *Bundesrepublik Deutschland* had incurred State liability in order to obtain reparation for the delay in the transposition of Directive 98/30/EC (*Official Journal*, L 204, p. 1). In this connection, the applicant applied for legal aid to enable it to make the advance payment of court costs required by law for proceedings of this kind. The application for legal aid was refused, on the ground that the conditions for granting such aid to legal persons, as laid down in German law, had not been satisfied. The applicant accordingly filed an appeal with the *Kammergericht*. The latter decided to stay the proceedings and to refer a number of questions to the Court of Justice for a preliminary ruling in order to ascertain whether the national legislation in question was inconsistent with the principle of effectiveness of European Union law.

II. Firstly, the Court noted that Article 47 CFREU provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. That right includes the right to legal aid for "those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

Secondly, the Court observed that it was apparent from examination of the case-law of the European Court of Human Rights in relation to Article 6 ECHR that the

grant of legal aid to legal persons was not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2011-C-001

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 21.12.2011 / **e)** C-411/10 and C-493/10 / **f)** N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (N.S. et al.) / **g)** / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000**.

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.

#### *Keywords of the alphabetical index:*

Asylum, safe countries of origin / Asylum, request, examination, determination of the Member State responsible.

#### *Headnotes:*

Article 3.2 of Regulation no. 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, grants Member States a discretionary power that forms an integral part of the Common European Asylum System. This has been provided for by the FEU Treaty and developed by the European Union

legislature. Member States must exercise discretionary power in accordance with the other provisions of that regulation. Thus a Member State that exercises the discretionary power must be considered as implementing European Union law within the meaning of Article 51.1 of the Charter of Fundamental Rights of the European Union (cf. paragraphs 65-66, 68-69, operative clause 1).

European Union law precludes the application of a conclusive presumption that the Member State, which Article 3.1 of Regulation no. 343/2003 indicates as responsible, observes the fundamental rights of the European Union. Articles 1, 18 and 47 of the Charter do not lead to a different answer than the above (cf. paragraphs 105, 115, operative clauses 2-3).

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of Regulation no. 343/2003. That is, they cannot be unaware of systemic deficiencies in the asylum procedure. Also, they cannot overlook deficiencies in the reception conditions for asylum seekers, in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right to examine for itself the application referred to in Article 3.2 of Regulation no. 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible according to the criteria set out in Chapter III of that regulation, entails that the Member State carrying out that transfer must continue to examine the criteria set out in that chapter. This would allow it to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application. It is important for the Member State, where the asylum seeker is present, to ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed. One means is by using a procedure for determining the Member State responsible that takes an unreasonable length of time. If necessary, the first-mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3.2 of Regulation no. 343/2003.

Articles 1, 18 and 47 of the Charter do not lead to a different answer than the above (cf. paragraphs 106, 115, operative clauses 2-3).

It emerges from Article 1 of Protocol (no. 30) on the application of the Charter of Fundamental Rights of the European Union to the Republic of Poland and the United Kingdom that the Protocol does not call into question the applicability of the Charter in the United Kingdom or in Poland. The position is confirmed by the recitals in the preamble to that protocol.

In these circumstances, Article 1.1 of the aforesaid Protocol explains Article 51 of the Charter with regard to the scope thereof. It is not intended to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions. (cf. paragraphs 119-120, 122, operative clause 4).

#### *Summary:*

I. In its judgment of 21 December 2011, the Court of Justice ruled as to whether Member States could transfer asylum seekers to other Member States where there was risk of serious infringement of the rights secured to these asylum seekers by the Charter of Fundamental Rights of the European Union. In the case in point, nationals of Afghanistan, Iran and Algeria, having transited via Greece, went to the United Kingdom and Ireland to request asylum. Having found that these persons had entered via Greece, the British and Irish authorities informed those concerned of their intention to return them to that country.

II. Firstly, the Court interpreted Article 4 of the Charter of Fundamental Rights of the European Union as meaning that it was the duty of the Member States, including the national courts, not to transfer an asylum seeker to the Member State responsible within the meaning of Regulation no. 343/2003 on determining the Member State responsible for examining an asylum application where they could not be unaware that systemic deficiencies in the asylum procedure. Also, they could not overlook deficiencies in the reception conditions for asylum seekers, in that Member State constituted substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision. It followed that European Union law precluded the application of a conclusive presumption that the Member State designated by the regulation as responsible upheld the fundamental rights of the European Union.

Moreover, the Court added that, subject to the possibility of making its own examination of the request, the Member State required to transfer the asylum seeker to the State responsible under the regulation, but unable to do so, must consider the other criteria of the regulation. By doing so, it could ascertain whether

one of the further criteria allowed another Member State to be identified as responsible for examining the asylum application. In this connection, it must take care that a situation where the fundamental rights of the applicant had been infringed would not be worsened. This would occur by using a procedure of unreasonable duration to determine the Member State responsible. If necessary, it should examine the application itself.

Lastly, the Court specified that the consideration of Protocol (no. 30) on the application of the Charter of Fundamental Rights of the European Union to the Republic of Poland and the United Kingdom had no effect on the answers given.

#### *Languages:*

German, English, Bulgarian, Danish, Spanish, Estonian, Finnish, French, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovakian, Slovenian, Swedish, Czech.



#### *Identification:* ECJ-2013-C-001

- a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 26.02.2013 / **e)** C-617/10 / **f)** Åkerberg Fransson / **g)** / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

1.3.4.14 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between the EU and member states.**

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**

5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem.**

#### *Keywords of the alphabetical index:*

Value added tax (VAT) / Tax evasion, penalty / Criminal penalty, concept.

#### *Headnotes:*

The scope of the Charter of Fundamental Rights of the European Union is defined according to the Member States action in Article 51.1, under whose terms the provisions of the Charter are addressed to the institutions and bodies of the Union only when they implement Union law. Indeed, the fundamental rights guaranteed in the legal order of the Union should be applied in all situations governed by the law of the Union, but not outside such situations. Accordingly, the Court may assess in the light of the Charter rules of national law, which are not within the ambit of Union law. Conversely, where such regulations do come within the scope of this law, the Court, having before it a request for a preliminary ruling, must provide all the guidance as to interpretation needed by the national court to determine whether that legislation is compatible with the fundamental rights, the observance of which the Court ensures (cf. paragraphs 17 and 19).

When a Member State court is called upon to review the compliance with fundamental rights of a national provision or measure which implements the latter for the purposes of Article 51.1 of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights. The review may occur in a situation when European Union law does not determine the actions of Member States. The level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law must not thereby be compromised (cf. paragraph 29).

The principle of *ne bis in idem* stated in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.

For the purpose of assessing whether tax penalties are criminal in nature, three criteria are relevant. The first criterion is the legal classification of the offence under national law. The second criterion is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (cf. paragraphs 34-35, 37, operative clause 1).

The law of the Union neither governs the relations between the European Convention on Human Rights and the legal systems of the Member States, nor determines the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by the Convention and a rule of national law.

Indeed, the fundamental rights recognised by the European Convention on Human Rights form part of the Union's law as general principles as Article 6.3 of the Treaty confirms. Also, Article 52.3 of the Charter of Fundamental Rights of the European Union requires that the rights contained therein, corresponding to rights guaranteed by the European Convention on Human Rights, be given the same meaning and scope as assigned to them by the Convention. The latter, for as long as the Union has not acceded to it, does not constitute a legal instrument formally incorporated into the legal order of the Union (cf. paragraph 44, operative clause 2).

The law of the Union precludes a judicial practice that obliges a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union. This is conditional upon the infringement being clear from the text of the Charter or the case-law relating to it. The reason is that, since it withdraws from the national court the power to assess fully, with, as the case may be, the co-operation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.

Indeed, the upshot of such a practice would be to impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions, which might prevent European Union rules from having full force and effect (cf. paragraphs 46, 48, operative clause 3).

### *Summary:*

I. In the context of a referral for preliminary ruling, the Court of Justice was questioned concerning the interpretation of the *ne bis in idem* principle stated in Article 50 of the Charter of Fundamental Rights of the European Union.

It was to be ascertained whether this principle would prevent criminal proceedings for tax evasion from being brought against an accused on whom a tax penalty had already been imposed for the same offences. In the instant case, the criminal proceedings were partly linked with breaches of the declaration obligations in respect of value added tax (VAT).

II. Before ruling on the substance of the dispute, the Court of Justice needed to determine whether it had jurisdiction to examine the conduct of the Member State by the yardstick of a Charter provision. The reason is that Article 51.1 of the Charter limits its scope to Member States applications of European Union law.

