

THE BULLETIN

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four months period (volumes numbered 1 to 3). The last two volumes of the series concerning the same year are actually published and delivered in the following year, i.e. volume 1 of the 2001 Edition in 2001, volumes 2 and 3 in 2002.

Its aim is to allow judges and constitutional law specialists to be informed quickly about the most important judgments in this field. The exchange of information and ideas among old and new democracies in the field of judge-made law is of vital importance. Such an exchange and such cooperation, it is hoped, will not only be of benefit to the newly established constitutional courts, but will also enrich the case-law of the existing courts. The main purpose of the Bulletin on Constitutional Case-law is to foster such an exchange and to assist national judges in solving critical questions of law which often arise simultaneously in different countries.

*The Commission is grateful to liaison officers of constitutional and other equivalent courts, who regularly prepare the contributions reproduced in this publication. **As such, the summaries of decisions and opinions published in the Bulletin do not constitute an official record of court decisions and should not be considered as offering or purporting to offer an authoritative interpretation of the law.***

The decisions are presented in the following way:

1. Identification
 - a) country or organisation
 - b) name of the court
 - c) chamber (if appropriate)
 - d) date of the decision
 - e) number of decision or case
 - f) title (if appropriate)
 - g) official publication
 - h) non-official publications
2. Keywords of the Systematic Thesaurus
3. Keywords of the alphabetical index
4. Headnotes
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8. Languages

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

The European Commission for Democracy through Law, also known as the Venice Commission, was established in 1990 pursuant to a Partial Agreement of the Council of Europe. It is a consultative body which co-operates with member States of the Council of Europe and with non-member States. It is composed of independent experts in the fields of law and political science whose main tasks are the following:

- to help new Central and Eastern Europe democracies to set up new political and legal infrastructures;
- to reinforce existing democratic structures;
- to promote and strengthen principles and institutions which represent the bases of true democracy.

The activities of the Venice Commission comprise, *inter alia*, research, seminars and legal opinions on issues of constitutional reform, electoral laws and the protection of minorities, as well as the collection and dissemination of case-law in matters of constitutional law from Constitutional Courts and other courts.

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Albania

Constitutional Court

Summaries of important decisions of the reference period 1 September 2001 – 31 December 2001 will be published in the next edition, *Bulletin* 2002/1.



Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2001-3-009

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 23.08.2001 / **e)** B.439.XXXIV / **f)** Bruno, Arnaldo Luis v. Sociedad Anónima La Nación / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Media, information, source, disclosure, publication / Newspaper, exemption from liability.

Headnotes:

A newspaper is exempted from liability for possible libel or infringements of privacy where it has “honestly” attributed the information to an identifiable source, used qualified statements in its report or refrained from disclosing the identity of the person(s) concerned.

Summary:

The plaintiff brought an action for damages against a daily newspaper for publishing news which was libellous and infringed his right to protection of privacy.

The action was rejected by the Court of Appeal, which amended the decision given at first instance.

The plaintiff therefore submitted an extraordinary appeal to the Supreme Court.

The Court held that in order to ensure proper handling of information liable to damage an individual's reputation it is necessary to attribute its content directly to the relevant source, or to use qualified statements in the report, or to refrain from disclosing the names of the individuals concerned.

Where the first of these three conditions is concerned, the Court specified that the daily newspaper is exempt from liability where it "honestly" attributes the information to a given source, on the grounds that this approach takes the information out of the newspaper's specific domain. It clarifies the origin of the information, so that readers can link it to the specific source of the news report rather than to the channel through which it has passed. Persons whose rights have been infringed by the information therefore benefit to the extent that their complaints can be addressed to those persons who actually originated the information rather than to those who have simply channelled it.

If this condition is to be valid the aforementioned source must be "identifiable", i.e. accurately designated, so that the origin of the information can be pinpointed in a manner precluding any doubt. The fact that the Court has allowed the use of anonymous statements is not an exception to this rule provided that, as has been pointed out in other judgments, the purposes of the requirement in question are essentially met, with the indication of the anonymity of the source providing readers with a clear idea of the degree of credibility of the allegations published by the newspaper.

Identification of the source, which is a prerequisite for exempting the newspaper from liability, cannot be waived for reasons of protecting the secrecy of the source. If such identification could be waived it would be sufficient for a journalist to cite protection of sources for a kind of "safeguarding law" to be applied to the organs of the press, allowing them to disseminate all kinds of information, whether it was true or false and even if it constituted libel against or infringed the privacy of the persons whom it mentioned. Furthermore, this does not undermine confidentiality of journalistic sources, because if the newspaper wishes to preserve confidentiality in publishing the information, it can use one of the aforementioned approaches, namely either refraining from disclosing the identity of the persons concerned or using qualified statements and avoiding any direct assertions.

Four judges signed a concurring opinion.

Supplementary information:

Article 43 of the Argentinian Constitution states that "the secret nature of the sources of journalistic information shall not be impaired".

Languages:

Spanish.



Armenia

Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

- 29 referrals made, 28 cases heard and 28 decisions delivered, including:
 - 28 decisions concerning the conformity of international treaties with the Constitution. All the treaties examined were declared compatible with the Constitution;
 - a referral by 1/3 of the parliament on the conformity with the Constitution of the Law on Privatisation of “Yerevan electric station”, “South electric station”, “North electric station” and “Central electric station” closed stock companies.

The Constitutional Court did not examine the substance of this referral, on the ground that the referral did not satisfy the requirements of admissibility.

There was no relevant constitutional case-law during the reference period 1 September 2001 – 31 December 2001.



Austria

Constitutional Court

Statistical data

Sessions of the Constitutional Court during September – October 2001

- Financial claims (Article 137 B-VG): 3
- Conflicts of jurisdiction (Article 138.1 B-VG): 2
- Review of regulations (Article 139 B-VG): 18
- Review of laws (Article 140 B-VG): 93
- Challenge of elections (Article 141 B-VG): 5
- Complaints against administrative decrees (Article 144 B-VG): 486 (312 refused examination)

and during November – December 2001

- Financial claims (Article 137 B-VG): 2
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Review of regulations (Article 139 B-VG): 32
- Review of laws (Article 140 B-VG): 31
- Challenge of elections (Article 141 B-VG): 0
- Complaints against administrative decrees (Article 144 B-VG): 507 (175 refused examination)

Important decisions

Identification: AUT-2001-3-005

a) Austria / **b)** Constitutional Court / **c)** / **d)** 11.10.2001 / **e)** G 12/00 *et al* / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.
- 3.3 **General Principles** – Democracy.
- 3.9 **General Principles** – Rule of law.
- 4.5.2 **Institutions** – Legislative bodies – Powers.

Keywords of the alphabetical index:

Constitutional law, ordinary / Constitution, suspension.

Headnotes:

Paragraph 126a of the Federal Procurement Law (*Bundesvergabegesetz* – hereinafter *BVergG*) having the rank of a constitutional provision according to which statutes of the *Länder* on the organisation and jurisdiction of organs established to review the awards of public contracts should be supposed not to be unconstitutional, but contradicts the Constitution through violation of two of its basic principles, the rule of law and democracy.

The loss of the Constitution's normative power and standard setting function for a part of the legal order violates the rule of law.

It furthermore contradicts the basic principle of democracy if the ordinary constitutional legislator was supposed to be authorised to suspend the Constitution in its effects if only for a part of the legal order.

Summary:

The facts and legal background of the case were already published in the précis on the *ex officio* review, G 12/00 *et al.*, *Bulletin* 2001/1 [AUT-2001-1-003].

In its final judgment, the Court came to the conclusion that not only the wording of the reviewed constitutional provision but also its systematic context, its historically provable purpose as well as the historical context of its creation, show abundantly clear that this provision should have made all legislation of the *Länder* on the organisation and jurisdiction of institutions in the field of public procurement control exempt from the (Federal) Constitution. Thus the Constitution should be deprived of its normative power for this part of the legal order.

Such a dismantling of the Constitution's standard-setting function violates the rule of law, the quintessence of which is that "all acts of state organs must be based on law and above all on the Constitution".

The Court expressly did not answer the question whether the Constitution could be suspended by holding an obligatory referendum as stipulated for the Constitution's total revision (Article 44.3 of the Constitution) or if the Constitution may not be suspended at all.

Supplementary information:

For the first time in the history of Austrian constitutional jurisdiction, the Court annulled ordinary constitutional law.

Languages:

German.

*Identification:* AUT-2001-3-006

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12.12.2001 / **e)** G 269/01 *et al* / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.6.1 **Institutions** – Executive bodies – Hierarchy.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.6.5 **Institutions** – Executive bodies – Organisation.
 4.6.8 **Institutions** – Executive bodies – Sectoral decentralisation.
 4.6.10.2 **Institutions** – Executive bodies – Liability – Political responsibility.
 4.15 **Institutions** – Exercise of public functions by private bodies.

Keywords of the alphabetical index:

Institution, public / Entity, corporate, independent / Sovereign power, transfer / State, functions.

Headnotes:

Transferring sovereign power (*Hoheitsgewalt*) either to a corporate body under civil law or to an independent corporate entity may only take place within the organisational structure of the Constitution according to which the performance of "sovereign" administrative activity is subject to the direction and supervision of the supreme (administrative) state organs being themselves subject to parliamentary control.

A construction by which an institution of public law as a separate entity ranks – as to say – next to a Minister, has the effect that the Minister's power as supreme administrative state organ is restricted, and subsequently his/her accountability *vis-à-vis* the parliament too.

As to the power transferred, there are matters such as the jurisdiction over administrative penalty procedures, which constitute the core of state functions and which must not be transferred to

independent legal entities. Matters concerning administrative offences (*Verwaltungsstrafverfahren*) and administrative adjudication belong to the hard core of public affairs and must be performed by administrative authorities established within the administrative organisational structure of the Constitution.

Summary:

On the ground of several applications filed by the Administrative Court but also *ex officio*, the Constitutional Court had started its review on relevant parts of the Federal Law on the Supervision of Securities Services (*Wertpapieraufsichtsgesetz*).

This law established the Federal Securities Supervisory Board (*Bundes-Wertpapieraufsicht*) as an institution of public law being a separate entity headed by a “director”. The Board was entrusted with tasks such as, to safeguard a proper and fair securities trade as well as the protection of the investors, to counteract and pursue the misuse of insider-information, to safeguard and pursue certain breaches of the Act on the Stock Exchange (*Börsegesetz*), to grant and to withdraw licences of securities services undertakings. Additionally, the Board had jurisdiction to impose administrative penalties (in each of these matters).

The Court found that this construction was clearly based on the idea of transferring sovereign power (*Ausgliederung von Hoheitsgewalt*) to an independent corporate entity. Such a transfer of sovereign power either to a corporate body under civil law or to an independent corporate entity may only take place within the organisational structure of the Constitution according to which the performance of “sovereign” administrative activity is subject to the direction and supervision of the supreme (administrative) state organs being themselves subject to parliamentary control.

The setting up of an institution of public law being a separate entity (*Anstalt öffentlichen Rechts mit eigener Rechtspersönlichkeit*) which has jurisdiction in procedures concerning administrative offences (*Verwaltungsübertretungen*) contradicts the Constitution.

The Court held that the construction of the Federal Securities Supervisory Board being independent and at the (more or less) same level as the Minister of Finance, diminished the Minister's power of direction and control as well as his responsibility vis-à-vis the parliament. For these reasons the Court annulled the relevant parts of the law being contrary to Articles 20.1 and 77.1 of the Constitution.

Supplementary information:

Furthermore the Court expressed its view that a transfer of power would not be unconstitutional if it was not to an independent corporate entity. This was an important hint for the legislator having the obvious intention to establish a similar board for a general financial market control (*Allgemeine Finanzmarktaufsicht*) supervising also banks and insurance companies.

Languages:

German.



Identification: AUT-2001-3-007

a) Austria / b) Constitutional Court / c) / d) 13.12.2001 / e) G 213/01, V 62,63/01 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
- 2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
- 4.3.4 **Institutions** – Languages – Minority language(s).
- 5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Inscriptions, topographical, bilingual / Terminology, topographical, bilingual / Constitutional Court, criticism.

Headnotes:

The term “administrative district”, as used in Article 7.3 of the Vienna State Treaty 1955 regarding

the obligatory bilingual topographical terminology and inscriptions (in the Slovene or Croat language as well as in German), comprises not only political districts but also (local) communities as smaller territorial units, and “built-up areas”.

As to identification of the percentage of the minority population living on a territory, necessary for it to be recognised minority rights, it should be established in accordance with the international common practice in the field.

Summary:

A citizen and Austrian national of the Slovene minority who was fined because he had exceeded the permitted speed limit in the area of St. Kanzian lodged a complaint with the Court alleging that the speed limit which is expressed by the city-limit sign (*Ortstafel* – an administrative regulation) was not published lawfully as this sign was put up in German only and not also in the Slovene language.

In its *ex officio* review the Court examined the constitutionality of the relevant parts of the Law on Ethnic Groups as well as the lawfulness of the Federal Government's (administrative) regulation on the determination of areas where topographical terminology shall be fixed in German and in the Slovene language (“*Topographieverordnung*” 1977) and the lawfulness of the word “St. Kanzian” in the (administrative) regulation issued by the district of *Völkermarkt* determining only the German terminology for the city-limit signs.

The Court stated that the posting of (bilingual) city-limit signs (*Ortstafeln*) which serve at the same time as road-signs comes plainly within the scope of the second sentence of Article 7.3 of the Vienna State Treaty 1955 (hereinafter: the Treaty) running as follows: “In such districts topographical terminology and inscriptions shall be in the Slovene or Croat language as well as in German”. Referring to its interpretation of this Treaty's provision (VfSlg. 12.836/1991) the Court held that it was the obvious object and purpose of the Treaty's provision to inform everyone in an eye-catching way to be in an area where a considerable number of the Slovene or Croat minority lives.

Recalling the considerations of its precedent (Judgment of 4 October 2000, V 91/99; see *Bulletin* 2000/3 [AUT-2000-3-006]), the Court determined that the term “administrative district” as used in Article 7.3 of the Treaty comprises not only political districts but also (local) communities as smaller territorial units.

The local government acts (*Gemeindeordnungen*) of the *Länder* including the ones of Carinthia and

Burgenland sub-divide the area of a community into built-up areas (*geschlossene Ortschaften*). On that the Court concluded that in the relevant normative context the term “administrative district” (Article 7.3 of the Treaty) must be understood in a way that it also applies to “built-up areas”.

By way of the Court's consistent case-law, another essential term of the Treaty “administrative and judicial district ... of mixed population” means a territory in which a higher number of its population belongs to a minority. For identification of their number it is sufficient to look at the statistical data taken at a census. Taking into account this case-law, the different drafts and the deliberations on the Treaty – especially on the term “... of mixed population”, the Court referred to the international common practice according to which minority rights are granted if a minority amounts to a percentage of 5 to 25%. Looking at the conformity of the Treaty's Article 7.3 (having the status of constitutional law) with international law and the international common practice for granting minority rights is of particular importance.

The Court therefore held that the relevant Treaty's provision could not be interpreted as requiring a percentage of at least 25% minority population for it to be granted minority rights.

Consequently, paragraph 2.1.2 of the Law on Ethnic Groups (*Volksgruppengesetz*) stipulating that “topographical terminology shall be bilingual in areas where a considerable number of people belonging to an ethnic group (up to a quarter) lives” contradicts the second sentence of Article 7.3 of the Vienna State Treaty 1955 having the rank of constitutional law.

The Court decided to annul parts of the reviewed law statute as well as parts of the above mentioned regulation in so far as it lacks “St. Kanzian” as a built-up area where bilingual city-limit signs are to be fixed. St. Kanzian having a minority percentage of 14.1% in the census of 1961, 14.9% in 1971 and 9.9% in 1991 must clearly be seen as “administrative district ... of mixed population”. The Court also annulled the word “St. Kanzian” in the regulation of the district of *Völkermarkt* pursuant to which the city-limit signs for this built-up area were posted in German only. The entry into force of the annulments was postponed by the Court for one year.

Supplementary information:

The question of bilingual city-limit signs has been very controversially and emotionally dealt with since 1972. Therefore this judgment caused a huge media echo and also some unpleasant reactions from politicians of all parties represented in the parliament (*Landtag*) of Carinthia. The judgment was heavily criticised by the Governor of Carinthia (*Landeshauptmann von Kärnten*) who did not want to accept the Court's ruling declaring that he would undertake everything to counteract its enforcement.

Besides his massive criticism he attacked the President of the Court blaming him for partiality and "unworthy conduct". He blamed the President for having met with the state President of Slovenia during an official visit to Austria while refusing a meeting with representatives of Carinthia including the Governor. On that the Court initiated the (pre-)procedure on whether a procedure to remove its President from office should be started. In its deliberations of 5 and 6 January 2002 (DV 1/01) the Court decided not to enter such a procedure following fully the legal view of the Public Attorney (Procurator General). As to the Public Attorney's opinion the reproaches of the Governor were on the one hand disproved by the documents produced by the Governor himself while on the other hand the conclusions the Governor had drawn from his (own) documents were not consistent with their contents.

This decision did not please the Governor of Carinthia who started a political debate on how to reform the Court.

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2001-3-006

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 26.10.2001 / **e)** 06/15-10 / **f)** / **g)** *Azerbaijan* (Official Gazette); *Azerbaijan Respublikasının Konstitusiyası Mehkemesinin Məlumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.

Keywords of the alphabetical index:

Military service, evasion / Criminal Code.

Headnotes:

The Republic's Assembly Point being the civil office and not a military unit or service place, the voluntary leaving of this point or deviation from military service, after passing the medical examination, by persons called up to military service does not create an objective element of the offence specified in Article 333 of the Criminal Code.

Summary:

The Supreme Court requested the Constitutional Court to give an interpretation of Article 3 of the Law On the Status of Military Servicemen ("the Law") according to which on the basis of the procedure specified in the legislation, citizens attain the status of the military servicemen from the date of call-up to the Armed Forces, entrance to military service by virtue of their own will as well as from the date of entry into military schools.

The group of persons who possess the status of military serviceman is determined in Article 2 of the law.

Article 333 of the Criminal Code provides for the criminal responsibility of military servicemen for voluntary leaving a military unit or non-appearance without good reasons at their service post for the fixed date.

In its petition, the Supreme Court alleged that in the light of Article 3 of the law, the acts of the persons who do not appear at military call-up stations or who do not perform military service after passing the medical examination and being recognised as able-bodied for military service, are considered as crimes against military service and those persons are brought to criminal responsibility in accordance with Article 333 of the Criminal Code.

The Constitutional Court observed that Article 3 of the Law provides only for acquisition of the status of military serviceman. It also noted that, in accordance with Article 3 of the Criminal Code, the perpetration of an action (or inaction) containing all the elements of an offence, provided for only by Criminal Code shall constitute the grounds for criminal responsibility. The Court therefore concluded that the voluntary leaving of a military unit as well as the non-appearance without good reasons to the service post for the fixed date constitute the objective element of the crime provided for in Article 333.

In the present case, the Constitutional Court considered that since the Republic's Assembly Point was created by the Resolution of Cabinet of Ministers and is the civil office and not a military unit or service place, the voluntary leaving of this point or deviation from military service, after passing the medical examination, by persons called up to military service does not create from objective side, an element of the offence specified in Article 333 of the Criminal Code.

The Constitutional Court decided that the persons indicated in Article 2.1 of the law carry the criminal responsibility on the basis of Article 333 of the Criminal Code for voluntary leaving their military unit or non-appearance without good reasons to the service post for the fixed date.

Languages:

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



Identification: AZE-2001-3-007

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 27.12.2001 / **e)** 1/12 / **f)** / **g)** Azerbaijan (Official Gazette); Azerbaijan Respublikasının Konstitusiyası Mehkemesinin Melumatı (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.

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

Keywords of the alphabetical index:

Limitation period, civil law.

Headnotes:

The absence of provisions on any other procedure in law means that the limitation for action applies to all requests. The absence of the terms for limitation of action would always create conditions to dispute the arisen relationships.

The terms for limitation of action are twofold: general and special. The general term for limitation of action does not depend either on legal status of subjects of the legal relationships or on the form and sort of property.

As to special terms for limitation of action, they are determined for specific forms of suits, and can be either abridged or prolonged in comparison with general terms.

Except for the exclusions specified by law, the acts of civil legislation shall not have a retroactive force and shall be applied to relationships arisen after they entered into force.

Summary:

Everyone shall be equal before law and court, according to Article 25.1 of the Constitution.

Taking into account the requirements of para. 3 of that article, Article 8 of the Civil Procedural Code provides that proceedings on civil cases and economic disputes shall be implemented on the basis of the principle of equality of everyone before law and the courts. The Court shall treat each participant of a case equally, regardless of his or her race, nationality, religion, sex, origin, property, social and official status, membership of political parties, professional and public unions, location, subordination, ownership

of property and other distinctions not provided for by law.

Equality before law and the courts shall be provided for by examination of each civil case via the same procedure and indivisible procedural forms as well as by guarantees for persons participating in a case. Thus, there are conditions created to meet legal demands by persons interested in issuing a suit, and citizens are provided with equal abilities for protection of their interests before court. The procedural equality of rights of parties contributes to the realisation of procedural remedies by them for protection of their rights and interests.

These norms also apply to limitation of action. The legislator determines the term for the right to request another person to perform a specific action or refrain from carrying out such an action. The limitation of action shall be the term for protection of rights on the basis of the suit brought by a person whose rights have been violated (Article 372.2 of the Civil Code).

The significance of the limitation of action lies in the following: first of all it disciplines the participants of legal relationships, obliges them to protect their rights in due time, and promotes contractual and financial discipline; secondly, the limitation of action promotes elimination of vagueness and instability in civil legal relationships; thirdly, the limitation of action provides judicial bodies with the possibility to resolve disputes on the ground of objective truth, eliminating the possibility for parties who try to use long-standing pieces of evidence whose validation is either impossible or very difficult.

The absence of provisions on any other procedure in law means that limitation of action applies to all requests. Thus, the absence of the terms for limitation of action would always create conditions to dispute the arisen relationships. The terms for limitation of action divide into two forms – general and special. The general term for limitation of action does not depend either on legal status of subjects of the legal relationships or on the form and sort of property.

Special terms for limitation of action are determined for specific forms of suits. They can be either abridged or prolonged in comparison with general terms.

The general term for limitation of action shall be 10 years, the terms for limitation of action on the basis of obligations proceeding from the provisions of an agreement and obligations originated from commitments to be implemented from time to time shall be 3 years and on the basis of obligations proceeding from the provisions of an agreement on

immovable property – 6 years (Article 373 of the Civil Code that came into force on 1 September 2000). This period is 1 year where a suit has been brought by legal persons against each other (Article 73 of the Civil Code, adopted on 11 September 1964).

Civil legislative acts shall not have retroactive force and shall be applied to relationships arisen after they entered into effect, except for cases provided for by Article 149.7 of the Constitution (Article 7.1 of the Civil Code). Acts of civil legislation shall have retroactive force in cases when it is provided for by law (Article 7.2 of the present Code). Acts of civil legislation shall not have retroactive force if their application can cause damage to subjects of civil law and worsen their conditions (Article 7.3 of the Code).

Thus, except for the exclusions specified in Article 7 of the Civil Code, acts of civil legislation shall not have retroactive force and shall be applied to relationships arisen after they entered into effect.

The Constitutional Court decided that the terms for limitation of action provided for by Article 373 of the Civil Code shall be applied on the basis of the requirements proceeded from legal relationships arising after 1 September 2000. Terms for limitation of action provided for by this article taking into account Article 7 of the Civil Code can be applied also to requirements proceeding from legal relationships arising from the mentioned date.

Languages:

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



Belgium

Court of Arbitration

Important decisions

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.

2.1.1.4.3 **Sources of Constitutional Law** – 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, cohabittees / Legislator, omission / Tax, deduction / Tax, spouse / Tax, cohabittees.

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 cohabittees (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 cohabittees 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 cohabitants 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 cohabitants.

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 cohabitants, 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 cohabitants.

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 cohabitants 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) laid down new tax regulations.

Cross-references:

Compare the German Constitutional Court's decision of 10.11.1998 (2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91), *Bulletin* 2000/2 [GER-2000-2-002].

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2001-3-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 04.05.2001 / **e)** U 14/00 / **f)** Appeal of Mr Z.M. against Fed BiH SC Judgment no. UZ-39/00 of 18.05.2001, Cantonal Court Bihac Judgment no. U 267/99 of 21.12.1999 and Cantonal Ministry ruling no. 11/1-23-1054-4 II/99 of 09.11.1999 / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 33/2001, 30.12.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
- 5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Occupancy, right, conditions / Property, restitution / Refugee, return, objective / Displaced person, return, objective.

Headnotes:

As far as the re-instatement of people into pre-war apartments is concerned, previous occupants without an occupancy right have to be treated like occupancy right holders if their factual position is comparable to that of an occupancy right holder.

Summary:

The appellant challenged various court decisions which denied him the restitution of the apartment he

had been living in for several years until he left it due to the war in Bosnia and Herzegovina. The court decisions were based on a strict application of the Law on Housing Relations and post-war laws regulating the restitution of apartments to their pre-war occupants. The courts had argued that the appellant could not be reinstated since he had not concluded a contract on use of the apartment and, therefore, had not acquired an occupancy right.

The Court annulled the ordinary court decisions and the administrative rulings and ordered the competent administrative organ to reinstate the appellant into the apartment in question. It considered that the non-restitution of the apartment amounted to a violation of the appellant's right to respect for his home (Article 8 ECHR) and to the peaceful enjoyment of his possessions (Article 1 Protocol 1 ECHR).

As regards Article 8 ECHR, the Court argued that the apartment at issue had to be regarded as the appellant's "home" within the meaning of this provision. It based its view on Article 1.1 Annex 7 General Framework Agreement for Peace in Bosnia and Herzegovina ("Agreement on Refugees and Displaced Persons" – GFAP) and Article II.5 of the Constitution of Bosnia and Herzegovina which both provide that all refugees and displaced persons have the right freely to return to their homes of origin and that they shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991. The latter article, said the Court, raised this right of refugees and displaced persons to the level of constitutional rights. The appellant had been in possession of the apartment and had had legal grounds for initially entering into and subsequently living in the apartment. The fact that no contract on the use of the apartment was concluded with the Housing Association (being a formal requirement for obtaining an occupancy right) was not due to any negligence on the part of the appellant. However, the Court noted, the appellant had paid the rent to the factory which had allocated the apartment to him from the moment he moved into it, and he therefore fulfilled the same obligation as he would have had to fulfil had he concluded a contract on the use of the apartment. The behaviour of the parties involved indicated that they had silently agreed to the factual state of affairs. The appellant had spent four years in the apartment from the moment of entry to 30 April 1991 (the qualifying date according to property law) as well as three further years until 1994 before leaving it due to the war. During this period nobody had contested his right to use the apartment.

The Court held that the failure to return the apartment during a period of approximately five years resulted in

an interference with the appellant's right to respect for his home, which was not justified. In the Court's opinion, the interference had initially served a legitimate aim in accordance with the meaning of Article 8.2 ECHR. The relevant aim had been the protection of the rights of others, i.e. the rights of persons who were forced to leave their homes because of the war and needed accommodation in other parts of the country. However, five years after the end of the war, the denial to give back the apartment could no longer be seen as a necessary interference in a democratic society and, therefore, was disproportionate in relation to the legal aim pursued.

As for Article 1 Protocol 1 ECHR, the Court found the appellant's legal position with regard to the apartment to constitute a "possession" within the meaning of this article, recalling the arguments put forward in the context of Article 8 ECHR which showed that the apartment represented an acquired economic value for the appellant. Moreover, the Court based its view on relevant provisions of the Law on Housing Relations which regulate the possibility of an eviction. Since the appellant had been living in the apartment for several years, those provisions, in the Court's eyes, excluded his eviction, thereby creating a legal status of possession equally strong as that of an occupancy right holder.

The Court observed that the ordinary courts' decisions denied the appellant his right to make use of the economic value which the apartment represented for him, and that this denial was not justified under the European Convention on Human Rights or the Constitution.

It considered that the courts failed to strike a fair balance between the appellant's interests and other conflicting interests. Similar to its line of argument under Article 8 ECHR, the Court accepted that there may have been strong reasons in the war period justifying the use of the apartment to give shelter to refugees. However, the conditions which then prevailed had fundamentally changed and could no longer justify an interference with the appellant's rights. Weighing the various interests involved, the Court paid particular attention to the fact that the return of refugees and displaced persons to their previous homes is a primary objective of the GFAP and the Constitution of Bosnia and Herzegovina and that the restoration of previously existing rights to houses and apartments should in this perspective be seen as a predominating objective. Article II.5 of the Constitution of Bosnia and Herzegovina constituted a constitutional right to the restoration of the *status quo ante*.

The Court saw its view further supported with regard to the lawfulness of the omission. At the time, the competent authorities assigning the apartment to a third party may have acted on the basis of the Law on Abandoned Apartments. However, in the meantime “all administrative, judicial and any other decisions enacted on the basis of the regulations referred to Article 1.1 of this law terminating occupancy rights” had been annulled (Article 2 Law on Cessation of the Law on Abandoned Apartments) and the authorities had been ordered to cease to apply those regulations. Thereby, the legal basis for the temporary re-allocation of those apartments had been removed. The present situation could therefore no longer be regarded as lawful.

The Court further pointed out that it was irrelevant that the competent administrative authorities and the courts may have applied the Law on Cessation of the Law on Abandoned Apartments according to its exact wording, i.e. not returning the apartment to the appellant because they did not consider him an occupancy right holder. In view of their obligation to apply the European Convention on Human Rights and the Constitution of Bosnia and Herzegovina as prevailing law, the Court stressed they were to interpret the Law on Cessation of the Law on Abandoned Apartments in a manner that would be compatible with the European Convention on Human Rights and the Constitution of Bosnia and Herzegovina, namely by equating the status of the appellant with that of an occupancy right holder.

Languages:

Bosnian, Croat, Serb (translations by the Court).



Identification: BIH-2001-3-006

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 04.05.2001 / **e)** U 17/01 / **f)** Requests of employees of the Municipal Court of Sanski Most and Rasim Jusufovic for the institution of proceedings for the evaluation of the constitutionality of Article 152 of the Law on Work of Republika Srpska / **g)** *Sluzbeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina), 27/2001, 24.10.2001 / **h)** CODICES (English).

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.

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

5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.

5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.

Keywords of the alphabetical index:

Employment, conditions, criteria / Referral, conditions.

Headnotes:

Lower courts in Bosnia and Herzegovina may only refer questions to the Constitutional Court of BiH according to Article VI.3.c of the Constitution of Bosnia and Herzegovina if they relate to a case pending before that court.

Summary:

The President of the Municipal Court of Sanski Most, on behalf also of other employees of the Court who resided before the war in municipalities which are now on the territory of Republika Srpska, as well as Rasim Jusufovic from Bijeljina requested the Court to evaluate the constitutionality of Article 152 of the Labour Law of the Republika Srpska (Official Gazette of the Republika Srpska no. 38/00 of 8 November 2000).

The appellants argued that Article 152 of the Labour Law of the Republika Srpska violates the human rights of citizens who, on 31 December 1991, were employed on the territory of the Republika Srpska. They referred to the “well-known fact” that employment used to be terminated for reasons based on racial discrimination, which was in contravention of the Constitution and international conventions.

The Court found the request to be inadmissible under Article VI.3.a and VI.3.c of the Constitution. The appellants do not belong to the categories of persons who are entitled to bring a dispute regarding the conformity of a law with the Constitution before the Court. According to Article VI.3.a of the Constitution, the Constitutional Court has exclusive jurisdiction to decide any dispute that arises under the Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between

institutions of Bosnia and Herzegovina, including disputes as to whether any provision of an Entity's constitution or law is consistent with the Constitution of Bosnia and Herzegovina. These disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

The Court added that, in so far as the President of the Municipal Court may be considered to have made the request on behalf of the Court itself, the request was not related to any case pending before the Court, this being a condition for the right of a court, under Article VI.3.c of the Constitution, to refer a constitutional issue to the Constitutional Court.

Cross-references:

- Decision U 19/01 declares the contested article (without the second paragraph) to be in conformity with the Constitution of Bosnia and Herzegovina.

Languages:

Bosniac, Croat, Serb (translations by the Court).



Identification: BIH-2001-3-007

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 05.05.2001 / **e)** U 10/01 / **f)** Preliminary question referred by the Cantonal Court of Zenica / **g)** / **h)** CODICES (English).

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.

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.

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

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

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

Keywords of the alphabetical index:

Decision, execution, conditions.

Headnotes:

The Court may not pronounce itself on a question referred to it by a lower court if that question does not fall within the jurisdiction of the Court under Article VI.3.c of the Constitution of Bosnia and Herzegovina, even if it raises issues under the Constitution.

Summary:

The Cantonal Court of Zenica requested the Court to state its opinion on whether the judgment of the Supreme Court of Bosnia and Herzegovina no. KZ 30/92 of 6 July 1992 could be legally executed, despite the existence of a conflicting ruling of the Supreme Court of Republika Srpska no. KZ 40/93 of 17 November 1993.

In 1991, the Higher Court of Doboj had convicted Mirko Karatovic and Nikola Karatovic of murder and sentenced each of them to 10 years' imprisonment. In 1992, the Supreme Court of Bosnia and Herzegovina increased these sentences to 12 years' imprisonment. No further appeal was available against that judgment. Nevertheless, in November 1993, the Supreme Court of Republika Srpska annulled the judgment of the Higher Court of Doboj and referred the case back for retrial to the First Instance Court of Maglaj. In May 1994, the Higher Court of Doboj, upon a proposal of the President of the Higher Court of Maglaj, decided that the further criminal proceedings should be held before the First Instance Court of Doboj. That Court scheduled a main hearing to be held in March 2000, but the hearing was cancelled since the accused were not present.