In that respect, the Court interpreted the Charter provision to the effect that the fundamental rights guaranteed by the Charter must be observed whenever a rule of national law came within the ambit of European Union law. The Court noted that penalties and prosecution for the inaccuracy of the information supplied in respect of VAT constituted an application of European Union law. As such, it must be consistent with the Charter.

As to the *ne bis in idem* principle stated in Article 50 of the Charter, the Court held that it did not preclude a Member States imposing a tax penalty followed by a criminal penalty for the same offences, on condition that the tax penalty was not of a criminal nature.

Finally, in reply to questions concerning the relations between the Member States legal systems and the European Convention on Human Rights, the Court recalled that European Union law did not interfere in these relations and did not indicate the procedure for national courts to follow. Indeed, for as long as the Union has not acceded to it, the European Convention on Human Rights does not constitute a legal instrument formally incorporated in the legal order of the Union.

### *Languages:*

German, English, Bulgarian, Danish, Spanish, Estonian, Finnish, French, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovakian, Slovenian, Swedish, Czech.



# European Court of Human Rights

## Important decisions

*Identification:* ECH-1999-1-004

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 18.02.1999 / **e)** 24833/94 / **f)** Matthews v. the United Kingdom / **g)** Reports of Judgments and Decisions 1999-I / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

- 2.1.1.3 Sources – Categories – Written rules – **Community law.**
- 4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**
- 4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**
- 4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states.**
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

*Keywords of the alphabetical index:*

International instruments, hierarchy / Competence ratione materiae.

*Headnotes:*

Notwithstanding the transfer of competences to the European Community (now European Union), Contracting States remain responsible for ensuring that Convention rights were guaranteed. Contracting States are responsible under the European Convention on Human Rights and its Protocols for the consequences of international treaties entered into subsequent to the applicability of the European Convention on Human Rights guarantees.

The European Parliament has the characteristics of a “legislature” in Contracting States for the purpose of Article 3 Protocol 1 ECHR.

*Summary:*

I. The applicant, a British citizen, is a resident of Gibraltar. She was born in 1975. In April 1994 she applied to be registered as a voter in the elections to

the European Parliament. She was told that under the terms of the EC Act on Direct Elections of 1976 Gibraltar was not included in the franchise for those elections.

The applicant claimed that the absence of elections in Gibraltar to the European Parliament was in violation of her right to participate in elections to choose the legislature under Article 3 Protocol 1 ECHR. She also alleged a violation of Article 14 ECHR (freedom from discrimination in the enjoyment of Convention rights) on the ground that she was entitled to vote in European Parliament elections anywhere in the European Union where she lived except in Gibraltar.

II. It was common ground that Article 3 Protocol 1 ECHR applied in Gibraltar. The Court first considered whether the United Kingdom could be held responsible for the lack of elections to the European Parliament in Gibraltar. It noted that acts of the European Community as such could not be challenged before it as the European Community was not a Contracting Party. However, notwithstanding the transfer of competences to the European Community, Contracting States remained responsible for ensuring that Convention rights were guaranteed. Contracting States were responsible under the Convention and its Protocols for the consequences of international treaties entered into subsequent to the applicability of the Convention guarantees. Moreover legislation emanating from the legislative process of the European Community affected the population of Gibraltar in the same way as legislation which entered the domestic legal order exclusively via the Gibraltar House of Assembly. There was accordingly no reason why the United Kingdom should not be required to secure the rights set out in Article 3 Protocol 1 ECHR in respect of European legislation. It followed that the United Kingdom was responsible for securing the rights guaranteed by Article 3 Protocol 1 ECHR regardless of whether the elections were purely domestic or European.

The Court then considered whether Article 3 Protocol 1 ECHR was applicable to an organ such as the European Parliament and whether that body had the characteristics of a “legislature” in Gibraltar. The Court observed that the word “legislature” in Article 3 Protocol 1 ECHR did not necessarily mean the national Parliament and that elections to the European Parliament could not be excluded from the ambit of Article 3 Protocol 1 ECHR merely on the ground that it was a supranational, rather than a purely domestic representative organ. The Court examined the powers of the European Parliament in the context of the European Community and concluded that the Parliament was sufficiently involved both in the specific legislative processes leading to the passage of certain types of legislation and in the general democratic

supervision of the activities of the European Community to constitute part of the legislature of Gibraltar for the purposes of Article 3 Protocol 1 ECHR.

The Court finally addressed the question whether the absence of European Parliamentary elections in Gibraltar was compatible with Article 3 Protocol 1 ECHR. It emphasised that the choice of the electoral system by which the free expression of the opinion of the people in the choice of the legislature was ensured was a matter in which States enjoyed a wide margin of appreciation. However, in the case before it the applicant had been denied any opportunity to express her opinion in the choice of members of the European Parliament, despite the fact that, as the Court had found, legislation that emanated from the European Community formed part of the legislation in Gibraltar and the applicant was directly affected by it. The very essence of the applicant's right to vote to choose the legislature, as guaranteed under Article 3 Protocol 1 ECHR, had been denied. There had accordingly been a violation of that provision. The Court was of the view that it was not necessary to consider the complaints under Article 14 ECHR.

#### *Languages:*

English, French.



#### *Identification:* ECH-2005-2-002

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 30.06.2005 / **e)** 45036/98 / **f)** Bosphorus Hava Yolları Turizm Ve Ticaret Sirketi ("Bosphorus Airways") v. Ireland / **g)** Reports of Judgments and Decisions of the Court / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

#### *Keywords of the alphabetical index:*

Property, enjoyment / Seizure / Embargo / European Communities, institution, act / State, duty to guarantee the protection of fundamental rights and freedoms.

#### *Headnotes:*

The protection of fundamental rights by EC law may have been considered "equivalent" to that of the European Convention on Human Rights. A presumption arises that a State does not depart from the requirements of the Convention when it implements legal obligations flowing from its membership of the European Union but such a presumption may be rebutted if, in a particular case, the protection of Convention rights was manifestly deficient.

#### *Summary:*

In May 1993 an aircraft leased by "Bosphorus Airways", an airline charter company registered in Turkey, from Yugoslav Airlines (hereinafter, "JAT") was seized by the Irish authorities. It had been in Ireland for maintenance by TEAM Aer Lingus, a company owned by the Irish State, and was seized under EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). The applicant's challenge to the retention of the aircraft was initially successful in the High Court, which held in 1994 that Regulation 990/93 was not applicable to the aircraft. However, on appeal, the Supreme Court referred a question under Article 177 of the EC Treaty to the European Court of Justice (ECJ) on whether the aircraft was covered by Regulation 990/93. The ECJ found that it was and, in its Judgment of 1996, the Supreme Court applied the decision of the ECJ and allowed the State's appeal. By that time, the applicant's lease on the aircraft had already expired. Since the sanctions regime against FRY (Serbia and Montenegro) had also been relaxed by that date, the Irish authorities returned the aircraft directly to JAT. The applicant consequently lost approximately three years of its four-year lease of the aircraft, which was the only one ever seized under the relevant EC and UN regulations.

In the application lodged with the Court, the applicant company complained that the manner in which Ireland had implemented the sanctions regime to impound its aircraft had constituted an unjustified interference with its right to peaceful enjoyment of its possessions. It relied on Article 1 Protocol 1 ECHR.

The Court noted that it was not disputed that the impoundment of the aircraft had been implemented by the Irish authorities on its territory following a decision by the Irish Minister for Transport. In such circumstances, the matter fell within the "jurisdiction" of the Irish State within the meaning of Article 1 ECHR. As to the legal basis for the impoundment, the Court observed that EC Regulation 990/93 had been generally applicable and binding in its entirety, thus applying to all Member States, none of which could lawfully depart from any of its

provisions. In addition, its direct applicability was not, and could not be, disputed. The Regulation had become part of Irish domestic law with effect from 28 April 1993, when it had been published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation. The impoundment powers had been entirely foreseeable and the Irish authorities had rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of EC Regulation 990/93 applied. Their decision that it did so apply had later been confirmed by the ECJ. The Court furthermore agreed with the Irish Government and the European Commission (intervening in the case) that the Supreme Court had no real discretion to exercise in the case, either before or after its preliminary reference to the ECJ. In conclusion, the impugned interference had not been the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather had amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93.

As to the justification of the impoundment, the Court found that the protection of fundamental rights by EC law could have been considered to be, and to have been at the relevant time, "equivalent" to that of the Convention system. Consequently, a presumption arose that Ireland had not departed from the requirements of the Convention when it had implemented legal obligations flowing from its membership of the EC. Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order in the field of human rights. The Court took note of the nature of the interference, of the general interest pursued by the impoundment and by the sanctions regime and of the ruling of the ECJ, a ruling with which the Supreme Court had been obliged to comply. It could not be said that the protection of Bosphorus Airways' Convention rights had been manifestly deficient. It followed that the presumption of Convention compliance had not been rebutted and that the impoundment of the aircraft did not give rise to a violation of Article 1 Protocol 1 ECHR.