The Court denied its competence to pronounce itself on the referred question. It observed, that in view of the continuing criminal proceedings, the question could arise as to whether or not the execution of the judgment of the Supreme Court of Bosnia and Herzegovina of 6 July 1992 would be compatible with Article 6 ECHR and Article 4 Protocol 7 ECHR. The European Convention and its Protocols are part of the

constitutional protection in Bosnia and Herzegovina, and the courts in charge of the execution of the Supreme Court's judgment must therefore apply those provisions and have regard to the fact that, according to Article II.2 of the Constitution of Bosnia and Herzegovina, the European Convention on Human Rights and its Protocols shall have priority over all other law.

However, the Court found that at the present stage of the proceedings the conditions laid down in Article VI.3.c of the Constitution of Bosnia and Herzegovina were not satisfied. According to that provision, the Constitutional Court has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with the Constitution, with the European Convention on Human Rights and its Protocols, or with the laws of Bosnia and Herzegovina, or concerning the scope of a general rule of public international law pertinent to the court's decision. In the case in point, the Cantonal Court of Zenica had raised a specific issue of legal interpretation but had not referred to any law whose compatibility with the Constitution or with the European Convention on Human Rights or its Protocols would be at issue, or concerning the scope of a general rule of public international law (19, 20).

Languages:

Bosniac, Croat, Serb (translations by the Court).



Identification: BIH-2001-3-008

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 22.06.2001 / **e)** U 28/01 / **f)** Appeal of Mr K.J. against the judgment of the Supreme Court of Republika Srpska no. KZ-196/00 of 18.12.2000 / **g)** to be published in *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.5.4.7 **Constitutional Justice** – Decisions – Types – Interim measures.

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

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

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

3.13 **General Principles** – Legality.

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

Keywords of the alphabetical index:

Hearing, court, obligation to inform the accused / European Convention on Human Rights, direct application.

Headnotes:

It violates the right to a fair trial, especially the principle of equality of arms, if in a public hearing dealing with factual and legal aspects of the appeal, neither the appellant nor his or her legal counsel are given the possibility to attend while the public prosecution office is represented, even if this is based on the law in force.

Summary:

The appellant challenged the judgments of the Supreme Court of Republika Srpska and of the District Court of Srpsko Sarajevo under Article VI.3.b of the Constitution of Bosnia and Herzegovina. He alleged that his constitutional right to a fair trial (especially equality of arms) under Article 6 ECHR (Article II.3.e of the Constitution of Bosnia and Herzegovina, respectively) and his right not to be discriminated against under Article II.4 of the Constitution of Bosnia and Herzegovina had been violated since he, unlike the public prosecutor, had not been able to attend the hearing before the Supreme Court dealing with the appellant's conviction of murder. Without previous notice to the appellant and his counsel, and despite their request to be so informed, the Supreme Court held a hearing on the appellant's appeal complaining that the proceedings before the District Court contained significant violations of procedural provisions and that the facts had been wrongly and incompletely established. The Supreme Court judgment dismissed the appeal as ill-founded and confirmed the judgment of the District Court. It had also stated that the accused had not been informed about the hearing according to Article 5 of the Law Amending the Law on Criminal Proceedings. This provision (which had been introduced during the war in Bosnia and Herzegovina

and subsequently not abolished) suspended the court's obligation under Article 371 of the Law on Criminal Proceedings to inform, *inter alia*, the accused and his defendant of the hearing of the court council.

After a temporary suspension of the execution of the Supreme Court judgment (Article 75 of the Rules of Procedure of the Court), the Court eventually annulled the judgment of the Supreme Court of Republika Srpska on the basis of a violation of the principle of the equality of arms as an inherent and essential part of Article 6 ECHR. It referred the case back to the Supreme Court for a new examination and decision while observing the right of the appellant/accused and his attorney to attend the session of the court council. In view of the legal and factual circumstances of the case, the Court said, the appellant was entitled, according to Article 6 ECHR, to attend the hearing before the Supreme Court and to present, personally or through his attorney, arguments in his favour.

The Court recalled that the manner in which Article 6 ECHR should be applied to appeal proceedings would depend on the special features of the proceedings concerned. According to the jurisprudence of the European Court of Human Rights, the Court said the question as to whether an accused had had a fair trial would have to be assessed on the basis of the proceedings in their entirety. The Supreme Court may have acted in accordance with the amended Article 371 of the Law on Criminal Proceedings. However, it did not observe the requirements set out by Article 6 ECHR which had priority over all other law and had to be applied directly by all domestic authorities (Article II.2 of the Constitution of Bosnia and Herzegovina). The notion of "session of the council of the court" in Article 371 had to be interpreted in the sense of a public "hearing" under Article 6 ECHR. The Court stressed that in his appeal the appellant had requested the Supreme Court to make a full review of the first instance judgment as regards facts and law, and that the Supreme Court was not bound by the findings of the lower court but was competent to make a new examination as well as assessment of the facts and of the significant violations of criminal proceedings procedural provisions, and, in case of accepting those claims, to refer the case back to the first instance court for new first instance proceedings and decision. In view of an imminent prison sentence of three years, the outcome of the proceedings before the Supreme Court was of great importance to the appellant.

As for first instance proceedings, the Court considered it unnecessary to examine any relating claims

since the second instance proceedings before the Supreme Court would be renewed, and the appellant would therein be in a position to address the alleged violations by the first instance judgment.

Languages:

Bosnian, Croat, Serb (translations by the Court).



Identification: BIH-2001-3-009

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 28.09.2001 / **e)** U 26/01 / **f)** Request of 25 representatives of the National Assembly of Republika Srpska for the evaluation of conformity of the Law on the Court of Bosnia and Herzegovina (Official Gazette no. 29/00) with the Constitution of Bosnia and Herzegovina / **g)** to be published in *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) / **h)** CODICES (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.

3.3 **General Principles** – Democracy.

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

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Distribution of powers, principle / High Representative for Bosnia and Herzegovina / State, institution, new, establishment / Venice Commission, opinion / Council of Europe, Venice Commission / Legal remedy, effective.

Headnotes:

Bosnia and Herzegovina is competent to establish a Court of Bosnia and Herzegovina in order to fulfil its

constitutional obligations, especially deriving from the principles of democracy and the rule of law.

Summary:

The applicants, a group of representatives of the National Assembly of Republika Srpska, requested the Court under Article VI.3.a of the Constitution of Bosnia and Herzegovina to evaluate the constitutionality of the Law on the Court of Bosnia and Herzegovina. This law had been enacted by the High Representative for Bosnia and Herzegovina (High Representative) and published in the Official Gazette of Bosnia and Herzegovina. It established the Court of Bosnia and Herzegovina and regulated its competences as well as procedural matters. A working group, chaired by the Ministry for Civil Affairs and Communications, and composed of members of this Ministry, the Ministries of Justice of the Federation of Bosnia and Herzegovina and of the Republika Srpska, and of the Office of the High Representative, had previously agreed on a draft law on a Court of Bosnia and Herzegovina. However, the law had failed to be adopted through the regular procedure. According to the Office of the High Representative the law corresponded not only to the constitutional obligation of Bosnia and Herzegovina, expressed in the opinion of the Venice Commission of the Council of Europe, to establish a Court at state level in Bosnia and Herzegovina, but also to a request of the Peace Implementation Council.

The applicants claimed that the challenged law violated Article III of the Constitution of Bosnia and Herzegovina which regulates the responsibilities of and the relations between Bosnia and Herzegovina and the Entities. They pointed out that the Constitution of Bosnia and Herzegovina did not provide that a judicial system is the responsibility of Bosnia and Herzegovina, but that the organisation of the judicial system was the responsibility of the Entities. Furthermore, they argued that the implementation of the Law on the Court of Bosnia and Herzegovina required the adoption of a number of laws of substantive and procedural nature for which there was no legal basis in the Constitution of Bosnia and Herzegovina.

The Court declared the Law on the Court of Bosnia and Herzegovina to be in conformity with the Constitution of Bosnia and Herzegovina.

With reference to its previous jurisprudence (U 9/00, *Bulletin* 2000/3 [BIH-2000-3-004], U 16/00, *Bulletin* 2001/2 [BIH-2001-2-001], and U 25/00, *Bulletin* 2001/2 [BIH-2001-2-004]), the Court found itself to be competent to review the challenged law although it had been enacted by the High Representative whose

mandate derived from Annex 10 of the General Framework Agreement for Peace, the relevant resolutions of the United Nations Security Council and the Bonn Declaration. The Court recalled that while the mandate and the exercise of the mandate were not subject to the control of the Court, it considered itself competent to review acts of the High Representative when he substituted the domestic authorities, thereby acting as an authority of Bosnia and Herzegovina, and the laws enacted by him being, by their nature, domestic laws of Bosnia and Herzegovina.

The Court found that the challenged law did not violate Article III.3.a of the Constitution of Bosnia and Herzegovina ("All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."). It argued that Bosnia and Herzegovina needed and therefore was competent to establish a Court of Bosnia and Herzegovina, fundamentally on the basis of the principles laid down in Article I.2 of the Constitution of Bosnia and Herzegovina ("Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.") and of its internal structure established pursuant to item 3 of the same article. Starting from there, the Court held, that the Constitution of Bosnia and Herzegovina conferred on Bosnia and Herzegovina certain responsibilities in order to ensure its sovereignty, territorial integrity, political independence and international personality (e.g. Articles I.1, II.7, III.1.a, III.5.a, IV.3.a), the highest level of internationally recognised human rights and fundamental freedoms (e.g. Article II.1 of the Constitution of Bosnia and Herzegovina as well as Annexes 5-8 General Framework Agreement for Peace) and free and democratic elections (Articles IV.2 and V.1 of the Constitution of Bosnia and Herzegovina).

The Court emphasised that apart from the responsibilities enumerated in Article III.1 of the Constitution of Bosnia and Herzegovina, there were other constitutional provisions assigning competences to Bosnia and Herzegovina such as Articles I.7, IV.2 and V.1 of the Constitution as well as Article II of the Constitution of Bosnia and Herzegovina. Moreover, the Court drew attention to Article III.5.a of the Constitution of Bosnia and Herzegovina which established that Bosnia and Herzegovina should assume responsibility for:

1. such other matters as were agreed by the Entities;
2. matters that were provided for in Annexes 5 through 8 to the General Framework Agreement; and

3. matters that were necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina, and that additional institutions could be established as necessary to carry out such responsibilities.

The Court especially pointed out that Bosnia and Herzegovina and both Entities should ensure the highest level of internationally recognised human rights and fundamental freedoms (Article II.1 of the Constitution of Bosnia and Herzegovina), and that the rights and freedoms as set forth in the European Convention on Human Rights were to be applied directly in Bosnia and Herzegovina and should have priority over all other law (Article II.2 of the Constitution of Bosnia and Herzegovina). The Court had particular regard to the general principle of the rule of law being inherent in the European Convention on Human Rights and, more particularly, to the principles of a fair court hearing and an effective legal remedy (Articles 6 and 13 ECHR). The establishment of the Court of Bosnia and Herzegovina, the Court argued, could be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina acted in conformity with the rule of law and in satisfying the requirements of the European Convention on Human Rights as regarded fair hearings before a court and effective legal remedies. Until the Court of Bosnia and Herzegovina would start functioning, there would have been no possibility in the legal system of Bosnia and Herzegovina to challenge decisions issued by the institutions of Bosnia and Herzegovina before an organ which fulfilled the requirements of an independent and impartial tribunal.

The Court also noted that, according to Article VI.3 of the Constitution of Bosnia and Herzegovina, the decisions of the Court of Bosnia and Herzegovina would be subject to review by the Constitutional Court as to their constitutionality.

Cross-references:

- Decision of 03.11.2000 (U 9/00), *Bulletin* 2000/3 [BIH-2000-3-004];
- Decision of 02.02.2001 (U 16/00), *Bulletin* 2001/2 [BIH-2001-2-001];
- Decision of 23.03.2001 (U 25/00), *Bulletin* 2001/2 [BIH-2001-2-004].

Languages:

Bosnian, Croat, Serb (translations by the Court).



Identification: BIH-2001-3-010

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 21.12.2001 / **e)** U 26/00 / **f)** Request of Municipal Court Cazin for review of constitutionality of Article 54 Amendment Law to the Law on Labour of the Federation of Bosnia and Herzegovina / **g)** to be published in *Službeni glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 3.19 **General Principles** – Margin of appreciation.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Employee, labour, economic and social conditions / Severance pay, reduction / Economy, forecast.

Headnotes:

The reduction of severance pay to laid-off and then dismissed employees with retroactive effect does not violate the right to peaceful enjoyment of one's possessions or the right not to be discriminated against if the legislator is constrained to do so by extreme economic conditions.

Summary:

In the course of proceedings for the purpose of payment of severance pay, the Municipal Court of Cazin requested the Constitutional Court according to Article VI.3.c of the Constitution of Bosnia and Herzegovina to review the conformity of Article 54 of the Law on Amendments to the Labour Law with the Constitution of Bosnia and Herzegovina. The referring court was of the opinion that this provision was not in

conformity with the Constitution of Bosnia and Herzegovina.

Through the aforementioned article, the Federation legislator had amended Article 143 of the Federation Labour Law which had been adopted less than one year earlier and which regulated the status of employees that had been laid-off as a consequence of the war. Article 50 of the Law on Amendments to the Labour amended Article 143 in order to reduce the amount of severance pay in cases where the employment of a laid off employee had been terminated. The contested article declared the previous law applicable with the exception of Article 143 of the Federation Labour Law. The legislator reduced the amount of severance to be paid by the companies concerned in order to facilitate any payment at all under the given economic conditions which, in the legislator's opinion, threatened the existence of those companies as well as the stabilisation of the economy in the Federation as a whole.

The Court found Article 54 of the Law on Amendments to the Labour Law to be in conformity with the Constitution of Bosnia and Herzegovina. It could neither find a violation of Article 1 Protocol 1 ECHR (Article II.3.k of the Constitution of Bosnia and Herzegovina) nor of Article 14 ECHR (Article II.4 of the Constitution of Bosnia and Herzegovina) in connection with Article 1 Protocol 1 ECHR (Article II.3.k of the Constitution of Bosnia and Herzegovina).

The Court considered the right to peaceful enjoyment of one's possessions to be applicable to the case in point since the words "property" and "possessions" were not to be interpreted in a restrictive manner but should be considered to include existing monetary claims and various other rights of the individual which have an economic value. Consequently, those employees whose employment had been terminated, had already obtained a right to severance pay according to Article 143 of the Federation Labour Law, before the Law on Amendments entered into force. This right to a severance pay represented a property right protected under Article 1 Protocol 1 ECHR. The Court found that for such employees Article 54 of the Law on Amendments meant that they were deprived of a part of their property.

However, the Court held that the reduction of the severance pay was in the public interest and provided for by law (second sentence of the first paragraph of Article 1 Protocol 1 ECHR), that it struck a fair balance between the public interest and the interest of the individuals who were deprived of their property, and that in the present economic situation, the aims

of the Law on Amendment could not reasonably have been achieved by offering financial support from the state authorities. It argued that a state also had a certain margin of appreciation in determining which economic and social policy was best suited to serve the general interest of the population. It agreed with the legislator's concern that a reduction of the severance pay was of vital interest to the economy, since the heavy burden imposed on employers by the obligation to pay these amounts to former employees was in many cases beyond the capabilities of the companies and would have forced many companies into liquidation and bankruptcy and would thereby also have further aggravated the employment situation in the country. The Court ascertained that the amount to be paid according to Article 143 of the Federation Labour Law would be 3,836 KM per employee, while it would be about 1,000 KM per employee under Article 50 in connection with Article 54 of the Law on Amendments. The difference between these amounts in respect of more than 100,000 employees, whose employment would be terminated according to Article 143 of the Federation Labour Law, would represent the financial means by which the economic viability of the companies would be strengthened. The macro-economic forecast of development of the Federation of Bosnia and Herzegovina presented by the Government of the Federation showed that compared to the level achieved on the territory of the Federation in 1991, only 34.9% of industrial production, 65.1% of employment, 47.6% of export and 52.7% of gross domestic product had been achieved recently. In 2000, the annual domestic product was \$1,121 per citizen. The percentage of unemployed persons was 40%, the proportion of employed persons to dependant persons was 1:4, and the total debt amounted to 3.5 billion KM. The export/import ratio was 27,4%. Industrial production was only 10% of the pre-war production. On those grounds the Court accepted that the amount which under the previous legal provisions should have been paid out to former employees would undoubtedly have represented a huge burden for the entire economy of the Federation of Bosnia and Herzegovina. The Court further noted that the right to severance pay was not totally eliminated by the Law on Amendments but was only reduced to a lower amount.

As regards Article 14 ECHR in connection with Article 1 Protocol 1 ECHR (Article II.4 of the Constitution of Bosnia and Herzegovina) – the right not to be discriminated against – the Court could not find that the challenged article discriminated against the employees to whom Article 54 of the Law on Amendments applied as compared with employed persons or with employees who were granted severance pay before the Law on Amendments came

into force. The Court stressed that an act or regulation was discriminatory if it distinguished between persons or groups of persons who were in a comparable situation, and if that distinction lacked an objective and reasonable justification, or if there was no reasonable relationship of proportionality between the means employed and the aim sought to be realised. In the present case, the Court observed that all laid off employees who were entitled to severance pay when the Amendment Law was enacted and entered into force but who had not yet been granted an amount of such pay, were treated alike. Moreover, it considered that the redundant employees were clearly in a different situation from those who were employed, and that they also differed from those laid off employees who had already obtained severance pay under the previous law. However, the Court held that when laws were changed, it were frequently unavoidable that a distinction aroused between those to whom the old law had applied and those whose rights were regulated by the new law. These two categories of persons, the Court said, could not be considered to be in an analogous situation, and the distinction which followed from the change in the legislation could not therefore be considered to be of a discriminatory nature.

Languages:

Bosnian, Croat, Serb (translations by the Court).



Bulgaria Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

Number of decisions: 2

Important decisions

There was no relevant constitutional case-law during the reference period 1 September 2001 – 31 December 2001.



Canada

Supreme Court

Important decisions

Identification: CAN-2001-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 20.12.2001 / **e)** 27216 / **f)** Dunmore v. Ontario (Attorney General) / **g)** / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; [2001] S.C.J. no. 87 (*Quicklaw*).

Keywords of the systematic thesaurus:

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

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

5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Agricultural worker / Labour relations.

Headnotes:

The exclusion of agricultural workers from Ontario's statutory labour relations regime unjustifiably infringes the right to freedom of association.

Summary:

Alleging an infringement of the right to free association protected by Section 2.d of the Canadian Charter of Rights and Freedoms, agricultural workers challenged their exclusion from the province of Ontario's statutory labour relations scheme. The trial judge and the Court of Appeal found that the impugned legislation did not infringe freedom of association. The Supreme Court of Canada reversed these decisions.

The purpose of Section 2.d of the Charter is to allow the achievement of individual potential through interpersonal relationships and collective action. This purpose commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? Ordinarily, the Charter does not oblige the state to take affirmative action to safeguard or

facilitate the exercise of fundamental freedoms. There is no constitutional right to protective legislation *per se*. However, history has shown and Canada's legislatures have recognised that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. In order to make the freedom to organise meaningful, in this very particular context, Section 2.d of the Charter may impose a positive obligation on the state to extend protective legislation to unprotected groups. The distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime contributes substantially to the violation of protected freedoms. Several considerations circumscribe the possibility of challenging underinclusion under Section 2 of the Charter: (1) claims of underinclusion should be grounded in fundamental Charter freedoms rather than in access to a particular statutory regime; (2) the evidentiary burden in such cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected Section 2.d activity; and (3), in order to link the alleged Charter violation to state action, the context must be such that the state can be truly held accountable for any inability to exercise a fundamental freedom. The contribution of private actors to a violation of fundamental freedoms does not immunise the state from Charter review.

In order to establish a violation of Section 2.d of the Charter, the claimants must demonstrate that their claim relates to activities that fall within the range of activities protected by Section 2.d of the Charter, and that the impugned legislation has, either in purpose or effect, interfered with these activities. In this case, insofar as the agricultural workers seek to establish and maintain an association of employees, their claim falls squarely within the protected ambit of Section 2.d. Although it is impossible to conclude that the exclusion of agricultural workers from Ontario's statutory labour relations regime was intended to infringe their freedom to organise, the effect of the exclusion is to limit their right to freedom of association. Here, the agricultural workers do not claim a constitutional right to general inclusion in Ontario's labour relations regime, but simply a constitutional freedom to organise a trade association. This freedom to organise exists independently of any statutory enactment, although its effective exercise may require legislative protection in some cases. The agricultural workers have met the evidentiary burden of showing that they are substantially incapable of exercising their fundamental freedom to organise

without the protective legislative regime. The inability of agricultural workers to organise can be linked to state action. The exclusion of agricultural workers from Ontario's labour relations regime functions not simply to permit private interferences with their fundamental freedoms, but to substantially reinforce such interferences. The inherent difficulties of organising farm workers, combined with the threat of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario. Equally important is the message sent by the exclusion of agricultural workers from Ontario's labour relations regime, which delegitimises their associational activity and thereby contributes to its ultimate failure. The most palpable effect of the exclusion of agricultural workers is, therefore, to place a chilling effect on non-statutory union activity.

The wholesale exclusion of agricultural workers from Ontario's labour relations regime does not minimally impair their right to freedom of association. The categorical exclusion of agricultural workers is unjustified where no satisfactory effort has been made to protect their basic right to form associations. The exclusion is overly broad as it denies the right of association to every sector of agriculture without distinction. The reliance on the family farm justification ignores an increasing trend in Canada towards corporate farming and complex agribusiness and does not justify the unqualified and total exclusion of all agricultural workers from Ontario's labour relations regime. More importantly, no justification is offered for excluding agricultural workers from all aspects of unionisation, in particular those protections that are necessary for the effective formation and maintenance of employee associations. Nothing in the record suggests that protecting agricultural workers from the legal and economic consequences of forming an association would pose a threat to the family farm structure. Consequently, the total exclusion of agricultural workers from Ontario's labour relations regime is not justifiable under Section 1 of the Charter.

A concurring judge concluded that the purpose of the exclusion of agricultural workers from Ontario's statutory labour relations regime infringed Section 2.d of the Charter.

A dissenting judge concluded that the exclusion of agricultural workers from Ontario's statutory labour relations regime did not infringe freedom of association.

Languages:

English, French (translation by the Court).



Croatia Constitutional Court

Summaries of important decisions of the reference period 1 September 2001 – 31 December 2001 will be published in the next edition, *Bulletin* 2002/1.



Czech Republic Constitutional Court

Statistical data:

1 October 2001 – 31 December 2001

- Decisions by the plenary Court: 4
- Decisions by chambers: 64
- Number of other decisions by the plenary Court: 12
- Number of other decisions by chambers: 628
- Number of other procedural orders: 26
- Total: 734

Important decisions

Identification: CZE-2001-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 03.10.2001 / **e)** II. US 359/98 / **f)** Land Registry Office review / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

- 1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
- 1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
- 1.4.6.3 **Constitutional Justice** – Procedure – Grounds – *Ex-officio* grounds.
- 3.13 **General Principles** – Legality.
- 3.19 **General Principles** – Margin of appreciation.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
- 5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
- 5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Decision, administrative, judicial review / Restitution / Property, right to dispose of / Succession, right / Constitutional justice, purpose / Disposition, principle / Subsidiarity, principle / Land, registry, record.

Headnotes:

The Land Registry Office reviews a legal act on the basis of which the entry of a record in the Land Register is proposed. The Office is not authorised to review conditions laid down by other regulations.

Summary:

The original complainant concluded an agreement on the transfer of property. The Land Registry Office rejected the proposal to enter a record in the Land Registry. The Court annulled this decision after an appeal had been filed. The Land Registry Office rejected the proposal repeatedly and the Court confirmed this decision.

In her constitutional petition, the complainant contested this decision. After her death and the death of her direct heir, his heirs became parties to the proceedings. According to settled jurisprudence of the Constitutional Court, when adjudicating restitution claims it is necessary to take into account that every restitution law requires a degree of discretion in its application to the entitled persons, in order to fulfil the purpose and sense of the law. Restitution laws cannot be interpreted restrictively only to the disadvantage of the entitled persons. It is the principle of subsidiarity, which is among the basic principles governing the proceedings on constitutional complaints.

A constitutional complaint can only be filed on condition that all procedural remedies afforded by the law to the protection of right have been exhausted. Protection of constitutionality is the responsibility of all public administration bodies. The Constitutional Court steps in after the failure of all other institutions. This rule also reflects the principle of minimisation of the Constitutional Court's interventions into the powers of other organs whose decisions are reviewed in the proceedings on constitutional complaints. The Constitutional Court is not another instance in the adjudication of the matter itself and its task is to find out whether the contested decision has infringed the constitutionally guaranteed fundamental right or freedom of the complainant.

Administrative judiciary bodies are governed by the disposition principle, which, however, according to the present theory and judiciary, has been breached and the Court is obliged to review the contested decision *ex officio* also from the point of view of the competence of the defendant administrative body to issue a decision in the given matter, since it cannot be excluded that this act can be subject to serious defects. The Constitutional Court identifies itself with the standpoint of the Supreme Court of the Czech Republic, according to which the Land Registry Office reviews a legal act, on the basis of which the permission to enter a record in the Land Register is proposed. Provided the agreement on the transfer of property is represented by this legal act, the Constitutional Court does not review whether the presumptions for extra-judicial rehabilitation were fulfilled, as it is not authorised to do so. The competence of the Land Registry Office to review the permissibility of legal acts is not denied as this Office reviews, in proceedings on permission to enter a record, whether parties to a legal act are in breach of legal regulations, by a decision of a court or by a decision of a government body on freedom of contract concerning the matter and whether a consent was granted for the legal act in accordance with a special regulation.

In the present case, the Land Registry Office performed a review of the complainant's restitution claim although only courts are competent to carry out such a review and thus it infringed the Constitution. The Constitutional Court further referred to its settled jurisprudence according to which it is not bound by the justification of the constitutional complaint. On the contrary, it is within its powers when the contested decision is also reviewed from points of view other than those stated in the constitutional complaint. The infringement of the Constitution is a sufficient reason to annul the contested decision. The infringement of the right to a fair trial can impact upon the property owned by the complainant and their legal successors. Therefore the Constitutional Court took into account the sensitive approach to restitution matters established in its previous jurisprudence and continued the proceeding with the heirs of the legal successor of the original complainant.

The contested decision infringed the Constitution and was therefore annulled.

Cross-references:

The Constitutional Court referred to Judgment IV. US 211/98 in which it stated that the realisation of the participant's right to dispose of property only presumes that entitled persons act on his behalf.

Languages:

Czech.

*Identification:* CZE-2001-3-014

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 16.10.2001 / **e)** I. US 322/2000 / **f)** Appointment of a guardian / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 4.7.2 **Institutions** – Judicial bodies – Procedure.
 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
 5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Civil procedure / Guardian, appointment / Guardian, local authority.

Headnotes:

Before appointing a guardian to a party in a set of civil proceedings, the Court has to carry out an investigation to find whether there are pre-requisites for such a procedure, and whether other measures could be used. The Court should also demand the plaintiff to duly prove his/her allegation that the defendant's residence is unknown. A similar obligation arises also if the person lives on the territory of the Czech Republic.

Summary:

The complainant challenged the decision of the Court by which she was appointed guardian to a party in a set of civil proceedings who was not living at either his permanent or his temporary address. According to the complainant no law imposed such an obligation on her and she did not agree to perform the duty of a

guardian. The appointment of a guardian by the Court is a decision of the Court, which can be appealed by the guardian (in this case the municipality).

A guardian's duty is terminated either by the disappearance of reasons leading to the establishment of a guardian's duty or by the decision of a court to withdraw a guardian.

When the Court appoints a guardian, it considers the fulfilment of statutory presumptions and conditions. The Court also appoints a guardian to a person whose residence is unknown or if it is necessary for the protection of his or her interests, if it is required by public interest or if the Court finds another important reason for the appointment.

The Court can only appoint a local government body as a guardian if a relative of a natural person or another person fulfilling the conditions for the appointment, as a guardian cannot be appointed. This provision should be applied only in case of a natural person who was deprived of legal capacity or whose legal capacity was limited by a judgment of a court.

The Constitutional Court pointed out that the ordinary courts did not deal with the statutory prerequisite for the possible appointment of a guardian at all, i.e. the obligation to examine if the relative of a natural person or another person fulfilling the pre-requisites for the appointment as a guardian could not be appointed. The ordinary courts also breached other fundamental rights of the complainant as they did not provide the municipality with relevant information for due performance of the guardianship leading to the protection of the ward's rights. Furthermore, the ordinary courts did not settle all objections stated in the remedies and did not use the possibility to order a hearing regardless of the complainant's serious objection.

Therefore the contested decision was annulled.

Languages:

Czech.



Identification: CZE-2001-3-015

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 16.10.2001 / **e)** Pl. US 5/01 / **f)** Regulation of agriculture / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
 2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
 3.10 **General Principles** – Certainty of the law.
 3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2 **Fundamental Rights** – Equality.
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Agriculture, quotas / Agriculture, subsidy / Fundamental right, essence, preservation / Animal, protection.

Headnotes:

Any interference by the state in person's disposal of his or her property has to respect a principle of balance between the interests of society and the protection of individual human rights. There must also be a reasonable relation of proportionality between the means used and the pursued aims. Neither constitutional order nor international treaties on human rights and fundamental freedoms forbid the legislator to introduce restrictions on the amount of economic production, distribution or consumption of goods.

The individual's right to a free market without any regulation does not represent the fundamental right guaranteed by the Constitution or international treaties. In European Union countries, regulation of agriculture is not understood as a breach of this principle either. The legislator is entitled to introduce price or quantity regulation in specific branches of the economy. This restriction does not represent expropriation as the owner is entitled to dispose of

the thing further. The claim to a certain price is not part of the fundamental right to property.

Summary:

A group of deputies lodged a petition to annul a government decree on quantification of milk production quotas for the period of 2001-2005. According to the deputies the Decree was incompatible with the fundamental rights. Their legal representative asserted during the oral hearing that it is not possible to argue on Community law grounds, as the Czech Republic is not an European Union member.

The government, the Ministry of Agriculture and the State Agricultural Intervention Fund gave their comments on the suggestion and requested a rejection of the petition. An entitled subject lodged the petition and the contested decree had been passed and accepted within the competence set up in the Constitution.

The Constitutional Court first noted that there are no legal regulations prohibiting the legislator to introduce a restriction on the amount of economic production, distribution or consumption of goods. A certain restriction of production and distribution of goods is also common by international standards. However, when issuing ordinary laws, the parliament should take into account the public interest in regulating economic relations in a particular activity. At the same time there must be a reasonable relation of proportionality between the means used and the pursued aims.

The introduction of milk production quotas presents an approximation of Czech legal regulation to that in the European Union. The regulation introduced by the contested Regulation basically represents the transposition of the Community model into Czech agriculture both from the legal technical point of view (production quotas and sanction payments for overproduction) and regarding the setting of the amount. The introduced regulation means the accomplishment of programme provisions relating to the approximation of the Czech law with Community law, as it is set up and demanded (although not expressly) in the Europe Agreement establishing an Association between the European Communities and the Czech Republic from 1993.

The right to free enterprise ranks among the rights that can be claimed only within the limits of the laws implementing them. The legislator is more qualified to establish more precise conditions of this right; at the same time he has to preserve the essence and significance of fundamental rights and the restrictions have to serve the prescribed aim only.

Legal independence of the producer is preserved. The purpose of this restriction is price stabilisation. The legislator defined clear, empowering delegated legislation for issuing the government regulation and the government respected these. The restriction of production does not represent expropriation, and the claim to a certain price is not part of the fundamental right to property. Although making stricter qualitative requirements could also be considered as a disadvantage, such an objection would be considered as unacceptable. The purpose of the system of quotas is to create conditions to secure sales and obtain an appropriate minimum price for every producer. The state can also, on serious grounds, prohibit the production exceeding the given amount. In case of infringement of such a prohibition the state can undoubtedly impose sanctions. A restriction putting milk production over the prescribed production quotas or outside their system at a disadvantage is generally admissible. Imposing fines can be considered as neither expropriation nor as compulsory administration of property. The Court of Justice of the European Communities expressed its opinion on the issue of restriction of the basic property right in connection with the application of the Community rules on agricultural production.

The Constitutional Court also observed that the objection of two different prices of milk is unfounded. The price of milk is the same for all producers and the prescribed payment is the sanction for the infringement of the rules of the quota system. When respecting the rules, all milk producers have an equal position and the law regulates the sanctions for their infringement in order to achieve a stability of the market.

The creation of the production quota system does not discriminate against anyone not participating in it. Differentiation among individual producers is based on the choice of each such producer. He has the opportunity to ask for an individual production quota or not to use this option. Thus the system of quotas corresponds with the principle embodied in the Constitution, according to which "any statutory limitations upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions". Owing to the factual impossibility of producing milk outside the system of production quotas, the division of production quotas is a mechanism similar to the determination of the quantitative scale of business activities. The quota system rules are general, accessible and foreseeable; therefore, in this respect, the objection of inequality is unsubstantiated.

As far as the producers exclusively using fixed cattle stalls are concerned, the Constitutional Court was of

the opinion that the preference for ecological breeding of dairy cattle in the division of new production quotas or increasing the existing ones, cannot be considered as unconstitutional discrimination. The legislator is entitled to use it for reasons of public interest, which, no doubt, includes the need to improve the treatment of animals. This activity is certainly right and acceptable. State aid can be provided in the form of subsidies or in other forms. The legislator is entitled to embody this preference into the law in connection with the division of other production quotas or their reduction. However, the government is not empowered to do it when it issues subordinated legislation.