#### Cross-references:

- *CFDT v. European Communities*, no. 8030/77, Commission decision of 10.07.1978, *Decisions and Reports* 13, p. 231;
- *AGOSI v. the United Kingdom*, 24.10.1986, Series A, no. 108;
- *Dufay v. European Communities*, no. 13539/88, Commission decision of 19.01.1989;
- *M. & Co v. Germany*, no. 13258/87, Commission decision, 09.02.1990, *Decisions and Reports* 64, p. 138;
- *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, 23.02.1995, Series A, no. 306-B;
- *Drozd and Janousek v. France and Spain*, 26.06.1992, Series A, no. 240;
- *Loizidou v. Turkey* (preliminary objections), 23.03.1995, Series A, no. 310;
- *Cantoni v. France*, 15.11.1996, *Reports of Judgments and Decisions* 1996-V;
- *United Communist Party of Turkey and Others v. Turkey*, 30.01.1998, *Reports of Judgments and Decisions* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, 18.02.1999, *Reports of Judgments and Decisions* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-005];
- *Matthews v. the United Kingdom* [GC], no. 24833/94, 18.02.1999, *Reports of Judgments and Decisions* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-004];
- *Moosbrugger v. Austria*, no. 44861/98, 25.01.2000;
- *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, 22.02.2001, *Reports of Judgments and Decisions* 2001-II; *Bulletin* 2001/1 [ECH-2001-1-002];
- *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, 12.07.2001, *Reports of Judgments and Decisions* 2001-VIII; *Bulletin* 2001/2 [ECH-2001-2-006];
- *Pellegrini v. Italy*, no. 30882/96, 20.07.2001, *Reports of Judgments and Decisions* 2001-VIII;
- *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, 21.11.2001, *Reports of Judgments and Decisions* 2001-XI; *Bulletin* 2002/1 [ECH-2002-1-002];
- *Stretch v. the United Kingdom*, no. 44277/98, 24.06.2003;
- *S.A. Dangeville v. France*, no. 36677/97, 16.04.2002, *Reports of Judgments and Decisions* 2002-III; *Bulletin* 2002/1 [ECH-2002-1-005];
- *Gentilhomme, Schaff-Benhadji and Zerouki v. France*, nos. 48205/99, 48207/99 and 48209/99, 14.05.2002;
- *Bankovic and Others v. Belgium and 16 other Contracting States*, no. 52207/99, 12.12.2001, *Reports of Judgments and Decisions* 2001-XII;
- *Assanidze v. Georgia*, no. 71503/01, 22.06.2004, *Reports of Judgments and Decisions* 2004-II; *Bulletin* 2004/1 [ECH-2004-1-002];
- *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, 08.07.2004, *Reports of Judgments and Decisions* 2004-VII.

**Languages:**

English, French.

**Identification:** ECH-2006-C-001

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.04.2006 / **e)** 65731/01 and 65900/01 / **f)** Stec and Others v. The United-Kingdom / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

**Keywords of the alphabetical index:**

Pension, age, gender, discrimination, justification, reasonable / Court of Justice of the European Communities, preliminary question.

**Headnotes:**

In the purposes of determining whether a difference in treatment between men and women as regards reduced earnings and retirement allowances payable to persons who had suffered work-related injuries was discriminatory for the purposes of Article 14 ECHR, it was significant that the European Court of Justice (ECJ) had found that since the reduced earnings allowance was intended to compensate people of working age for loss of earning capacity due to an accident at work or occupational disease, it was necessary for the sake of coherence to link the age-limits (§ 58).

Both the policy decision to stop paying reduced earnings allowances to persons who would otherwise have retired from paid employment and the decision to achieve this aim by linking the cut-off age to the notional “end of working life”, or State pensionable age, therefore pursued a legitimate aim and were reasonably and objectively justified (§ 59).

Further, the underlying difference in treatment between men and women in the State pension scheme, which was adopted in order to mitigate financial inequality and hardship arising out of the woman's traditional unpaid role of caring for the family in the home rather than earning money in the workplace, was objectively justified under Article 14 ECHR until such time that social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life (§§ 58-62).

**Summary:**

I. The pensionable age in the United Kingdom for persons born before 6 April 1950 is 65 for men and 60 for women. The applicants, two men and two women, all suffered work-related injuries and received reduced earnings allowances as a result; all received retirement allowances when they reached their respective pensionable ages. For all the applicants, this resulted in various ways in a drop in income that would have been spared them had they been of the opposite sex and hence subject to the other pensionable age. In the course of the domestic proceedings, the Social Security Commissioner sought a preliminary ruling from the European Court of Justice (ECJ), which on 23 May 2000 ruled that there was no incompatibility with Council Directive 79/7/EEC on equal treatment in social security.

II. The Court had held in its decision on admissibility that the applicants' interests fell within the scope of Article 1 Protocol 1 ECHR. It was reasonable to aim to stop paying reduced earnings benefits after the age when the beneficiaries would in any case have retired. A single cut-off date divorced from the pensionable age, as advocated by the applicants, would, however, not have achieved the same level of consistency with the State pension scheme, which was based on a notional “end of working life” at 60 for women and 65 for men. Nor would such a scheme have been as easy to understand and administer. It was moreover significant that the ECJ had found that since the reduced earnings allowance was intended to compensate people of working age for loss of earning capacity due to an accident at work or occupational disease, it was necessary for the sake of coherence to link the age-limits. Both the policy decision to stop paying reduced earnings allowances to persons who would otherwise have retired from paid employment and the decision to achieve this aim by linking the cut-off age to the notional “end of working life”, or State pensionable age, therefore pursued a legitimate aim and were reasonably and objectively justified. The remaining question was whether the underlying difference in treatment between men and women in the State pension scheme was acceptable under Article 14 ECHR.

The difference in treatment appeared to have been adopted in order to mitigate financial inequality and hardship arising out of women's traditional unpaid role of caring for the family in the home rather than earning money in the workplace. At their origin, therefore, the differential pensionable ages had been intended to correct "factual inequalities" between men and women and hence appeared to have been objectively justified under Article 14 ECHR. It followed that the difference in pensionable ages continued to be justified until such time as social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life. This change must, by its very nature, have been gradual and it would be difficult or impossible to pinpoint any particular moment when the unfairness to men caused by differential pensionable ages began to outweigh the need to correct the disadvantaged position of women. It was significant that many of the other Contracting States still maintained a difference in the ages at which men and women became eligible for the State retirement pension. In the light of the original justification for the measure as correcting financial inequality between the sexes and of the slowly evolving nature of the change in women's working lives, and in the absence of a common standard amongst the Contracting States, the United Kingdom could not be criticised for not having started earlier on the road towards a single pensionable age. Having begun the move towards equality, moreover, the Court did not consider it unreasonable of the government to carry out a thorough process of consultation and review, nor could Parliament be blamed for deciding in 1995 to introduce the reform slowly and in stages. Given the extremely far-reaching and serious implications for women and for the economy in general, these were matters which clearly fell within the States margin of appreciation. There had accordingly been no violation of the Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR.

#### Cross-references:

- Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), 23.07.1968, Series A, no. 6, *Special Bulletin – Leading cases ECHR* [ECH-1968-S-003];
- *James and Others v. the United Kingdom*, 21.02.1986, Series A, no. 98;
- *Schuler-Zgraggen v. Switzerland*, 24.06.1993, Series A, no. 263;
- *Van Raalte v. the Netherlands*, 21.02.1997, *Reports of Judgments and Decisions* 1997-I, *Bulletin* 1997/1 [ECH-1997-1-006];
- *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23.10.1997, *Reports* 1997-VII;

- *Petrovic v. Austria*, 27.03.1998, *Reports* 1998-II, *Bulletin* 1998/1 [ECH-1998-1-006];
- *Thlimmenos v. Greece* [GC], no. 34369/97, 06.04.2000, *Reports of Judgments and Decisions* 2000-IV, *Bulletin* 2000/1 [ECH-2000-1-004];
- *Stec and Others v. the United Kingdom*, nos. 65731/01 and 65900/01, 12.04.2006, *Reports of Judgments and Decisions* 2005-X.

#### Languages:

English, French.



#### Identification: ECH-2011-C-001

- a)** Council of Europe / **b)** European Court of Human Rights / **c)** / **d)** 21.01.2011 / **e)** 30696/09 / **f)** M.S.S. v. Belgium and Greece / **g)** / **h)**.

#### Keywords of the systematic thesaurus:

- 5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
- 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment**.
- 5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum**.