The Constitutional Court has annulled this provision as it does not respect the reservation of law and is in contradiction with the Constitution.

The dissenting opinion stated that the reasoning contained in the majority opinion did not meet all the requirements of the principle of proportionality. In particular, it did not meet the requirement of subsidiarity in relation to the possible alternative means to achieve the pursued aim.

The judges consider as a key principle the application of Article 1.2 Protocol 1 ECHR, from the interpretative point of view, resulting from the European standards contained in Community law.

Supplementary information:

See also Pl. ÚS 16/93.

Languages:

Czech.



Identification: CZE-2001-3-016

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 22.10.2001 / **e)** IV. US 37/01 / **f)** Unlawfully evidence / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

3.18 **General Principles** – General interest.

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

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

5.3.13.29 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.

Keywords of the alphabetical index:

Criminal procedure / Witness, anonymous / Witness, right of defence to examine / Evidence, partial submission.

Headnotes:

The principle of subsidiarity and the need to minimise restrictions on the rights of defence have to be considered as decisive criteria of the constitutionality of a secret examination of a witness. When taking evidence during a secret examination of a witness, a conflict arises between the principles of due process on the one hand, and the legitimate attempt of legislators to protect democratic society against an increase in crime and particularly organised crime on the other. Restricting the right of defence of an accused or defendant by concealing the witness' real identity is only allowed if necessary for the protection of the witness' fundamental rights. The established circumstances have to indicate that the witness or the person close to him are obviously threatened by injury or another serious danger of infringement of their fundamental rights.

Summary:

In his constitutional complaint the complainant challenged judgments of the courts, which found him guilty of producing and possessing narcotics and psychotropic drugs and toxicants. He objected that he was sentenced on the basis of an identification performed in conflict with the Code of Criminal Procedure. According to settled jurisprudence the witness, when establishing the identification of an offender, first describes him. Subsequently, the suspected person is shown to him among several other persons of similar appearance. Identification of a person only by virtue of a photo can be used only if "identification *in natura*" is not possible because the suspected person has not been identified. This also applies for an investigation carried out in a broad circle of persons and the suspected person is established by this procedure. Carrying out of repeated "*in natura*" identification would prevent due process when checking a notice of facts indicating

commission of a crime. This procedure, however, was not kept. The identification was only carried out by virtue of photographs.

According to the opinion of the Constitutional Court, the identification was not carried out duly as the complainant was placed among much younger persons who differed from him markedly. This fact creates a doubt about the credibility of the identification.

Another circumstance leading to the conclusion on unconstitutionality of the contested provisions is the concealment of two witnesses' identities without either mentioning any specific reasons proving that these persons, or the persons close to them, were threatened by injury or another serious danger of infringement of their fundamental rights, or providing protection for a witness in another suitable way. It follows from the judgments of the Constitutional Court that the purpose of the right to an open hearing is to provide the defendant with the possibility of verification of evidence directed against him during the criminal procedure. This comprises two components: the first is to verify the truthfulness of the facts of the case, the other to verify the credibility of a witness. The fact that some witnesses can be anonymous restricts the possibility of a defendant to verify the truthfulness of a witness testimony directed against him as it excludes the possibility to express his opinion on the person of a witness and his credibility. Therefore it restricts his right to defence and is in conflict with the principle of equality of arms. It is possible to restrict fundamental rights or freedoms in case of their conflict. However, a fundamental right or freedom can be restricted only in the interest of another fundamental right or freedom.

In the case of the justification of priority of one of the two fundamental rights in conflict, the necessary prerequisite for the final decision is to use all possibilities to minimise the infringement of the other right. Fundamental rights and freedoms have to be preserved not only in employing the provisions concerning limitations upon fundamental rights and freedoms, but by analogy, also in the case of their mutual conflict.

The Court deals independently, according to the circumstances of a given case, with the issue of necessity of the witness' protection during the main trial proceedings and mere fear that he does not tell the truth in the presence of a defendant is sufficient for such procedure. It is necessary to differentiate between the concealment of a witness during the main trial proceedings and the concealment of his identity in the preparatory proceedings. The act

stipulates much stricter requirements in the latter case.

The Constitutional Court also noted that the ordinary court should also review the relation between witnesses and the complainant as well as objections against the credibility of witnesses, and supply all necessary evidence for this purpose. The fact that the part of the contested decision relating to the statement does not contain the statement determining the complainant's guilt is a formal mistake. It is clear only from the reasoning that the court identified itself with the statement determining the guilt. As the complainant's right to a fair trial was violated by ordinary courts and bodies responsible for criminal proceedings, the Constitutional Court annulled the contested decisions.

Supplementary information:

See also Pl. US 4/94, III. US 210/98, II. US 104/96.

Languages:

Czech.



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 of Constitutional Law** – Categories – Written rules – International instruments.

2.1.3 **Sources of Constitutional Law** – Categories – Case-law.

3.3 **General Principles** – Democracy.

3.18 **General Principles** – General interest.

3.21 **General Principles** – Equality.

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

5.4.8 **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 iudicata* / 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 (*Glaser 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 (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;

European Court of Human Rights:

- *Glaserapp 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*, 08.12.1999, no. 28541/95, §§ 60, 66 and 67, ECHR 1999-VIII; *Bulletin* 1999/3 [ECH-1999-3-009].

Languages:

Czech.

Denmark

Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 2001 – 31 December 2001.



Estonia

Supreme Court

Important decisions

Identification: EST-2001-3-005

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 11.10.2001 / **e)** 3-4-1-7-01 / **f)** Review of the constitutionality of the Weapons Act / **g)** *Riigi Teataja III* (Official Bulletin), 2001, 26, Article 280 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.41 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Weapon, permit / Punishment, criminal, consequences / Hunting, self fulfilment / Weapon, self fulfilment.

Headnotes:

A restriction which results from the criminal punishment of a person and which accompanies him for life, irrespective of the nature and gravity of the crime committed, may prove to be disproportional to the purpose of protecting the life and health of others.

Hunting is a form of personal self-realisation.

Summary:

Tallinn Administrative Court initiated constitutional review proceedings, asking the Supreme Court to declare Section 28.1.6 of the Weapons Act invalid. According to that provision, a weapons permit should not be issued to a person who had been punished under criminal procedure for a crime, irrespective of whether his criminal record had expired or had been expunged. That was found to be in conflict with Article 11 of the Constitution.

A person who filed an action in the original Administrative Court proceedings had been punished for robbery in 1971 with an imprisonment of three years. He was 17 years old at that time. Later on, he had been a hunter for years, and had never been in conflict with the law. According to him the restriction of the Weapons Act was unnecessary in a democratic society and distorted the fundamental rights of Articles 19, 29.1 and 32.2 of the Constitution.

The Constitutional Review Chamber of the Supreme Court decided to transfer the case to the Supreme Court *en banc*, due to the importance of the case and because the previous practice of the Chamber was about to be changed.

The Supreme Court *en banc* found that the right to buy and possess a weapon may be covered by the right to free self-realisation guaranteed by Article 19 of the Constitution, and possibly also by other rights (e.g. the right to freely choose one's sphere of activity and profession). Hunting was found to be a form of free personal self-realisation.

While analysing the compliance of the restriction imposed by the Weapons Act with Article 11 of the Constitution, the Supreme Court found that the restriction met the requirement of having a legitimate aim (to prevent danger to life and health of individuals) and that the restriction was enacted by an act of parliament (i.e. formally in compliance with the Constitution). With reference to an earlier decision of the Supreme Court (Decision 3-4-1-9-2000, *Bulletin* 2000/3 [EST-2000-3-008]), the Court found, however, that the requirement of proportionality was not met. According to the Supreme Court, a restriction which was related to punishment under criminal procedure and accompanied a person for the whole of his life, disregarding the nature and gravity of the crime committed, might prove to be disproportional to the purpose of protecting the life and health of others. The legislator should have given the executive an opportunity to consider the personality of an applicant for a weapons permit and the circumstances of the crime committed.

The Supreme Court partially invalidated Section 28.1.6 of the Weapons Act.

Supplementary information:

Two of the justices of the Supreme Court submitted a dissenting opinion. They considered the restriction imposed by the Weapons Act to be proportional to the aim of protection of life and health of individuals, taking into account that this restriction applied to persons who had committed a crime.

Cross-references:

- Decision III-4/A-1/94 of 12.01.1994, English full text in CODICES [EST-1994-X-001];
- Decision 3-4-1-9-2000 of 06.10.2000, *Bulletin* 2000/3 [EST-2000-3-008];
- Decision 3-4-1-2-01 of 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003].

Languages:

Estonian, English (translation by the Court).

*Identification:* EST-2001-3-006

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 07.12.2001 / **e)** 3-1-1-27-01 / **f)** / **g)** *Riigi Teataja III* (Official Bulletin), 2002, 2, Article 8 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.

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

4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Fee, amount, purpose / Parking, fee / Tax, characteristics / Parking, fee, essence and purpose.

Headnotes:

A parking fee is not a tax, but a service fee, a charge for the use of a public facility.

Summary:

Mr Toomas Liiva, who had been subjected to a fine for a violation of parking regulations, filed a complaint with Tallinn Administrative Court, requesting the annulment of the fine-claim. He found that the fine-claim was unlawful, since the request of a fee for parking in public streets cannot be a duty in public law, or compulsory insurance payment, fine, tax, fee or rental charge in private law. Consequently, Mr Liiva

considered the parking fee to be unconstitutional and he asked the Court to declare unconstitutional some provisions of a regulation of Tallinn City Council, which regulated parking fees in public streets. Tallinn Administrative Court did not satisfy the complaint. Tallinn Circuit Court upheld the decision of the Administrative Court. Mr Liiva appealed against the judgment of the Circuit Court to the Supreme Court. He upheld this claim that the parking fee imposed by the Tallinn City Government was unconstitutional. The parking fee could not be a fee in private law, since the streets in a city are for public use, and cannot be commercially exploited. On the other hand, if the parking fee is to be considered a tax, it was imposed in an unlawful manner. Although the Traffic Act empowers the owner or possessor of a road to provide for a parking fee, it is the city councils, not city governments that may determine the tax rate according to the Local Taxes Act. In the case of the City of Tallinn, determination of the tax rate and the area of application of the parking fee was delegated to the City Government by the City Council.

The Criminal Chamber of the Supreme Court transferred the case to the Supreme Court *en banc* in order to ensure uniform application of law. The Supreme Court *en banc* decided to proceed from the Constitutional Review Court Procedure Act, in addition to the provisions of the Code of Administrative Offences. Therefore, additional persons – representatives of the City of Tallinn, the parliament, the Legal Chancellor and Minister of Justice – were invited to take part in the procedure.

According to the Supreme Court the parking fee is not a tax, since it does not have all the characteristics of a tax as provided for by Section 2.1.1 of the Taxation Act.

The Supreme Court found that the parking fee shall be considered a service fee. It is a fee that is charged for a service provided by the city, a charge for the use of a public facility. The Traffic Act empowered the local governments to impose parking fees, not determining which institution of local government shall decide upon the imposition of a parking fee. Tallinn City Council delegated the right to determine the areas and rates of parking fees to the City Government. According to the Local Government Organisation Act the right to levy taxes is in the exclusive competence of city councils. Since the Supreme Court found that the parking fee was not a tax, the City Council had the right to delegate the determination of the areas and rates of parking fees to the City Government.

The Supreme Court concluded that the pertinent regulations of Tallinn City Council and City Govern-

ment were in conformity with Article 3 of the Constitution and with other legislation.

Supplementary information:

This case was not formally a “pure” constitutional review case. It was the first time that the Supreme Court examined a case both from the aspect of “ordinary” law (in the procedure prescribed by the Code of Administrative Offences) and from the aspect of constitutionality of the applicable legislation (in the procedure prescribed by the Constitutional Review Court Procedure Act).

Four dissenting opinions were submitted by six justices of the Supreme Court.

Chief Justice Uno Lõhmus found that in order to interpret the notion of “tax” of Articles 113 and 157 of the Constitution, one cannot proceed solely from the definition of “tax” according to the Taxation Act. The decisive factor should be the essence and purpose of the parking fee. The primary purpose of imposing a parking fee is to guarantee reasonable use of a limited resource – parking space – not to provide a service. Parking fees should have been considered a special purpose tax for the use of a public facility. Also, such monetary obligations which are not defined as “taxes” according to legislation can be interpreted as “taxes” in the meaning of the Constitution. Furthermore, the list of local taxes of Section 5 of the Local Taxes Act is not comprehensive. With reference to several previous decisions concerning the relations between the parliament and the government in the questions of taxation, Mr Lõhmus concluded that a principle has been established that all monetary obligations in public law should be imposed and important elements of these obligations should be determined by a representative body. This applies both to the national parliament and to the local government councils.

Justice Põld, with whom Justices Kull and Salmann joined, found in his dissenting opinion that the parking fee is in essence a tax. Delegation of the determination of the tax rate and the area of application of the parking fee to the City Government by the City Council was unconstitutional. Notions used in the Constitution cannot be interpreted proceeding from the interpretation attributed to them by legislation. When interpreting the Constitution, one must proceed from the substantial characteristics of the legal phenomena, taking into account legal theory. It can be concluded from Article 157.2 of the Constitution in conjunction with Articles 13, 106.1 and 110 that it is up to the representative bodies to levy taxes.

Justice Anton held that Article 157.2 of the Constitution should be interpreted in a similar way to the interpretation of Article 113 of the Constitution. This means that Article 157.2 of the Constitution includes all monetary obligations in public law, regardless of how they are described. Parking fees fall into the sphere of protection of Article 157.2 of the Constitution even if they are not a type of tax. Another position would enable the local governments to impose monetary obligations in public law without any legal authorisation, in case these obligations would not be or would not be defined as “taxes”.

Justice Kergandberg did not agree with the opinion of the majority that the parking fee was not a tax because it did not have all the characteristics of a tax as provided for by Section 2.1.1 of the Taxation Act. If this position were to be developed further, hundreds of different monetary obligations – essentially taxes – could be imposed on people, but they would not be considered taxes, if some of the characteristics of a tax were omitted on purpose. According to Article 57.2 of the Constitution local governments may only levy and collect taxes and impose duties. Article 157.2 entails the right of individuals to be subjected by local governments only to the two categories of obligations mentioned. Article 157.2 of the Constitution is much more restrictive than the corresponding Article 113 on the national level. Parking fees are a local tax. It should have been listed in the Local Taxes Act. Its absence from that Act is not in conformity with Article 3 of the Constitution and with the principle of legitimate expectation.

Cross-references:

- Decision III-4/A-9/94 of 07.12.1994, *Bulletin* 1994/3 [EST-1994-3-005];
- Decision 3-4-1-2-98 of 23.03.1998, *Bulletin* 1998/1 [EST-1998-1-002];
- Decision 3-4-1-11-98 of 22.12.1998, *Bulletin* 1998/3 [EST-1998-3-009];
- Decision 3-4-1-10-2000 of 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009].

Languages:

Estonian, English (translation by the Court).



Finland

Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 September 2001 – 31 December 2001.



France

Constitutional Council

Important decisions

Identification: FRA-2001-3-010

a) France / **b)** Constitutional Council / **c)** / **d)** 27.11.2001 / **e)** 2001-451 DC / **f)** Act to improve cover against work accidents and occupational illnesses for non-salaried agricultural workers / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 01.12.2001, 19112 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

4.7.9 **Institutions** – Judicial bodies – Administrative courts.

4.7.13 **Institutions** – Judicial bodies – Other courts.

Keywords of the alphabetical index:

Work accident, non-salaried agricultural worker / Social security, non-salaried agricultural worker / Occupational illness, non-salaried agricultural worker / Parliament, order of business / Court, social security, jurisdiction.

Headnotes:

The member of parliament who tabled the bill based it on the provisions of an earlier government bill which had failed; in addition, in the course of debate, the government tabled amendments supplementing the private member's bill in line with the previous government bill. These circumstances are no impediment to the bill being debated under the part of the order of business determined by parliament ("*niche parlementaire*").

The provision giving the social security tribunals jurisdiction over administrative cases involving public authority prerogatives is struck out *ex officio*. This provision is held to be contrary to the fundamental principle recognised by the laws of the Republic

whereby “except for matters reserved by their nature for the judicial authorities, the annulment or reversal of decisions taken in the exercise of public prerogatives by the authorities exercising executive powers, their servants, the local or regional authorities of the Republic or public agencies placed under their authority or supervision fall under the final jurisdiction of the administrative courts ...”.

Summary:

The Act “to improve cover against work accidents and occupational illnesses for non-salaried agricultural workers” having been referred to it by more than 60 senators and more than 60 members of parliament, the Constitutional Council rejected both applications. The act in question replaced previous protection, based on a compulsory, competitive insurance mechanism, by the institution of a fourth branch of social security for non-salaried agricultural workers and for this purpose conferred a non-exclusive but determining role upon the agricultural mutual insurance network. In particular, the Council rejected the complaints of an abuse of Article 48.3 of the Constitution (“*niche parlementaire*”).

Article L. 752-27 of the Rural Code, in the wording of Article 1 introduced by the Act in question, giving the social security tribunals jurisdiction over administrative cases involving public prerogatives, was annulled *ex officio*.

Languages:

French.



Identification: FRA-2001-3-011

a) France / **b)** Constitutional Council / **c)** / **d)** 06.12.2001 / **e)** 2001-452 DC / **f)** Act introducing urgent reforms of an economic and financial nature / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.12.2001, 19712 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
3.25 **General Principles** – Market economy.

5.2 Fundamental Rights – Equality.

Keywords of the alphabetical index:

Social economy, co-operatives and associations / Public tender, bidder, persons with integration difficulties.

Headnotes:

The public interest in fostering the “social economy” clearly does not justify the unequal treatment of bidders for a public contract through one quarter of the items open for tender being reserved for co-operatives and associations.

Summary:

The following provision was annulled: “Where public tenders to which the Public Tenders Code applies are divided into parts, some or all of which may be performed by co-operative societies or associations whose aim is to foster the employment of persons encountering particular integration difficulties or to support individual or collective enterprise, combat unemployment or protect the environment, one quarter of such parts shall be offered for competition between such co-operatives and associations”.

Languages:

French.



Identification: FRA-2001-3-012

a) France / **b)** Constitutional Council / **c)** / **d)** 18.12.2001 / **e)** 2001-453 DC / **f)** Social Security Financing Act 2002 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.12.2001, 20582 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.3.36 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Social security, law on financing.

Headnotes:

The principle of the non-retroactive effect of laws has constitutional value only in criminal matters; whereas, in other matters, the legislature may adopt retroactive provisions, it may do so only in consideration of a sufficient public interest and provided constitutional requirements are not thereby deprived of statutory safeguards.

Provisions of which none has any significant impact on the expenditure or receipts of the social security bodies for the current or the following year and none of which improves parliamentary scrutiny of the application of social security funding legislation, must be declared unconstitutional, as they fall outside the scope of legislation governing social security funding.

Summary:

A provision to cancel an amount owed by the state to the social security agencies as at 31 December 2000 constitutes a retroactive measure not justified by a sufficient public interest.

Various measures (including crediting the 2000 surplus of the National Family Allowances Fund to the Infant Care Establishments Development Fund and the Pensions Reserve Fund) had no impact on the financial equilibrium of the social security agencies in either 2001 or 2002. They accordingly had no place in the Social Security Financing Act 2002.

Languages:

French.

*Identification:* FRA-2001-3-013

a) France / **b)** Constitutional Council / **c)** / **d)** 27.12.2001 / **e)** 2001-456 DC / **f)** Finance Act 2002 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.12.2001, 21159 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.1.1.2.3 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation – Independence – Financial independence.

3.4 **General Principles** – Separation of powers.

4.3.1 **Institutions** – Languages – Official language(s).

4.3.3 **Institutions** – Languages – Regional language(s).

4.4.1.6 **Institutions** – Head of State – Powers – Powers with respect to the armed forces.

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

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

4.10.2 **Institutions** – Public finances – Budget.

5.4.1 **Fundamental Rights** – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Parliament, appropriations / President, appropriations / Constitutional Court, appropriations / Public authority, financial autonomy / Secret service, military operation in progress / Language, teaching / Language, regional, use in public services / Education, school, private, use of regional language.

Headnotes:

According to the relevant constitutional provisions, it is for the parliamentary assembly to authorise a declaration of war, to vote appropriations for national defence and to review the use made of them, but by no means to intervene in the conduct of operations in progress.

Section 115 of the Finance Act 2002 reads: "I. A report shall be appended to the annual Finance Bill explaining the estimates submitted by each of the public authorities. II. An explanatory schedule shall be appended to the Settlement Act showing, for each of the public authorities, the final amount of appropriations and expenditure and detailing the difference between them and the initial estimates for 2003".

These provisions must not be interpreted as an impediment to the rule whereby the constitutional public authorities themselves determine the appropriations necessary for their operation. This rule is inherent in the principle of their financial autonomy, which guarantees the separation of powers. Subject to this strict proviso, Section 115 complies with the Constitution.

Under Article 2.1 of the Constitution, the use of French is obligatory for public law legal entities and private law persons in performing public service

functions. Individuals may not, in their relations with public services and government departments, claim a right to use a language other than French, nor be compelled to do so.

Consequently, although, in order to help preserve regional languages, the state and local and regional authorities may assist associations which pursue that goal, the use of a language other than French may not be imposed on pupils of public educational establishments either in the establishment's affairs or in the teaching of subjects other than the language concerned.

Summary:

According to Article 5.2 of the Constitution, the President of the Republic is the guardian of national independence, territorial integrity and the observance of treaties; under Article 15 of the Constitution, he is commander-in-chief of the armed forces; Article 21 of the Constitution provides that the Prime Minister is responsible for national defence; under Article 35 of the Constitution, parliament authorises a declaration of war; according to Articles 34 and 47 of the Constitution, parliament, when adopting the Finance Act, votes the necessary appropriations for national defence.

A committee composed mainly of members of parliament was made responsible for scrutinising the "operations in progress" of the secret services. This provision was annulled because it was contrary to the constitutional prerogatives of the executive in defence matters. Parliamentary scrutiny may be exercised only *a posteriori* to verify whether the appropriations have been used for the purpose for which they were intended.

The Act provides for a report explaining the estimates submitted by the constitutional public authorities (parliamentary assembly, President of the Republic, Constitutional Council, High Court of Justice). This provision must not be interpreted as contradicting the rule of their financial autonomy, directly derived from the principle of the separation of powers.

On the question of incorporating into the public education system establishments run by the "Diwan" association, practising the teaching of Breton by "total immersion", the Council exhorts the relevant administrative and judicial authorities to abide by Article 2 of the Constitution ("the language of the Republic is French").

Cross-references:

- Cf. on the question of regional languages, the decision of 29.07.1994 (1994-345 DC), *Bulletin* 1994/2 [FRA-1994-2-005].

Languages:

French.



Identification: FRA-2001-3-014

a) France / **b)** Constitutional Council / **c)** / **d)** 27.12.2001 / **e)** 2001-457 DC / **f)** Finance (Rectification) Act 2001 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.12.2001, 21172 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
 4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
 4.10.2 **Institutions** – Public finances – Budget.

Keywords of the alphabetical index:

Amendment, admissibility, conditions / Parliament, joint committee / Finance act, scope.

Headnotes:

According to Articles 39, 44 and 45 of the Constitution, concerning legislative procedure, the "joint committee" is responsible for proposing a text on provisions remaining under discussion. The only amendments that may still be adopted after the meeting of the joint committee must be directly related to a provision still under discussion or necessary in order to comply with the Constitution, ensure co-ordination with other texts being considered by parliament or correct a mistake. Amendments not meeting this requirement are deemed to have been adopted improperly.

Provisions not relating to the determination of state resources and expenditure, to taxation, not serving the purpose of organising parliamentary information

and scrutiny concerning the management of public funds or imposing pecuniary responsibilities on public service personnel and not entailing any creation or transformation of posts' lie outside the scope of the Finance Act.

Summary:

An amendment introducing new provisions after the meeting of the joint committee was annulled.

Provisions concerning the governance of public intermunicipal co-operation establishments or the delegation of authority by the municipal councils of Paris, Lyons and Marseilles to district councils for the award of public contracts were held to lie outside the scope of the Finance Act.

Languages:

French.



Georgia Constitutional Court

Summaries of important decisions of the reference period 1 September 2001 – 31 December 2001 will be published in the next edition, *Bulletin 2002/1*.



Germany

Constitutional Court

Important decisions

Identification: GER-2001-3-004

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 04.04.2001 / **e)** 1 BvQ 32/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.5.4.7 **Constitutional Justice** – Decisions – Types – Interim measures.

1.6.7 **Constitutional Justice** – Effects – Influence on everyday life.

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 family life.

Keywords of the alphabetical index:

Injunction, temporary / Parent, right / Education / Consequences, weighing / School, primary / Childcare / Schoolchild / Detriment, serious.

Headnotes:

Issuing a temporary injunction against a law clearly constitutes a considerable intervention in parliament's legislative discretion. Therefore, the Federal Constitutional Court may temporarily prevent legislation entering into force only if the detriment that would result from its entry into force and its subsequent declaration of unconstitutionality markedly outweighs the detriment that would result from preventing the entry into force of legislation that is deemed to be constitutional.

Summary:

I. By way of a motion for a temporary injunction order, several parents of school-age children challenged the entry into force of a *Land* (Federal State) law which regulates the establishment of a "primary school with fixed opening hours" in the *Land* of Saxony-Anhalt as of 1 August 2001.

The challenged regulation of the *Land* School Act stipulated that a fixed, standard opening time of five and a half hours a day would be prescribed for primary schools in the *Land* and, in addition to classes, there would be day care by educational staff. At the same time, the act extended compulsory attendance at school to the periods of complementary care.

The parents who moved for the temporary injunction claimed that the new regulation violated their fundamental right under Article 6.2.1 of the Basic Law. To substantiate their motion, they stated that the execution of the law would constitute an irreparable interference with their children's education. They alleged that the practice of mothers eating lunch with their children, the extensive conversation during this time and, in some families, the saying of grace that goes with it, is of essential importance to their children's education, as is the fact that mothers generally look after their children in the afternoon. In the parents' opinion, compulsory presence at primary school for five and a half hours forces them to have their children participate, against their will, in lunch at school. The parents who moved for the temporary injunction were of the opinion that, in view of the extended influence of the state on their children, they were left with nearly no opportunity to intervene in their children's education according to their own concept of how that education should be carried out.

II. The Second Chamber of the First Panel rejected the motion as being unfounded. The grounds included the following:

Since the outcome of the proceedings in the main action could have gone in either direction when the Court was called upon to decide whether to grant the motion for a temporary injunction, the detriment that would have resulted from failing to issue the temporary injunction though the legislation was subsequently deemed unconstitutional, was to be weighed against the detriment that would have resulted if the temporary injunction were to have been issued, only for the legislation to be subsequently deemed constitutional.

In the present proceedings, such weighing of consequences showed that the detriment that could occur if the temporary injunction were granted was greater. Therefore, the motion for a temporary injunction against the implementation of the schooling model of the "primary school with fixed opening hours" was rejected.

The Court held that, if the challenged regulation entered into force as was planned on 1 August 2001, the applicants' children would be subject to compulso-

ry attendance at primary school until the main action was terminated. The fact that due to this, the children would stay at school longer and would therefore also be away from home for longer would not result, however, in a serious hindrance to or complete frustration of their parents' educational efforts. In particular, it was planned that the children be not merely looked after during their longer stay at school but also that they would receive educational care to complement the classes.

The Court reasoned that, if the temporary injunction sought by the parents were to be granted, this would, with regard to the fact that the Day Nursery Act expires on 1 August 2001, result in considerable burdens especially for working single parents but also for families in which both parents work. In this case, the parents could no longer rely on their children being taught or at least looked after by qualified staff at school. Apart from this, parliament's education policy of better adapting primary school education to the children's needs could, for the time being, not be implemented. If a temporary injunction were issued, the pupils would for some time, possibly even for a whole school year, be denied a school model that is beneficial in the opinion of education experts.

Languages:

German.



Identification: GER-2001-3-005

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 04.04.2001 / **e)** 2 BvL 7/98 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 4.6.9.3 **Institutions** – Executive bodies – The civil service – Remuneration.
- 4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.
- 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
- 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Public official, adequate remuneration, principle / Civil service, permanent / Employment, length / Legislative discretion / Secret service, informant / Informant, work.

Headnotes:

The case raised question as to the constitutionality of discounting the length of employment in the civil service of the former German Democratic Republic (GDR), when calculating the length of service for remuneration purposes for DG1 and DG2 grades, where a civil servant has worked as an informant for the Ministry of State Security.

Summary:

I. Pursuant to § 30 of the *Bundesbesoldungsgesetz* (BBesG, Federal Civil Service Remuneration Act) certain periods of time which a civil servant spent working for the GDR civil service will not be taken into account when calculating the length of his or her service as a federal civil servant for remuneration purposes. This applies especially to periods when he or she was an informant for the Ministry of State Security (*Ministerium für Staatssicherheit*) or the Office for National Security (*Amt für Nationale Sicherheit*). In addition, the Act precludes time preceding the work as an informant from equal treatment with time spent elsewhere in the civil service.

The plaintiff in the initial proceedings, who was born on 12 July 1941, became a member of the German People's Police in the former GDR on 1 June 1961. From 16 March 1988 until 30 November 1989 he also worked as an informant for the Ministry of State Security and was entrusted with the task of keeping a flat under surveillance where a group of conspirators were thought to be staying. After German reunification, the police service of the Free State of Saxony took over the plaintiff's employment contract. With effect from 1 March 1992 he was appointed a police superintendent with a salary in the A9 salary group and granted probationary civil servant status.

Since 9 May 1995 the plaintiff has been a civil servant appointed for life. In a notice issued on 27 October 1995, the commencement date of his length of service was fixed as 1 March 1970. Due to his work as an informant for the Ministry of State Security, both the plaintiff's service while working for such Ministry (see § 30.1.1 of the Federal Civil Service Remuneration Act) as well as the entire prior period of

employment (see § 30.1.2 of the Federal Civil Service Remuneration Act) were disregarded.



Since in the law regulating the rights and duties of civil servants the length of service has considerable influence on when a civil servant reaches a level of DG3 or DG4 seniority and, accordingly which basic salary to which he is entitled, the plaintiff brought an action to have his periods of service prior to his work for the Ministry of State Security taken into account in the determination of his length of service for remuneration purposes. The Administrative Court suspended the proceedings and referred the matter to the Federal Constitutional Court for the latter to decide on whether § 30.1, sentence 2 of the Federal Civil Service Remuneration Act was in conformity with the Basic Law (i.e. the Constitution) and, in particular whether it was in conformity with the principle of equality before the law.

II. The Second Panel of the Federal Constitutional Court determined that the statutory provision was in conformity with Article 3.1 of the Basic Law.

After reunification, when the legislature was undertaking the necessary transition of a large quantity of laws it was permitted to carry out its task by looking at the type of law involved. This was so even if could lead to hardship and possible injustice in individual cases.

The underlying idea of the provision contained in § 30 of the Federal Civil Service Remuneration Act is that periods of time spent working in the GDR civil service, which are characterised by a close proximity to its ruling system, should not serve to increase a civil servant's remuneration to the extent fully possible. This does not imply that the differentiation made between periods of service prior to and following work for the Ministry of State Security is arbitrary. The parliament was permitted to assume that prior to commencing work for the Ministry of State Security, particularly as an informant, an individual would usually have been through a phase where he was favourably disposed to the GDR system. It is, therefore, justified to take this into account by not allowing such a period to be included when measuring a civil servant's length of service for remuneration purposes. In contrast, it is possible to interpret the discontinuation of work for the Ministry of State Security as a conscious rejection of the ruling system in the GDR so that on the whole, different treatment of the periods of time involved is not arbitrary.

Languages:

German.

Identification: GER-2001-3-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 06.06.2001 / **e)** 2 BvR 828/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
 5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Recidivism, prediction / Imprisonment, life / Guilt, seriousness / Sentence, suspension, probation / Sentence, remainder / Imprisonment, length.

Headnotes:

If a prisoner has already served a relatively long part of his or her imprisonment, his constitutional rights, guaranteed under Article 2.2.2 in conjunction with Article 20.3 of the Basic Law are violated, at least when, in proceedings that seek the suspension of a sentence of life imprisonment in favour of probation, the competent court unreasonably delays the proceedings.

Summary:

I. In 1977, the complainant was sentenced to life imprisonment for homicide. After serving 15 years of his sentence, the prisoner, who had been in prison since his conviction, lodged an application seeking probation and the suspension of the remainder of his prison sentence. The competent court rejected the application and held that the seriousness of the prisoner's guilt justified an execution of his prison sentence for 17 years.