#### Keywords of the alphabetical index:

Asylum, seeker, removal from territory / Expulsion, prior detention / Foreigner, expulsion / Foreigner, expulsion, danger of ill treatment / Foreigner, expulsion, remedy, effective / Treatment, cruel, inhumane, degrading / Dublin Regulation / European Union, regulation, legal basis for expulsion.

#### Headnotes:

Considering the Belgian Government was warned of the practical difficulties involved in the application of the Dublin system in Greece, the Belgian authorities must have been aware of the deficiencies of the asylum procedure in Greece at the time when the expulsion order was issued and the applicant should not have been expected to bear the entire burden of proof of the risks to which the procedure would expose him. To conform to the requirements of Article 3 ECHR, the

Belgian authorities should not have merely assumed that the applicant would be treated in conformity with the Convention standards; on the contrary, they should have first verified how the Greek authorities applied their legislation on asylum in practice, but they did not (§§ 347-352, 358). The Dublin Regulation allowed them to refuse the transfer at this stage.

**Summary:**

I. The applicant, an Afghan national, entered the European Union through Greece. In February 2009 he arrived in Belgium, where he applied for asylum. The Aliens Office submitted a request, under the Dublin Regulation, for the Greek authorities to take charge of the asylum application. At the end of May 2009 the Aliens Office issued an order directing the applicant to leave the country and return to Greece. The applicant applied for a stay of execution under the extremely urgent procedure, but to no avail. On 4 June 2009 the Greek authorities confirmed in a standard letter that that it was their responsibility to examine the applicants asylum request and that the applicant would be able to submit an application for asylum when he arrived in Greece. On 15 June 2009 the applicant was transferred to Greece, where he was immediately placed in detention for four days in a building next to the airport, in allegedly appalling conditions. On 18 June 2009 he was released, given an asylum seekers "pink card" and told to report to police headquarters to register his address in Greece so that he could be informed of progress with his asylum application. The applicant did not report to the police headquarters. Having no means of subsistence, he lived in the street. Sometime later, as he was attempting to leave Greece, the applicant was arrested and placed in detention for a week in the same building next to the airport, where he was allegedly beaten by the police. On his release he went back to living in the street. When his pink card was renewed in December 2009, steps were set in motion to find him accommodation, but nothing came of it.

II. Concerning detention conditions in Greece – The difficulties caused by the increasing influx of migrants and asylum seekers in the States which formed the external borders of the European Union did not absolve a State of its obligations under Article 3 ECHR. Following the agreement on 4 June 2009 to take charge of the applicant, the Greek authorities had been aware of his identity and of the fact that he was a potential asylum seeker. In spite of that, he had immediately been placed in detention, without any explanation – a widespread practice according to various reports by international bodies and non-governmental organisations. He had then been subjected to poor conditions of detention, and brutality and insults by the police in the detention centre, conditions which had already been considered as

degrading treatment where the applicants were asylum seekers. The fact that the periods when the applicant was kept in detention were brief did not make them insignificant. Taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably had on a persons dignity, amounted to degrading treatment. In addition, the applicants distress had been accentuated by the vulnerability inherent in his situation as an asylum seeker. There had accordingly been a violation of the Article 3 ECHR.

Concerning the applicant s living conditions in Greece In spite of the obligations incumbent on the Greek authorities under their own domestic legislation as well as the European Reception Directive, the applicant had spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed, and the total lack of any likelihood of his situation improving. It was to escape from that situation that he had tried several times to leave Greece. His account was corroborated by the reports of various international bodies and organisations. The applicant was not duly informed at any time of the possibilities of accommodation that were available to him. In view of the situation in Greece, the authorities could not have been unaware, or should at least have assumed, that the applicant had nowhere to live, and should not simply have waited for him to take the initiative of turning to the police headquarters to provide for his essential needs. The applicant had been in the same situation since his transfer in June 2009. The authorities could have substantially alleviated his suffering by promptly examining his asylum application. They had therefore not had due regard to the applicants vulnerability as an asylum seeker and must be held responsible, because of their inaction and their failure to examine his application, for the situation in which he had found himself for several months. The applicants living conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving, had attained the level of severity required to fall within the scope of Article 3 ECHR and that provision was consequently breached.

The situation in Afghanistan posed a widespread problem of insecurity and the applicant belonged to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he had done as an interpreter for the international air forces.

The three-day time-limit the applicant had been given to report to police headquarters was a very short one considering how difficult it was to gain access to the building. And like him, many asylum seekers believed that the only reason they were required to report there

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was to give their address, which he could not have done as he had no address. And nowhere was it explained that asylum seekers could inform the police that they had no address in Greece, so that information could be sent to them through another channel. The Government should therefore have proposed a reliable means of communicating with the applicant so that he could follow the procedure effectively.

Next, the applicant's asylum request had not yet been examined by the authorities. To date the Greek authorities had not taken any steps to communicate with the applicant or reached any decision in his case, offering him no real and adequate opportunity to defend his application for asylum. Also of concern were the risks of *refoulement* the applicant faced in practice before any decision was taken on the merits of his case, even if he had twice managed to avoid expulsion thus far.

Furthermore, concerning the possibility of applying to the Supreme Administrative Court for judicial review of a possible rejection of the applicants request for asylum, the authorities had taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of "persons of no known address", made it very uncertain whether the applicant could have learnt the outcome of his asylum application in time to react within the prescribed time-limit. In addition, although the applicant lacked the wherewithal to pay a lawyer, he had received no information concerning access to legal advice through the legal aid system, which itself was rendered ineffective in practice by the shortage of lawyers on the list. Lastly, an appeal to the Supreme Administrative Court did not offset the lack of guarantees surrounding the examination of asylum applications on the merits, because of the length of that procedure.

There had therefore been a violation of Article 13 ECHR taken in conjunction with Article 3 ECHR because of the deficiencies in the Greek authorities examination of the applicants asylum request and the risk he faced of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

Concerning the applicant's transfer from Belgium to Greece Considering the reports of the various international organisations and bodies describing the practical difficulties involved in the application of the Dublin system in Greece, and the letter sent to the Belgian Government by the UNHCR warning them of the situation when the applicants case was still pending, the Belgian authorities must have been aware of the deficiencies of the asylum procedure in Greece at the time when the expulsion order was issued and the

applicant should not have been expected to bear the entire burden of proof of the risks to which the procedure would expose him. Initially Belgium had ordered the applicants expulsion solely on the basis of a tacit agreement of the Greek authorities, and had executed the order without Greece having provided any individual guarantee, although the Dublin Regulation itself allowed it to refuse the transfer at this stage. The Belgian authorities should not have merely assumed that the applicant would be treated in conformity with the Convention standards; on the contrary, they should have first verified how the Greek authorities applied their legislation on asylum in practice, but they did not. There had accordingly been a violation of Article 3 ECHR.

Concerning the Belgian authorities decision to expose the applicant to the conditions of detention and the living conditions that prevailed in Greece The Court had already found the conditions of the applicants detention and life in Greece degrading. These facts had been well known before the applicants transfer and were corroborated by a wide number of sources. So, by transferring the applicant to Greece the Belgian authorities had knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment. There had accordingly been a violation of Article 3 ECHR.

The Court considered that the extremely urgent procedure did not meet the standards established in its case-law, according to which any complaint that expulsion to another country would expose an individual to treatment prohibited by Article 3 ECHR required close and rigorous scrutiny, and the competent body must be able to examine the substance of the complaint and afford proper reparation. As the Aliens Appeals Board limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3 ECHR, the applicants appeal had had no chance of success. There had accordingly been a violation of Article 13 ECHR taken in conjunction with Article 3 ECHR.

Without prejudice to the general measures required to prevent other similar violations in the future, it was incumbent on Greece, without delay, to proceed with an examination of the merits of the applicants asylum request that met the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

#### Cross-references:

- A.A. v. Greece, no. 12186/08, 22.07.2010;
- Amuur v. France, 25.06.1996, *Reports of Judgments and Decisions* 1996-III, *Bulletin* 1996/2 [ECH-1996-2-011];

- Assanidze v. Georgia [GC], no. 71503/01, 08.04.2004, *Reports of Judgments and Decisions* 2004-II, *Bulletin* 2004/1 [ECH-2004-1-002];
- Bati and Others v. Turkey, nos. 33097/96 and 57834/00, 03.06.2004, *Reports of Judgments and Decisions* 2004-IV, extracts;
- Bosphorus Hava Yolları Turizm ve Ticaret Anonim Sirketi v. Ireland [GC], no. 45036/98, 30.06.2005, *Reports of Judgments and Decisions* 2005-VI, *Bulletin* 2005/2 [ECH-2005-2-002];
- Broniowski v. Poland [GC], no. 31443/96, 22.06.2004, *Reports of Judgments and Decisions* 2004-V;
- Bryan v. the United Kingdom, 22.11.1995, Series A, no. 335-A, *Bulletin* 1995/3 [ECH-1995-3-022];
- Budina v. Russia, no. 45603/05, 18.06.2009;
- Çakıcı v. Turkey [GC], no. 23657/94, 08.07.1999, *Reports of Judgments and Decisions* 1999-IV;
- Chamaïev and Others v. Georgia and Russia, no. 36378/02, 12.04.2005, *Reports of Judgments and Decisions* 2005-III;
- Conka v. Belgium, no. 51564/99, 05.05.2002, *Reports of Judgments and Decisions* 2002-I;
- De Wilde, Ooms and Versyp v. Belgium (article 50), 18.06.1971, Series A, no. 12, *Special Bulletin – Leading cases ECHR* [ECH-1971-S-001];
- Doran v. Ireland, no. 50389/99, 31.10.2003, *Reports of Judgments and Decisions* 2003-X;
- Gebremedhin [Gaberamadhien] v. France, no. 25389/05, 26.04.2007, *Reports of Judgments and Decisions* 2007-V;
- H.L.R. c. France, 29.04.1997, *Reports of Judgments and Decisions* 1997-III;
- Jabari v. Turkey, no. 40035/98, 11.07.2000, *Reports of Judgments and Decisions* 2000-VIII;
- K.R.S. v. the United Kingdom, no. 32733/08, 02.12.2008;
- Kudla v. Poland [GC], no. 30210/96, 26.10.2000, *Reports of Judgments and Decisions* 2000-XI;
- Labita c. Italy [GC], no. 26772/95, 06.04.2000, *Reports of Judgments and Decisions* 2000-IV, *Bulletin* 2000/1 [ECH-2000-1-002];
- Musial v. Poland [GC], no. 24557/94, 25.03.1999, *Reports of Judgments and Decisions* 1999-II;
- Muslim v. Turkey, no. 53566/99, 26.04.2005;
- NA. v. the United Kingdom, no. 25904/07, 17.07.2008;
- Öcalan v. Turkey [GC], no. 46221/99, 12.05.2005, *Reports of Judgments and Decisions* 2005-IV;
- Orsus and Others v. Croatia [GC], no. 15766/03, 16.03.2010;
- Paladi v. Moldova [GC], no. 39806/05, 10.03.2009;
- Peers v. Greece, no. 28524/95, 19.04.2001, *Reports of Judgments and Decisions* 2001-III;
- Popov v. Russia, no. 26853/04, 13.07.2006;
- Pretty v. the United Kingdom, no. 2346/02, 29.04.2002, *Reports of Judgments and Decisions* 2002-III, *Bulletin* 2002/1 [ECH-2002-1-006];
- Quraishi v. Belgium, no. 6130/08, 12.05.2009;
- Riad and Idiab v. Belgium, nos. 29787/03 and 29810/03, 24.04.2008 (extracts);
- S.D. v. Greece, no. 53541/07, 11.06.2009;
- Saadi v. Italy [GC], no. 37201/06, 28.02.2008, *Bulletin* 2008/2 [ECH-2008-2-003];
- Salah Sheekh v. the Netherlands, no. 1948/04, 23.05.2007, *Reports of Judgments and Decisions* 2007-I (extracts);
- Sanoma Uitgevers B.V. v. the Netherlands, no. 38224/03, 31.03.2009;
- Soering v. the United Kingdom, 07.07.1989, Series A, no. 161, *Special Bulletin – Leading cases ECHR* [ECH-1989-S-003];
- Stapleton v. Ireland, no. 56588/07, 04.05.2010;
- T.I. v. the United Kingdom, no. 43844/98, 07.03.2000, *Reports of Judgments and Decisions* 2000-III;
- Tabesh v. Greece, no. 8256/07, 26.11.2009;
- Thampibillai v. the Netherlands, no. 61350/00, 17.02.2004;
- Tyrer v. the United Kingdom, 25.04.1978, Series A, no. 26, *Special Bulletin – Leading cases ECHR* [ECH-1978-S-002];
- Venema v. the Netherlands, no. 35731/97, 17.12.2002, *Reports of Judgments and Decisions* 2002-X;
- Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC], no. 32772/02, 30.06.2009, §§ 85 and 88;
- Vilvarajah and Others v. the United Kingdom, 30.10.1991, Series A, no. 125;
- Waite and Kennedy v. Germany [GC], no. 26083/94, 18.02.1999, *Reports of Judgments and Decisions* 1999-I, *Bulletin* 1999/1 [ECH-1999-1-005];
- Y. v. Russia, no. 20113/07, 04.12.2008.

#### Languages:

English, French.



*Identification: ECH-2011-C-002*

- a)** Council of Europe / **b)** European Court of Human Rights / **c)** Second Section / **d)** 01.02.2011 / **e)** 23205/08 / **f)** Karoussiotis v. Portugal / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

1.1.4 Constitutional Justice – Constitutional jurisdiction – **Relations with other institutions.**

4.17.1.3 Institutions – European Union – Institutional structure – **Commission.**

**Keywords of the alphabetical index:**

European Commission, procedure of international investigation or settlement / European Court of Human Rights, complaint, proceedings, parallel / Procedure of international investigation or settlement.

**Headnotes:**

When the European Commission ruled on a complaint lodged by an individual, it did not constitute a “procedure of international investigation or settlement” for the purposes of determining the admissibility of a subsequent application to the European Court of Human Rights under Article 35.2.b ECHR. The sole purpose of a complaint to the Commission alleging a violation of Community law and seeking “infringement proceedings” or “pre-litigation proceedings” was to secure voluntary compliance by the member State concerned with the requirements of European Union law. It had no effect on individual rights (§§ 65-76).

**Summary:**

I. The case concerned proceedings for the return of a child who had been removed wrongfully from Germany to Portugal and the issue of custody. In April 2008 the applicant filed a complaint with the European Commission alleging an infringement by Portugal of an EU Regulation on account of the excessive length of the domestic proceedings. The Government argued that the application before the Court was inadmissible, on the ground that the application had already been “submitted to another procedure of international investigation or settlement”.

II. The similarity of the facts and complaints referred by the applicant both to the Court and to the European Commission was unquestionable. It thus had to be examined whether the Commission procedure was similar, in its procedural aspects and potential effects, to the individual applications provided for in Article 34 ECHR. Individuals were entitled to lodge a complaint with the European Commission against a member State about any measure or practice which they considered incompatible with a provision or a principle of European Union law. To be admissible, a complaint had to relate to an infringement of EU law by a member State. According to the settled case-law of the European Court of Justice, the European Commission

had the discretion to decide whether or not infringement proceedings should be opened and then whether or not to refer the case to the European Court of Justice. The sole purpose of the “infringement proceedings” or “pre-litigation phase” was to enable the member State to conform voluntarily with the requirements of EU law. Where a case was referred to the Court of Justice and if an infringement was then found, the court could impose a lump sum or penalty payment on the member State concerned, not exceeding the amount specified by the Commission, in order to compel the State to comply with EU law. Such a finding would have no impact on the rights of the complainant, since it did not serve to resolve individual cases. Any individual actions for damages had to be brought before national courts. For that reason, complainants did not have to demonstrate a formal interest in bringing proceedings before the Commission, nor did they have to prove that they were principally and directly concerned by the infringement complained of. Having regard to the foregoing, the procedure in question was not similar, in its procedural aspects or its potential effects, to the individual application provided for in Article 34 ECHR. Accordingly, where the European Commission decided, as in the present case, on a complaint by a private individual, this did not constitute a “procedure of international investigation or settlement”, within the meaning of Article 35.2.b ECHR. The objection raised by the Government must therefore be dismissed.

**Cross-references:**

- *Calcerrada Fornieles and Cabeza Mato v. Spain*, no. 17512/90, Commission decision of 06.07.1992, *Decisions and Rapports* 73;
- *Celniku v. Greece*, no. 21449/04, 05.07.2007;
- *De Pace v. Italy*, no. 22728/03, 17.07.2008;
- *Folgerø and Others v. Norway*, no. 15472/02, 14.02.2006;
- *Lukanov v. Bulgaria*, no. 21915/93, 12.01.1995, *Decisions and Rapports* 80-A;
- *Malsagova and Others v. Russia*, no. 27244/03, 06.03.2008;
- *Mikolenko v. Estonia*, no. 16944/03, 05.01.2006;
- *Pauger v. Austria*, no. 24872/94, Commission decision of 09.01.1995, *Decisions and Rapports* 80-A;
- *Smirnova and Smirnova v. Russia*, nos. 46133/99 and 48183/99, 03.10.2002;
- *Zagaria v. Italy*, no. 24408/03, 03.06.2008.