In the following years, the complainant applied for measures easing the imprisonment and for probation following the suspension of the remainder of his sentence. In this context, numerous delays in the

proceedings occurred. When examining whether the prerequisites for granting probation and suspending the remainder of the complainant's sentence were met, the Regional Court (*Landgericht*) subsequently commissioned, between May 1993 and December 1998, four opinions by psychiatric experts on the dangers posed by the complainant. Motions to disqualify the experts were not granted. The Court accepted, without making sustained efforts to speed up the process, that it took the third expert from May 1994 to April 1995 to draw up his opinion. As concerns the motions to disqualify the experts, the Regional Court, between June 1995 and May 1997, limited itself to reminding the expert, at intervals of several months, that he should submit his opinion, although it is not mandatory to hear the expert in the proceedings for his disqualification. Only in February 1996 did the Regional Court decide upon a motion to challenge the presiding judge on grounds of bias. After the submission of the fourth expert opinion, the compilation of which was drawn out until May 1998, due to the fact that the prison at first did not provide the expert with the prisoner's file, the Regional Court ordered the suspension of the remainder of the prisoner's sentence and placed the complainant on probation as from October 1999. Upon an immediate complaint of the public prosecutor, however, this order was reversed by the Higher Regional Court subject to the proviso that the complainant first had to prove himself worthy of probation during a period in which his imprisonment was to be eased gradually. In spite of this decision, the prison continued to deny the complainant's requests for measures easing the terms of his imprisonment. After an unsuccessful appeal before the Regional Court, the Higher Regional Court, in February 2000, described the denial of the complainant's requests for an easing of the terms of his imprisonment as "no longer understandable".

When the Regional Court, in May 2001, had not yet decided upon a new application by the complainant, dated 27 June 2000, by means of which he sought probation and the suspension of the remainder of his sentence, the prisoner lodged a constitutional complaint against the Court, claiming that his constitutional rights had been violated by the court's inaction.

II. The Third Chamber of the Second Panel granted the complainant's constitutional complaint on account of a violation of Article 2.2.2 of the Basic Law in conjunction with the principle of the rule of law.

The Chamber stated that the delay of eleven months in the proceedings, seen by itself, is not unreasonably long in the case of a sentence of life imprisonment. However, due to the unique case history, a different

assessment was required. For about seven years, the particular seriousness of the prisoner's guilt no longer justified the maintenance of the actual length of imprisonment. At the same time, the way in which the complainant's former applications for measures easing the terms of his imprisonment, which would have given him the opportunity to prepare himself for his discharge, and for the suspension of the remainder of his sentence and the grant of probation, had been dealt with in their entirety, all of which made the decision especially urgent.

Whether the principle of speedy proceedings that is enshrined in constitutional law has been violated must be judged in accordance with the circumstances of each individual case. The standards in this context, were in particular:

1. the length of time for which proceedings were delayed;
2. the actual length of imprisonment;
3. the length of the proceedings that dealt with the granting of probation and the suspension of the remainder of his sentence;
4. the importance of these proceedings with a view to the crime for which the accused was sentenced;
5. the imposed sentence or measures of correction and prevention;
6. the scope and difficulty of the subject matter of the case, and
7. the burden that a continuation of the pending proceedings would mean for the accused. In this context, the behaviour of the accused during proceedings is to be valued in a reasonable way as well.

If these aspects were taken into account, and against the background of the unique circumstances of the proceedings that have been described above, the fact that the Regional Court, in the proceedings that were initiated more than eleven months previously upon the complainant's application, seeking probation and the suspension of the remainder of his sentence, let several more months pass without hearing the complainant, which is prescribed by law, transgresses the bounds of what is compatible with the duty to provide speedy process under constitutional law. Because all information that is relevant for the decision had been compiled at this point in time, the complainant's application for probation and the

suspension of the remainder of his sentence could have been decided sooner.

The delay in the proceedings also appears to be unreasonable with a view to the fact that the actual length of imprisonment in the case of a life sentence, which in most cases is only imposed for murder, is, on average, only 20 years, whereas the actual length of imprisonment in the present case was approximately 24 years to date.

Languages:

German.



Identification: GER-2001-3-007

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 02.07.2001 / **e)** 1 BvR 2049/00 / **f)** **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.

Keywords of the alphabetical index:

Employment, relationship / Statement, duty / Evidence, taking / Criminal justice, functionality / Preliminary investigation, termination, ground.

Headnotes:

The duty to give evidence is a general civic duty and may not immediately lead to a citizen's suffering private law disadvantages as a result of his or her fulfilment of such duty. The present case dealt with the termination of an employment relationship without notice on account of a witness statement made by the employee incriminating the employer in criminal investigation proceedings.

Summary:

I. The complainant, who was born in 1937, was employed by the same company for almost thirty years. The company was involved in urban development and traffic planning for a town, "B". As a result of press releases and the activities of a municipal council group, the Public Prosecutor's Office (PPO) commenced *ex officio* investigative proceedings in October 1996 against the company and its director. The PPO suspected that there had been irregularities in the company's performance of contracts which could make the company criminally liable and which had disadvantaged the public purse. While investigations were being carried out, the complainant held several conversations with various public prosecutors. In the course of such meetings he handed over to them *inter alia* a folder containing documents collected by himself. The preliminary investigations were discontinued after one and a half years.

After the employer learned that the complainant had given the PPO documents, it terminated his contract of employment without notice. The reason given for the termination was the complainant's handing over of documents to the public prosecutor for the purposes of incriminating the director without having been asked to do so.

An action for protection against unlawful dismissal brought by the complainant was unsuccessful at all instances. In particular, the court deciding at last instance, the Higher Labour Court (*Landesarbeitsgericht*), was of the opinion that the termination was justified since the employee had voluntarily and upon his own initiative made documents available to the public prosecutor which gave rise to a suspicion against his employer. He had gone to the public prosecutor's office several times of his own accord hoping to expedite the investigations into the employee's dealings through his statements. The discontinuation of the preliminary investigations was proof that his statements were unfounded.

In bringing this constitutional complaint the complainant is alleging an infringement of his rights under Article 2.1 of the Basic Law in conjunction with the principle of the rule of law as well as an infringement of his rights under Article 12.1 of the Basic Law in conjunction with the principle of a social welfare state.

II. The Second Chamber of the First Panel overturned the Higher Labour Court's decision and found that statements made by an employee against an employer in investigation proceedings do not necessarily entitle the latter to terminate the employment relationship. Its reasons were essentially as follows:

The Higher Labour Court should have taken into account that in making statements to the Public Prosecutor's Office and by supplying it with documents the complainant was in fact fulfilling duties imposed by the legal order. Especially the duty to give evidence is a general civic duty. It would not be reconcilable with the existence of these duties in a state governed by the rule of law if the person fulfilling such duties had to suffer disadvantages under private law as a result thereof. Even if the employee did go to the Public Prosecutor's Office voluntarily and hand over documents of his own free will, the Higher Labour Court should have taken the constitutional aspect into account. The exercise of civic rights in criminal proceedings – provided no statements known to be untrue are made and provided no false statements are made recklessly – will not normally provide grounds for terminating an employee relationship without notice due to reasons connected with the rule of law. A private law decision which does not recognise this or ignores it violates the affected citizen's fundamental rights under Article 2.1 of the Basic Law in conjunction with the principle of the rule of law.

Languages:

German.



Identification: GER-2001-3-008

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 23.07.2001 / **e)** 1 BvR 873/00, 1 BvR 874/00 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 3.19 **General Principles** – Margin of appreciation.
 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Occupation, profession, practise / Ethics, medical / Patient, best interest / Surgery nameplate / Advertising, dentist / Medical profession, commercialisation.

Headnotes:

Article 12.1 of the Basic Law (occupational and professional freedom) requires that the courts should not use a prohibition on information – derived from rules governing professional conduct – as a means of standardising how practitioners present themselves since this would be against the interests of patients.

Summary:

1. The complainants were practising dentists and had acquired special knowledge and expertise in the field of oral implant work. They also possessed the relevant certificates evidencing their qualifications.

They had been active in this field for many years and derived a quarter, if not half, of their fees from implant services. They had written on their letterhead and the nameplate of their surgery the additional words "Specialists in Dental Implants".

The professional disciplinary tribunal competent for dentists fined the complainants for conduct unbecoming to their profession and a breach of the prohibition on advertising laid down in the rules governing professional conduct.

After being unsuccessful in appellate proceedings, the dentists involved filed a constitutional complaint and claimed that their occupational and professional freedom protected by Article 12.1 of the Basic Law had been infringed.

2. The Second Chamber of the First Panel overturned the judgment which was the subject of the constitutional complaint because the professional disciplinary tribunal's view of the significance of occupational and professional freedom (Article 12.1 of the Basic Law) was fundamentally erroneous. The Second Chamber then referred the case back to the competent professional disciplinary tribunal.

The essential reasoning was as follows:

In principle, the prohibition on advertising by practitioners – aimed at the protection of a legal interest, namely the health of the population – is intended to prevent what health policy considers to be the undesirable commercialisation of the medical profession. However, this objective is no justification for generally prohibiting any details and additional information from being included on a surgery's nameplate unless they have been expressly allowed by the rules governing professional conduct. The meaning and purpose as well as the informational content of the details and information included must

be first taken into account. Even practitioners are not prohibited from using any kind of advertising; they are simply prohibited from advertising in a manner which is in breach of the rules governing professional conduct.

In addition, there is from the patient's point of view an interest in knowing the dentist's range of services if he or she has a particular specialisation. The professional regulations recognise this by allowing fellow practitioners to have such information and allowing information regarding specialisations to be passed on to the Medical Society. It is true that the nameplate on a surgery door has a more far-reaching effect, but nonetheless the danger of misleading patients, or of patients confusing a specialisation with the designation of an occupational field, is not increased.

Patients here would have understood the wording of the information as meaning that the dentist possessed particular experience and that he or she practised regularly. No misunderstandings would occur if a practitioner whose field of occupation is dental, orthodontic and facial surgery adds his or her specialisation with the initials "BDIZ" (Association of Dentists Practising Implant Surgery in Germany) to the designation of the occupational field.

Even if dentists rarely specialise, Article 12.1 of the Basic Law still requires that the courts do not use a prohibition on information to standardise the way they present themselves since this would be against the best interests of patients.

However, when rules of professional conduct are interpreted and applied, the legitimate interest which the Medical Society has in safeguarding quality standards must be taken into account. This presupposes that the self-description on a surgery nameplate remains subject to certain controls. The provisions concerning admissible information for nameplates contained in the rules governing professional conduct are based on dentists being bound to serve the public interest and the related need for Medical Societies to take over a part of the control function exercised by the state. A complete prohibition on the giving of information regarding specialisations is, however, unnecessary for these control purposes.

Languages:

German.



Identification: GER-2001-3-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 10.08.2001 / **e)** 2 BvR 569/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Wealth, discrimination / Success, chance / Main action, proceedings / Legal protection, guarantee, equal / Legal aid, equal access.

Headnotes:

In principle, the grant of legal aid may not be made dependent on whether the legal remedy or defence sought appears to have a sufficient chance of success or is not malicious. When a court is deciding whether to grant legal aid pursuant to § 114.1 of the Code of Civil Procedure, its examination of how successful a claim is likely to be should not be allowed to make the legal remedies or defences involved in such claim issues in the ancillary proceedings for legal aid, since to do so would be to set the latter in the place of the proceedings in the main action.

Summary:

I. The complainants were siblings and were born in 1969 and 1972 respectively in Romania. Their mother, who was born in 1943, has lived in German Federal territory since September 1986. She was exiled from Romania and was naturalised in Germany in 1987. In the same year, she received so-called acceptance approval for her five children still living in Romania.

The complainants did not arrive from Romania until 1991 and 1992 – each with a visitor's visa. They were not recognised as either emigrants of German extraction or exiles, but were nonetheless granted residence permits for a time according to the law concerning foreign nationals. After the extension of their residence permits was refused, they brought an action against the demand to leave the country and the expulsion warning with which they had meanwhile been issued.

They lost at first instance and then the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof*) allowed their appeal and granted them legal aid.

During those proceedings the Senate expressed the view that it was inclined to see the plaintiffs as “persons with German status” and, therefore, not as persons subject to the law concerning foreign nationals. Accordingly, it suspended the proceedings so that the plaintiffs could clarify whether they were Germans within the meaning of Article 116.1 of the Basic Law through an action for a declaratory judgment. This issue could not be clarified in appellate proceedings dealing with the law concerning foreign nationals.

The complainants then brought an action for a declaratory judgment and applied for legal aid at the same time. The competent Administrative Court rejected the application for legal aid on the basis that the complainants were unlikely to succeed in the proceedings in the main action.

A “German” within the meaning of Article 116.1 of the Basic Law is someone who has been admitted to Federal territory as an exile of German ethnic origin or the spouse or descendant of such a person. Therefore, in principle the complainants could have been eligible for admission to Federal territory due to the acceptance approval, which had been granted in 1987 to allow the reunion of minors with their parents. As the complainants were no longer minors when they entered the country (in 1991 and 1992 respectively), this possibility of recognition as a German was excluded.

In addition, it was questionable as to whether the complainants even entered the country in order to be reunited with their mother. The court held further that if a person seeks to relocate permanently in order to be reunited with a parent, he or she does not enter the country with a visitor's visa limited in time nor does he or she apply for recognition as an asylum seeker.

The Bavarian Higher Administrative Court rejected the application for permission to appeal against the negative decision regarding legal aid.

After being unsuccessful in appellate proceedings, the complainants brought a constitutional complaint against the rejection of their application for legal aid and alleged essentially a violation of Article 3.1 of the Basic Law (principle of equality before the law) as well as a violation of the principle of the rule of law.

II. The First Chamber of the Second Panel overturned the decisions against the complainants and remitted the matter for decision to the Administrative Court. Its reasoning was essentially as follows:

The contested decisions violated the principle of equality before the law in conjunction with the principle of the rule of law. These norms require that there be a large degree of similarity in the treatment of wealthy and less wealthy parties to legal proceedings seeking legal protection.

Even if the guarantee of equal legal protection is taken into account, a grant of legal aid can be made dependent on the action for a remedy having sufficient chances of success.

However, an examination of the likelihood of success should not serve to bring the legal aid proceedings forward into the action for a remedy itself.

If, when judging a case's chances of success, the competent courts use a criterion which makes the position of the less wealthy party much harder in comparison to the position of the wealthier party, then this would indicate a fundamentally incorrect view of the significance of the guarantee of equal legal protection.

In the present case, the challenged decisions required the actions brought to have higher chances of success than necessary. The competent courts should have accepted that the question whether the complainants had been admitted to Germany within the meaning of Article 116.1 of the Basic Law was associated with particular legal difficulties which required clarification in the proceedings in the main action. Thus, already the assumption by the Administrative Court that the relevant acceptance approval had been granted for the purposes of reuniting the minors with their parents was not tenable. The approval also extended to cover the complainants' older siblings who had already reached the age of majority at the time. The Chamber found that there was also no indication of a time limitation on the validity of the acceptance approval. Insofar as the Administrative Court in fact based its refusal to

grant legal aid on the missing causal connection between the acceptance approval and the entry into the country, it also failed to judge the grant of legal aid by the appropriate measures. In principle, unclear questions of fact and law should be dealt with in the proceedings in the main action.

Languages:

German.



Identification: GER-2001-3-010

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 26.09.2001 / **e)** 1 BvR 1426/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

3.18 **General Principles** – General interest.

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

Keywords of the alphabetical index:

Individual, interest / Effect, suspensive / Effectiveness, principle / Protection, immediate, legal / Protection, guarantee, legal / Temporary relief.

Headnotes:

If when deciding whether an applicant's order for temporary relief should be granted, only a summary examination of the reasons for the order is undertaken and if, in addition, the threat alleged by the applicant to its financial survival is not taken into account, then there will be a violation of the constitutionally anchored guarantee of effective legal protection.

Summary:

I. The complainant runs a company which hires out personnel to nursing institutions. The competent state

employment office issued an order on 12 January 1998 prohibiting the company's hiring activities on the grounds that it was not in possession of the necessary permit. After objection proceedings were unsuccessful, the company brought an action before the Social Court (*Sozialgericht*).

The complainant's application to the Court to grant its action suspensive effect failed. The competent Higher Social Court (*Landessozialgericht*) explained its rejection of the application by stating that it was unnecessary to decide whether the complainant's financial survival would be seriously and unreasonably threatened and whether it would have no means of averting such a threat unless the Court granted temporary relief. The results of the necessary summary examination seemed to indicate that at the time the complainant's chances of being unsuccessful in the main proceedings were greater than its chances of succeeding.

The complainant was of the opinion that the rejection of its application for immediate legal protection violated its rights under Article 14.1 of the Basic Law (guarantee of property and the right of inheritance) and under Article 19.4 of the Basic Law (guarantee of the right of recourse to a court). In its constitutional complaint, the complainant applied for a temporary injunction granting its action suspensive effect.

II. The First Chamber of the First Panel set aside the challenged decision and remitted the matter to the Higher Social Court for a new decision. Its reasoning was essentially as follows:

The decision appealed against violates the complainant's basic right under Article 19.4 which guarantees effective court protection, which should be as complete as possible against the acts of public authorities.

It is true that the right to effective legal protection does not provide an absolute guarantee of the suspensive effect of a legal remedy. Rather it is possible for interests which are of a predominantly public nature to justify the subordination of an individual's right to legal protection, so that urgent measures for the general good can be arranged in time.