**Languages:**

English, French.



### *Identification: ECH-2011-C-003*

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Section II / **d)** 20.09.2011 / **e)** 3989/07 / **f)** Ullens de Schooten and Rezabek v. Belgium / **g)** Information note no. 144 / **h)**.

### *Keywords of the systematic thesaurus:*

1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law**.

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities**.

2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Community law and domestic law**.

4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

### *Keywords of the alphabetical index:*

European Union, Court of Justice, preliminary ruling, request, obligation.

### *Headnotes:*

For the purpose of Article 6.1 ECHR (right to a fair trial) courts and tribunals against whose decisions there was no judicial remedy are not required to refer a question to the Court of Justice where one of the conditions established by the Court of Justice is met (the question raised is not relevant or the Community provision in question has already been interpreted by the Court of Justice, or the correct application of Community law is so obvious as to leave no scope for any reasonable doubt) and the requirement to give reasons have been complied with.

### *Summary:*

I. Refusal by the Court of Cassation and the *Conseil d'Etat* to refer questions relating to the interpretation of European Community law, raised in proceedings before those courts, to the Court of Justice of the European Communities (now the Court of Justice of the European Union) for a preliminary ruling.

II. The European Court of Human Rights noted that in its *CILFIT* judgment, the Court of Justice of the European Communities (hereinafter, the "Court of Justice") had ruled that courts and tribunals against whose decisions there was no judicial remedy were not required to refer a question where they had established that it was not relevant or that the Community provision in question had already been interpreted by the Court of Justice, or where the correct application of Community law was so obvious as to leave no scope for any reasonable doubt. The Court further reiterated that the Convention did not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. Where, in a given legal system, other sources of law stipulated that a particular field of law was to be interpreted by a specific court and required other courts and tribunals to refer to it all questions relating to that field, it was in accordance with the functioning of such a mechanism for the court or tribunal concerned, before granting a request to refer a preliminary question, to first satisfy itself that the question had to be answered before it could determine the case before it.

Nonetheless, Article 6.1 ECHR imposed an obligation on the national courts against whose decisions there was no judicial remedy under national law to give reasons, based on the exceptions provided for by the case-law of the Court of Justice, for any decision refusing to refer to the latter a preliminary question concerning the interpretation of European Union law, particularly where the applicable law permitted such a refusal only in exceptional circumstances. According to the *CILFIT* judgment, therefore, they had to state the reasons why they considered that the question was not relevant, that the provision of European Union law in question had already been interpreted by the Court of Justice or that the correct application of European Union law was so obvious as to leave no scope for any reasonable doubt. The Court observed that this requirement to give reasons had been complied with in the present case. The Court of Cassation had refused the request to refer the question to the Court of Justice for a preliminary ruling on the grounds that the question whether the principle of the primacy of Community law should take precedence over the *res judicata* principle had already been the subject of a ruling by the Court of Justice, and had constructed a lengthy rationale based on the latter's case-law. The *Conseil d'Etat*, for its part, had refused the request on the grounds that no reasonable doubt existed as to the inapplicability of the relevant provisions and that a ruling from the Court of Justice on the interpretation of other provisions of European Union law could not in any way affect the case before it. There had therefore been no violation of Article 6.1 ECHR.

**Cross-references:**

Court of Justice of the European Communities:

- C-283/81, 06.10.1982, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, European Court Reports 1982, page 3415; Special Bulletin – Inter-Court Relations [ECJ-1982-C-001]*.

**Languages:**

English, French.



**Identification:** ECH-2012-3-001

- a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.09.2012 / **e)** 10593/08 / **f)** Nada v. Switzerland / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

- 3.16 General Principles – **Proportionality**.  
 3.17 General Principles – **Weighing of interests**.  
 3.19 General Principles – **Margin of appreciation**.  
 4.16 Institutions – **International relations**.  
 4.16.1 Institutions – International relations – **Transfer of powers to international institutions**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

**Keywords of the alphabetical index:**

Foreigner, freedom of movement / UNO, Security Council, Resolution, implementation, proportionality.

**Headnotes:**

Where a State enjoys a degree of latitude in the implementation of UN Security Council resolutions, the measures it takes must comply with the States Convention obligations, including the requirement of proportionality.

In particular, a prohibition on an individual entering or transiting through a States national territory owing to the inclusion of his or her name on the UN Security Councils Sanctions Committees list of persons

suspected of being associated with the Taliban and al-Qaeda may be imposed only to the extent that it strikes a fair balance between the individuals right to the protection of his private and family life and the legitimate aims pursued.

**Summary:**

I. The Swiss Federal Taliban Ordinance was enacted pursuant to several UN Security Council Resolutions. It had the effect of preventing the applicant, an Egyptian national, from entering or transiting through Switzerland due to the fact that his name had been added to the list annexed to the UN Security Council's Sanctions Committee of persons suspected of being associated with the Taliban and al-Qaeda ("the list"). The applicant had been living in *Campione d'Italia*, an Italian enclave of about 1.6 square kilometres surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by a lake. The applicant claimed that the restriction made it difficult for him to leave the enclave and therefore to see his friends and family, and that it caused him suffering due to his inability to receive appropriate medical treatment for his health problems. The **applicant further found it difficult to remove his name** from the Ordinance, even after the Swiss investigators had found the accusations against him to be unsubstantiated.

The Swiss Government argued that the application was inadmissible on several counts, namely that it was incompatible *ratione personae* and *ratione materiae* with the Convention.

II. The Court joined consideration of the issue of compatibility *ratione materiae* to the merits.

As regards the question of compatibility *ratione personae*, the Court could not endorse the argument that the measures taken by the Member States of the United Nations to implement the relevant Security Council resolutions were attributable to that organisation, rather than to the respondent State. Unlike the position in *Behrami and Behrami v. France*, in which the impugned acts and omissions were attributable to UN bodies, the relevant resolutions in the instant case required States to act in their own names and to implement them at national level. The measures imposed by the Security Council resolutions had been implemented at national level by an Ordinance of the Federal Council and the applicants requests for exemption from the ban on entry into Swiss territory were rejected by the Swiss authorities. The acts and omissions in question were thus attributable to Switzerland and capable of engaging its responsibility. The Governments preliminary objection was therefore dismissed.

As regards Article 8 ECHR, the impugned measures had left the applicant in a confined area for at least six years and had prevented him, or at least made it more difficult for him, to consult his doctors in Italy or Switzerland or to visit his friends and family. There had thus been interference with the applicants rights to private life and family life. The measures had a sufficient legal basis and pursued the legitimate aims of preventing crime and contributing to national security and public safety.

The Court then considered whether the interference was justified. It reiterated that a Contracting Party is responsible under Article 1 ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. When considering the relationship between the Convention and Security Council resolutions, the Court had found in *Al-Jedda v. the United Kingdom* that there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights and that it was to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human-rights law. In the present case, however, that presumption had been rebutted as Resolution 1390 (2002) expressly required the States to prevent individuals on the list from entering or transiting through their territory.

Nevertheless, the UN Charter did not impose on States a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, but instead left them a free choice among the various possible models for transposition of those resolutions into their domestic legal order. Accordingly, Switzerland had enjoyed a limited but real latitude in implementing the relevant binding resolutions. The Court went on to consider whether the measures taken by the Swiss authorities were proportionate in light of this latitude. It found it surprising that the Swiss authorities had apparently not informed the Sanctions Committee until September 2009 of the Federal Prosecutors findings in May 2005 that the accusations against the applicant were clearly unfounded: a more prompt communication of the investigative authorities conclusions might have led to the applicant s name being deleted from the UN list considerably earlier. As regards the scope of the prohibition, it had prevented the applicant not only from entering Switzerland but also from leaving *Campione d'Italia* at all, in view of its situation as an enclave, even to travel to any other part of Italy, the country of which he was a national. There was also a medical aspect to the case that was not to be underestimated: the applicant, who was born in

1931 and had health problems, was denied a number of requests he had submitted for exemption from the entry and transit ban for medical reasons or in connection with judicial proceedings. Nor had the Swiss authorities offered him any assistance in seeking a broad exemption from the ban in view of his particular situation. While it was true that Switzerland was not responsible for the applicant s name being on the list and, not being his State of citizenship or residence, was not competent to approach the Sanctions Committee for delisting purposes, the Swiss authorities appeared never to have sought to encourage Italy to undertake such action or offer it assistance for that purpose. The Court considered in this connection that they had not sufficiently taken into account the realities of the case, especially the unique situation of the applicant geographically, and the considerable duration of the measures. The respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken or attempted to take all possible measures to adapt the sanctions regime to the applicant s individual situation. That finding dispensed the Court from determining the question of the hierarchy between the obligations arising under the Convention on the one hand and under the UN Charter on the other. The respondent Government had failed to show that they had attempted, as far as possible, to harmonise the obligations that they regarded as divergent. Their preliminary objection that the application was incompatible *ratione materiae* with the Convention was therefore dismissed. Having regard to all the circumstances, the restrictions imposed on the applicants freedom of movement for a considerable period of time had not struck a fair balance between his right to the protection of his private and family life and the legitimate aims pursued. There had thus been a violation of Article 8 ECHR.

#### *Cross-references:*

- *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], nos. 71412/01 and 78166/01, 02.05.2007;
- *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 18.12.1996;
- *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 11.07.2011.

#### *Languages:*

English, French.



***Identification: ECH-2012-C-001***

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Former Fifth Section / **d)** 06.12.2012 / **e)** 12323/11 / **f)** Michaud v. France / **g)** Reports of Judgments and Decisions / **h)** CODICES (English, French).

***Keywords of the systematic thesaurus:***

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications.**

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence.**

***Keywords of the alphabetical index:***

Lawyer, professional privilege.

***Headnotes:***

Lawyers have a fundamental right of professional privilege protected by Article 8 ECHR. The right is not, however, inviolable and may be subject to interference provided (a) the interference is not excessive having regard to the importance of the legitimate aim pursued in the public interest, (b) any information received or obtained as part of the lawyers defence role remains privileged and (c) a filter protecting professional privilege exists whereby the information concerned is shared with a legal professional subject to the same rules of conduct and elected by his or her peers and is only transmitted to the relevant administrative authority if the relevant statutory conditions are met (§§ 121, 123, 127 to 129 of the judgment).

***Summary:***

I. In July 2007 the National Bar Council decided to adopt a professional regulation intended, *inter alia*, to secure the implementation of obligations imposed on the legal profession in the context of the fight against money laundering, pursuant to European Directive 2005/60/EC. In consequence, lawyers were obliged in certain circumstances to report to the national financial intelligence unit (Tracfin) sums of money belonging to their clients where they suspected that these had been obtained through a criminal activity such as money laundering. In October 2007 the applicant, a lawyer, applied to the *Conseil d'État* to have the Bar Councils decision set aside. On 23 July 2010 his application was dismissed.

II. The obligation placed on lawyers to report suspicions constituted an interference with their right to respect for their correspondence, in that they were required to transmit to an administrative authority information concerning another person obtained through exchanges with him or her. It also amounted to an interference with their right to respect for their private life, which covered activities of a professional or business nature. Admittedly, the applicant had not had reason to report such suspicions, nor had he been sanctioned pursuant to the impugned regulations for having omitted to do so. However, either he complied with the regulations if the circumstances in question arose, or, should he fail to do so, he would be exposed to disciplinary sanctions, including disbarment. Thus, the obligation to report suspicions represented a “continuing interference” with the applicants exercise, in his capacity as a lawyer, of the rights safeguarded by Article 8 ECHR in respect of professional exchanges with his clients.

The obligation placed on lawyers to report suspicions was in accordance with the law as set out in the Monetary and Financial Code. The law was accessible and clear in its description of the activities to which it was applicable. The impugned interference was intended to combat money laundering and related criminal offences, thus pursuing the legitimate aim of the prevention of disorder and the prevention of crime.

The obligations of vigilance and reporting of suspicions resulted from the transposition of European directives into the Monetary and Financial Code that France had been required to carry out on account of the legal obligations arising from its membership of the European Union. Referring to the judgment in *Bosphorus Airways* [ECH-2005-2-002], the Government considered that France should be presumed to have complied with the requirements of the Convention, given that it had merely discharged those obligations and that it had been established that the European Union afforded fundamental rights equivalent protection to that guaranteed by the Convention. However, the present case differed from the *Bosphorus Airways* case in two main ways. It concerned France's implementation of directives which bound the member States with regard to the result to be attained, but left them free to choose the method and form. The issue of whether, in complying with the obligations resulting from its membership of the European Union, France had in consequence sufficient discretion to thwart application of the presumption of equivalent protection was not therefore irrelevant. Further and most importantly, the *Conseil d'État*, in deciding not to request a preliminary ruling from the European Court of Justice although that court had not yet examined the question concerning Convention rights that was before it, had ruled before the relevant international machinery for supervision of

fundamental rights, in principle equivalent to that of the Convention, had been able to demonstrate its full potential. Having regard to that decision and the importance of what was at stake, the presumption of equivalent protection was not applicable. The European Court of Human Rights was therefore required to determine whether the interference had been necessary within the meaning of Article 8 ECHR.

The Court concurred with the *Conseil d'Etats* analysis in its judgment of 23 July 2010, which, after noting that Article 8 ECHR protected the fundamental right of professional privilege, held that subjecting lawyers to an obligation to report suspicions did not constitute an excessive interference in view of the public interest attached to the fight against money laundering and the guarantee represented by the exclusion from its scope of information received or obtained by lawyers when acting for clients in court proceedings, and information received or obtained in the context of providing legal advice (except where the legal adviser played, through his or her acts, an active role in the money laundering). Legal professional privilege was not inviolable. It had to be weighed against steps to combat the laundering of proceeds of unlawful activities, themselves likely to be used in financing criminal activities. The European directives followed that logic. Even if any lawyer implicated in a money-laundering operation were to be liable to criminal proceedings, this could not invalidate the decision to provide for punitive sanctions in a measure that had a specifically preventive aim. Finally, two elements were decisive in assessing the proportionality of the impugned interference. The first was related to the fact that lawyers were subject to the obligation to report suspicions only in two cases: firstly, where, in the context of their professional duties, they took part for and on behalf of their clients in financial or property transactions or acted as trustees; and, secondly, where, still in the context of their professional duties, they assisted their clients in preparing or carrying out transactions concerning certain defined operations. Thus, the obligation to report suspicions concerned only activities which were remote from the role of defence entrusted to lawyers and which resembled those carried out by the other professionals who were also subject to the above obligation. The second element was the fact that the legislation had introduced a filter which protected professional privilege: lawyers did not transmit reports directly to Tracfin but, as appropriate, to the president of the Bar of the *Conseil d'Etat* and the Court of Cassation or to the president of the Bar of which they were members. Thus, the information was shared with a professional who was not only subject to the same rules of conduct but was also elected by his or her peers to ensure compliance with them, thus ensuring that professional privilege was not breached. The president of the relevant Bar transmitted the disclosure of suspicions to

Tracfin only after ascertaining that the conditions laid down by the Monetary and Financial Code had been met.

Thus, as implemented and having regard to the legitimate aim pursued and the latter's particular importance in a democratic society, the obligation to report suspicions did not constitute a disproportionate interference with legal professional privilege. The European Court of Human Rights therefore held that there had been no violation of Article 8 ECHR.

#### *Cross-references:*

- *André and Other v. France*, no. 18603/03, 24.07.2008;
- *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30.06.2005, *Reports of Judgments and Decisions* 2005-VI, *Bulletin* 2005/2 [ECH-2005-2-002];
- *Campbell v. the United Kingdom*, 25.03.1992, Series A, no. 233;
- *Ekinci and Akalın v. Turkey*, no. 77097/01, 30.01.2007;
- *Grifhorst v. France*, no. 28336/02, 26.02.2009;
- *Kopp v. Switzerland*, no. 51772/99, 25.03.1998, *Reports of Judgments and Decisions* 1998-II, *Bulletin* 1998/1 [ECH-1998-1-005];
- *Mor v. France*, no. 28198/09, 15.12.2011;
- *Niemietz v. Germany*, 16.12.1992, Series A, no. 251-B, *Special Bulletin – Leading cases ECHR* [ECH-1992-S-007];
- *Roemen and Schmit v. Luxembourg*, no. 51772/99, 25.02.2003, *Reports of Judgments and Decisions* 2003-IV, *Bulletin* 2003/1 [ECH-2003-1-004];
- *Sallinen and Others v. Finland*, no. 50882/99, 27.09.2005;
- *Schönenberger and Durmaz v. Switzerland*, 20.06.1988, Series A, no. 137, *Special Bulletin – Leading cases ECHR* [ECH-1998-S-004];
- *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, 16.01.2008, *Reports of Judgments and Decisions* 2007-IV;
- *Xavier Da Silveira v. France*, no. 43757/05, 21.01.2010.

#### *Languages:*

English, French.



***Identification: ECH-2013-C-001***

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Section I / **d)** 18.06.2013 / **e)** 3890/11 / **f)** Povse v. Austria / **g)** Information note no. 164 / **h)** CODICES (English).

***Keywords of the systematic thesaurus:***

1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law.**

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the EU.**

2.1.3.2.2 Sources – Categories – Case-law – International case-law – **Court of Justice of the European Communities.**

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

***Keywords of the alphabetical index:***

European Union, law, fundamental rights / Fundamental rights, equivalent protection / International agreement, direct applicability / Judgment, foreign, execution / Child, custody, court order for the return / Child, custody, removal from jurisdiction, wrongful.

***Headnotes:***

There is a presumption that a State does not depart from the requirements of the Convention when implementing legal obligations flowing from its membership in the European Union. This presumption is not rebutted when, in applying Council Regulation (EC) no. 2201/2003 and without examining the merits, authorities of one EU Member State allow enforcement of an order for the return of a child issued by another EU Member State (that of the child's origin), in a case where they have not exercised any discretion and have duly made use of the control mechanism provided for in European Union law by asking the CJEU for a preliminary ruling.

***Summary:***

I. The case concerned the enforcement under the Brussels IIa Regulation of an Italian court order for the return of a child who had been taken to Austria by its mother. Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa Regulation") simplifies the procedure for the return of children who have been victims of wrongful removal or retention. It provides for judgments on return that have been certified in the State of origin to be recognised and enforceable in all

other European Union Member States without any further procedure being required.

In the instant case, the second applicant returned to her native Austria with her daughter (the first applicant) after leaving the child's father with whom she had been living in Italy on account of his allegedly violent behaviour. Following a lengthy court battle in Austria and Italy, the father was awarded sole custody by an Italian court, which also ordered the child's return to Italy. In the enforcement proceedings in Austria, the Austrian Supreme Court upheld an order for the child's return after noting that at an earlier stage of the proceedings the Court of Justice of the European Union (CJEU) had clarified in a preliminary ruling that where a certificate of enforceability had been issued under Article 42.1 of the Brussels IIa Regulation, the requested court was required to proceed to enforcement and that any questions relating to the merits of the return decision, in particular the question whether the requirements for ordering a return were met, had to be raised before the courts of the requesting State. According to the Supreme Court, the second applicant's argument that the first applicant's return would lead to serious harm for the child and entail a violation of Article 8 ECHR was therefore not relevant in the proceedings before the Austrian courts but had to be raised before the competent Italian courts.

II. It was undisputed that the Austrian courts' decisions ordering the enforcement of the Italian court's return orders had interfered with the applicants' right to respect for their family life within the meaning of Article 8 ECHR. The interference was "in accordance with the law" as the Austrian courts' decisions were based on Article 42 of the Brussels IIa Regulation, which was directly applicable in Austrian law, and it pursued the legitimate aim of protecting the rights of others and the general-interest objective of securing European Union law compliance by a Contracting Party.

As to the necessity for the interference, the Court reiterated that a State will be presumed not to have departed from the requirements of the ECHR when it does no more than implement legal obligations flowing from its membership of an international organisation which provides equivalent protection to that afforded by the ECHR. The Court had already found in previous cases that the protection of fundamental rights afforded by the European Union is in principle equivalent to that of the ECHR system as regards both the substantive guarantees offered and the mechanisms controlling their observance. Nevertheless, a State will be fully responsible under the ECHR for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion, and the presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of ECHR rights was manifestly deficient.

In the instant case, the Austrian courts had not been exercising any discretion when they ordered the enforcement of the return orders (contrast the position in *M.S.S. v. Belgium and Greece*). Furthermore, the Austrian Supreme Court had duly made use of the control mechanism provided for in European Union law by asking the CJEU for a preliminary ruling (contrast the position in *Michaud v. France*). That ruling had made it clear that where the courts of the State of origin of a wrongfully removed child had ordered the child's return and had issued a certificate of enforceability, the courts of the requested State could not review the merits of the return order, or refuse enforcement on the ground that the return would entail a grave risk for the child owing to a change in circumstances since the delivery of the certified judgment. Any such change had to be brought before the courts of the State of origin, which were also competent to decide on a possible request for a stay of enforcement. It was thus clear from the CJEU's ruling that within the framework of the Brussels IIA Regulation it was for the Italian courts to protect the fundamental rights of the parties. The Italian Government had indicated that it was still open to the applicants to request a review of the return order before the Italian courts and that legal aid was in principle available. Further, should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the Court against Italy. In sum, the Court could not find any dysfunction in the control mechanisms for the observance of the applicants' ECHR rights. Consequently, the presumption that simply by fulfilling its obligations as an EU member State under the Brussels IIA Regulation Austria had complied with the ECHR had not been rebutted. The application was therefore declared inadmissible as being manifestly ill-founded.

#### Cross-references:

- *Bosphorus Hava Yollar1 Turizm ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, 30.06.2005, *Bulletin* 2005/2 [ECH-2005-2-002];
- *M.S.S. v. Belgium and Greece* [GC], 30696/09, 21.01.2011;
- *Michaud v. France*, no. 12323/11, 06.12.2012;
- *Sneersone and Kampanella v. Italy*, no. 14737/09, 12.07.2011;

#### Court of Justice of the European Union:

- C-211/10 PPU, 01.07.2010, *Doris Povse v Mauro Alpago*, *European Court Reports* I-06673.

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#### Languages:

English, French.



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<sup>1</sup> This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

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<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.

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<sup>21</sup> Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

<sup>29</sup> Including language issues relating to procedure, deliberations, decisions, etc.

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<sup>32</sup> May be used in combination with Chapter 1.2. Types of claim.

<sup>33</sup> For the withdrawal of the originating document, see also 1.4.5.

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<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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<sup>45</sup> Principle according to which general sub-statutory acts must be based on and in conformity with the law.

<sup>46</sup> Prohibition of punishment without proper legal base.

<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.

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<sup>53</sup> For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

<sup>56</sup> For regional and local authorities, see Chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>59</sup> In particular, commissions of enquiry.

<sup>60</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

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<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>64</sup> Including their creation, composition and terms of reference.

<sup>65</sup> State budgetary contribution, other sources, etc.

<sup>66</sup> For the publication of laws, see 3.15.

<sup>67</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>68</sup> For local authorities, see 4.8.

<sup>69</sup> Derived directly from the Constitution.

<sup>70</sup> See also 4.8.

<sup>71</sup> The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

<sup>72</sup> Civil servants, administrators, etc.

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<sup>74</sup> Other than the body delivering the decision summarised here.

<sup>75</sup> Positive and negative conflicts.

<sup>76</sup> Notwithstanding the question to which branch of state power the prosecutor belongs.

<sup>77</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

<sup>78</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

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<sup>80</sup> And other units of local self-government.

<sup>81</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>82</sup> Organs of control and supervision.

<sup>83</sup> Including other consultations.

<sup>84</sup> For questions of jurisdiction, see keyword 1.3.4.6.

<sup>85</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>86</sup> For example, Panachage, voting for whole list or part of list, blank votes.

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<sup>88</sup> For the creation of political parties, see 4.5.10.1.

<sup>89</sup> For example, names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>90</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

<sup>91</sup> For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

<sup>92</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>93</sup> For example, signatures on electoral rolls, stamps, crossing out of names on list.

<sup>94</sup> For example, in person, proxy vote, postal vote, electronic vote.

<sup>95</sup> This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

<sup>96</sup> For example, Auditor-General.

<sup>97</sup> Includes ownership in undertakings by the state, regions or municipalities.

<sup>98</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

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<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

<sup>104</sup> Positive and negative aspects.

<sup>105</sup> For rights of the child, see 5.3.44.

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

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<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>108</sup> Taxes and other duties towards the state.

<sup>109</sup> Universal and equal suffrage.

<sup>110</sup> According to the European Convention on Nationality of 1997, ETS no. 166, “nationality” means the legal bond between a person and a state and does not indicate the person’s ethnic origin” (Article 2) and “... with regard to the effects of the Convention, the terms ‘nationality’ and ‘citizenship’ are synonymous” (paragraph 23, Explanatory Memorandum).

<sup>111</sup> For example, discrimination between married and single persons.

<sup>112</sup> This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

<sup>113</sup> Detention by police.

<sup>114</sup> Including questions related to the granting of passports or other travel documents.

<sup>115</sup> May include questions of expulsion and extradition.

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<sup>116</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>117</sup> In the meaning of Article 6.1 of the European Convention on Human Rights.

<sup>118</sup> This keyword covers the right of appeal to a court.

<sup>119</sup> Including the right to be present at hearing.

<sup>120</sup> Including challenging of a judge.

<sup>121</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>122</sup> This keyword also includes the right to freely communicate information.

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<sup>123</sup> Militia, conscientious objection, etc.

<sup>124</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>125</sup> Including compensation issues.

<sup>126</sup> This keyword also covers "Freedom of work".

<sup>127</sup> This should also cover the term freedom of enterprise.

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<sup>128</sup> Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

## **Keywords of the alphabetical index \***

\* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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