However, in respect of both contested matters and matters where performance is sought, temporary relief must be granted if the alternative would be the infliction of serious and unreasonable disadvantages, which could not otherwise be avoided and which could not be subsequently removed by the decision in the principal action. For this reason, the Court must regularly weigh up the interest a public authority has

in having its decisions executed and the private interests of the person affected in having execution suspended until clarification in the principal proceedings. A court decision will not in any case satisfy these constitutional requirements if, after a summary examination, the refusal of immediate legal protection is based solely on the probable absence of a right to an order. The case law of the Federal Constitutional Court requires that a court look at the question of whether ordering suspensive effect is necessary to avoid the occurrence of serious and unreasonable disadvantages, which could not otherwise be avoided.

Accordingly, the Court called upon to decide in this case should have considered the complainant's submission that the prohibition of its hiring activities would have the effect of leading to its financial ruin.

As the contested order was based on an established violation of the constitution, it was decided that it should be reversed and the case remitted to the Higher Social Court.

Languages:

German.



Hungary Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

- Decisions by the plenary Court published in the Official Gazette: 13
- Decisions by chambers published in the Official Gazette: 12
- Number of other decisions by the plenary Court: 19
- Number of other decisions by chambers: 24
- Number of other (procedural) orders: 30

Total number of decisions: 98

Important decisions

Identification: HUN-2001-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.11.2001 / **e)** 55/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/134 / **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.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.20 **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:

Gathering, peaceful, reporting.

Headnotes:

In spite of being one of the most important civil liberties, the right to freedom of assembly is not unlimited. Indeed, it can be restricted in the interest of others' rights and freedoms.

The provisions of the Act on the Right to Freedom of Assembly covering also peaceful gatherings, providing that the organisers of a meeting can only be Hungarian citizens or those who have a residence or a settlement permit in Hungary, and requiring organisers to report a planned meeting do not violate the constitutionally guaranteed right to freedom of assembly.

Summary:

The petitioners requested the constitutional review of some provisions of the Act on the Right of Assembly.

First, they claimed that as the scope of the act covers even peaceful gatherings, the police might misuse their power to prohibit or to dissolve spontaneous gatherings.

The Constitutional Court held that if the police in an unjustifiable way prohibit or dissolve an assembly, the affected person has the possibility under the act to seek a remedy for abuse of police power.

Second, the petitioners also challenged the constitutionality of the provision of the Act under which the exercise of the right of assembly must not violate other people's rights and freedoms. In the petitioners' view, the provision is too vague to limit such an important fundamental right like the right of peaceful assembly, therefore violating the principle of legal certainty.

The Court considered that there exist several legal provisions the authorities should take into account when deciding about limiting fundamental human rights. One such provision is Article 8.2 of the Constitution, according to which rules pertaining to fundamental rights and duties shall be determined by statute, which, however, may not limit the essential contents of any fundamental right. Furthermore, it was noted that in the present case, the police should adhere to the decisions of the court when considering to prohibit or dissolve an assembly in the interest of other people's rights or freedoms.

Another contested provision of the Act on the Right of Assembly was Article 5, under which the organisers of a meeting could only be Hungarian citizens or those who have a residence or a settlement permit in Hungary. The petitioners found it unjustifiable that the act prohibits foreigners without a residence or settlement permit to organise an assembly in Hungary.

The Court however, did not find the provision in question unconstitutional. It considered that the reason for this differentiation is that the organiser of an assembly should be a person who is aware of the Hungarian legal regulations and customs concerning staging a peaceful demonstration, and someone who can be liable for the damages caused during the meeting.

Last but not least, the petitioners found it unjustifiable that the Act requires participants to report a planned meeting, because this way the statute excludes the possibility of spontaneous meetings. The Court was of opinion that the Act only requires the reporting of planned meetings outdoors, in a public place. The reason for this is that exercising the right of peaceful assembly is connected with another fundamental right, the right to freedom of movement (Article 58 of the Constitution). The most frequent places to exercise the right to freedom of movement are on the streets, in squares etc. Reporting among others the date and place of the planned meeting to the police is necessary in order that the authorities are aware of the fact that someone plans to organise an assembly outdoors in a public place.

Concerning the argument of the petitioners that the prohibition of an unreported assembly is a disproportionate limitation of the right to assembly, the Court emphasised that failing to report a planned gathering could constitute negligence, but could also be the first step towards misusing the right of assembly. Without reporting a planned gathering, the authorities cannot consider whether the planned assembly will unduly disrupt traffic or will severely endanger the operation of the courts or of parliament. If an assembly can be arranged at another time and at another place than was reported, the reporting would be useless. In addition, the Court stressed that from the fact that the police have the power to dissolve an assembly in the case of an unreported event, it does not follow that the police should always use this power.

One of the Justices, with whom three Justices agreed, gave their dissenting opinion. According to the Judges, the right of peaceful assembly is a human right and not only a right of citizens. Therefore Article 5 of the act, which stated that only Hungarian citizens and those with a residence or settlement

permit can organise an assembly in Hungary, violates the basic right of assembly. The separate opinion emphasises that the notion of “gathering” used by the Act is too vague, and therefore it makes it possible for the police to use force without sufficient reason.

Justice Kukorelli in the separate opinion stressed that in general there is no conflict between the right of assembly and the right to freedom of movement. The latter does not mean that the participants of a public meeting have the right to use a specific route. The right of assembly is sometimes in conflict with the interest of the undisrupted traffic.

Justice Kukorelli denied that the subsequent legal remedy is a sufficient guarantee against the possibility of police power being used arbitrarily. When considering whether to disperse an assembly, the police should take into account whether the meeting violates the rights and freedoms of others, or whether it constitutes a clear and present danger of violating such rights. The police should not use force without trying to convince the participants to break up the gathering. This is important since the right of assembly is one of the most important human rights of self-expression.

Languages:

Hungarian.



Identification: HUN-2001-3-009

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.12.2001 / **e)** 57/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/137 / **h)**.

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.5.6.3 **Institutions** – Legislative bodies – Law-making procedure – Majority required.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.

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

5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Media, false statement, retraction / Media, right to reply / Fine, duty to impose / Commercial speech, limitation / Fine, upper limit, lack / Media, press, self-censorship.

Headnotes:

The right of reply (a reply in the case of an opinion) and the right of correction (a reply in the case of a false fact) together aim to redress the harm caused by a false fact or an opinion deemed to violate someone's personal rights and reputation. Although the right of reply and correction do restricts the freedom of the press this is justifiable in the interest of the right to reputation and to human dignity, provided that the legislator determined the limits of exercising it.

Summary:

The President of the Republic appealed to the Constitutional Court for evaluation of the law, which has not yet been promulgated, on amendment to the Civil Code requiring the press to publish a reaction to opinions deemed to violate personal rights. The President claimed that the amendments were contrary to the Constitution on several aspects: the law would oblige the media to publish a retraction if a person mentioned in an article felt their personal rights or reputation had been damaged. It would also insist that if a court ruled against the media, it would be under an obligation to impose a fine and could no longer opt for non-enforcement of this sanction. In the President's view, the proposed modification would hinder press freedom and by not defining the upper limit of fines, violated Article 2.1 of the Constitution.

The Constitutional Court held that the restriction of the freedom of expression and of the press must be narrowly tailored when dealing with political speeches and criticism of the state. On the other hand, when dealing with commercial speech, the restriction of this speech could be constitutional even if the limitation is wider.

It was also noted that the right of reply in the case of the written and the electronic press means the obligation to publish a reply. It may very well be that the press itself would not publish a reply without such a legal requirement. Imposing such a duty limits the freedom of the press and the autonomy of the editorial board. Having such an obligation may result in a situation when the press would not publish an opinion if there is a possibility that someone will require the publishing of a reaction to the opinion, claiming that the published opinion violates his/her personal rights. The Court examined whether such a limitation was in accord with the Constitution.

The Court considered that the right of reply (a reply in the case of an opinion) and the right of correction (a reply in the case of a false fact) aim to redress the harm caused by a false fact or an opinion deemed to violate people's personal rights and reputation. In addition, the right of the audience to be fully informed and to see and hear all sides on an issue requires sufficient regulation. Therefore, the right of reply and correction restricts the right to free press, but is justifiable in the interest of the right to reputation and to human dignity.

However, the Court observed that the not yet promulgated law restricted the freedom of the press in that it does not limit the right of reply: the reply can be unlawful, it can be longer than the opinion it is referring to, and can contain more than the original statement. When establishing an obligation of the press to publish retractions, the legislator should determine the limits of exercising the right of reply. The Constitutional Court, therefore declared the law unconstitutional in its current state.

As to the other questions, the Court did not find unconstitutional that provision of the amendment under which if someone's personal rights were infringed in the press, the judge should penalise the press by ordering it to pay a fine to be used for public purposes. The President claimed that it is contrary to the principle of the certainty of law that the amendment did not define the upper limit of such a fine.

The Court considered that when deciding about the fine, the judge must take into account the amount of the damages. The Hungarian legal system determines the upper limit neither in the case of damages nor in the case of fines. The amount of damages as well as fines depend upon the damage suffered.

Justice Bihari attached a concurring opinion to the decision. Justice Bihari differentiates between the right to reply, which ensures the plurality of opinion in the press, and the obligation of the press to publish a "reaction" to an opinion deemed to violate someone's

personal rights. The latter violates the right to a free press and the autonomy of the press. According to Justice Czucz's separate opinion, the fine which should be ordered by the judge, violates the Constitution. When regulating such a repressive sanction, the legislator fails to determine the frames within which the court can exercise their power. Without such limits the application of the law can be arbitrary.

Under Justice Hollo's opinion, the Court should have held that the right of reply unnecessarily restricted the right to a free press. The right of correction ensured by the Civil Code repairs the damage caused by a false factual assertion. Subjective opinions and remarks do not make introducing the right of reply necessary. In addition, the Court should have examined whether the compulsory fine is in accordance with the Constitution without having an upper limit. These two new provisions threatens the right to a free press.

Justice Kiss in his separate opinion pointed out that the legislator failed to pass an act required by Article 61.3 of the Constitution, under which a majority of two-thirds of the votes of the members of parliament present is required to pass the statute on the freedom of the press. Consequently, there is a lack of "constitutional press law". In the absence of this, parliament regulates the press by amending laws which requires a simple majority.

The separate opinion of Justice Kukorelli emphasised that in the Hungarian legal system there were several possibilities for those whose personal rights were violated to redress the damage caused by a violating article. In addition when introducing the right to reply into the Hungarian legal system, the legislator does not take into account the fact that the criticism concerning a public figure is different from a violating article published in connection with a non-public figure. The separate opinion pointed out that the amendment tries to apply the "fairness doctrine" to the written press, which cannot be justifiable outside the sphere of the electronic press. Under the Constitution, no one has the right to express their opinion in a chosen newspaper, journal or on the chosen TV channel. Not only the right of reply itself but also the introduction of a compulsory fine is contrary to the Constitution. The fine might lead to the self-censorship of the press, which unacceptably restricts the right to a free press, besides having a censoring effect on speech.

Languages:

Hungarian.



Identification: HUN-2001-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 07.12.2001 / **e)** 58/2001 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2001/138 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Name, acquired through marriage / Name, right / Name, family, free choice / Name, modification.

Headnotes:

In its Decision no. 8/1990, the Constitutional Court had paired the right to human dignity with the general right to a legal personality. In the present case, the right to one's name was derived from the right to a legal personality.

As the right to one's own name enjoys absolute constitutional protection, it must not be limited by the state. However, society and the state have an interest in regulating the use of names; therefore, the right to choose, change, or modify a name may be restricted by the legislator. When allowing people to choose, change or modify a name, the state should take into account other people's rights and freedoms, and the aim of a coherent and transparent population registration.

Summary:

The Constitutional Court was seized on constitutional-ity of some provisions of the Family Act.

As regards the provision excluding the possibility of having a double-barrelled name as a family name, the Court considered that everyone has an inalienable right to his own name. This right must not be restricted by the state. Other components of the right

to a name, like the right to choose, change and to modify one's name and to take a new name can be limited by the legislator.

Considering the claim that precluding a woman to re-take the surname of her first husband as her family name after the end of her second marriage was unconstitutional, the Court considered that the tradition and the personality rights of the family affected by the changing of the name justify such a legal regulation.

On the other hand, the provision under which, upon the request of the parents the registrar can change the name of the juvenile under 14 only once, was considered unconstitutional insofar as it limited the right of the parents to change the name of their children.

Furthermore, the Court held unconstitutional the provision of the Family Act under which only the wife has the right to take the husband's surname as her family name. In the Hungarian legal system the man's name is always the marital and family name upon marriage. The Court considered that such regulation is inconsistent with the principle of equality. However, it did not annul the provision, but called upon parliament to meet the legislative requirement and to pass an amendment to the Family Act.

Justice Harmathy attached a separate opinion to the judgment. According to the judge, the right to one's name is not a separate basic right. In addition, the judge held that it was unconstitutional that the registrar can change the name of a child based upon the parents' request only once. The reason of the unconstitutionality is that the registrar modifies the name. It is also unconstitutional (since it infringes the right to the child's self-determination) that the law does not require the consent of the child. Under the separate opinion, the Court should not have to state that parliament failed to comply with its legislative task when not making it possible for a husband to take his wife's family name as a marital name. To prove the marital status of women and the family status of children, that traditional custom under which the woman takes the family name of the man as her family name after marriage is justified. In addition, the Court should have declared it unconstitutional that the woman cannot take again the surname of her first husband as her family name after the end of her second marriage. This absolute prohibition could not be justified. Justice Bagi and the Chief Justice Nemeth joined to this opinion.

Justice Vasadi also attached a separate opinion to the judgment. Justice Vasadi did not agree with the majority of the Court in creating a new fundamental

right: the right to one's name. According to the judge, the right to one's name is one of the personal rights ensured by the Civil Code. The right to a name is a right which should be protected against another private person and not against the state.

Languages:

Hungarian.



Israel Supreme Court

Important decisions

Identification: ISR-2001-3-011

a) Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 14.04.2002 / **e)** H.C. 3114/02, 3115/02, 3116/02 / **f)** Mohammed Barakeh, M.K v. the Minister of Defence / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 2.1.2.3 **Sources of Constitutional Law** – Categories – Unwritten rules – Natural law.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 4.18 **Institutions** – State of emergency and emergency powers.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
- 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:

Respect for the dead / Body location, evacuation, identification and burial / Combat / Red Cross.

Headnotes:

Responsibility for the location, identification, evacuation and burial of bodies in areas of combat during battle belongs to the army. This responsibility stems from international law.

Location, identification and burial of bodies are important humanitarian acts, which stem from the principle of respect for the dead. The principle of

respect for the dead – all dead – lies at the base of Israel's values as a Jewish and democratic state.

Summary:

After terrorist attacks in Israel's cities, Israel engaged in a military operation to prevent the recurrence of these attacks. According to the information provided by the Respondents, a widespread terror infrastructure had developed, among other places, in the city of Jenin and its adjacent refugee camp. More than 23 suicide bombers had come from that area, about one fourth of all of the suicide bombings. Thus, the Israel Defence Forces (I.D.F.) entered the Jenin refugee camp as part of the operation.

As I.D.F. forces entered the refugee camp, they called out a general appeal to residents to leave their houses; only days later did approximately 100 people leave the camp. In order to apprehend the terrorists, weapons and explosives, I.D.F. forces began combat activity from house to house, a technique adopted to prevent massive casualties to innocent civilians. A skirmish developed, and 23 Israeli soldiers fell in battle. According to the Respondents, after a call was given to evacuate the houses, bulldozers destroyed houses during the fighting, and some Palestinians were killed.

Bodies of Palestinians remained in the camp. When the camp was under control, a search for bodies began, during which the explosive charges which the Palestinians had scattered around the refugee camp were neutralised and removed. Up to the point when the petitions were served, 37 bodies had been found. 11 bodies had been given over to the Palestinian side. Twenty-six bodies had not yet been evacuated.

As the operation was underway, two Knesset (parliament) members and two human rights organisations brought three petitions against the Prime Minister, Minister of Defence, Chief of the General Staff of the I.D.F. and other military commanders. The Court was asked to order the Respondents to refrain from locating and evacuating the bodies of Palestinians in the Jenin refugee camp, and from burying the bodies of those determined to be terrorists in a cemetery in the Jordan Valley. The Petitioners requested that location and collection of bodies be performed by medical teams and the Red Cross, and that family members be allowed to bring their dead to burial.

The Court's point of departure was that in the circumstances of the case, the responsibility for the location, identification, evacuation and burial of the bodies belonged to the Respondents, according to international law. In response to the question of the

Court, the Respondents declared their willingness to include representatives of the Red Cross, and to consider the participation of a representative of the Red Crescent in the location and identification process. The Court suggested that a representative of the Red Crescent be included, subject to the judgments of the military commanders. It was also acceptable to the Respondents that the process of identification, including standard photography and documentation, would include local representatives. The Court instructed, and the Petitioners agreed, that these activities were to be done as quickly as possible, with respect for the dead and while safeguarding the security of the acting forces.

The Court ruled that after identification, burial would begin. The Respondents agreed that burial would be performed in a timely manner, by the Palestinian side. The Court commented that if the Palestinian side does not perform burial immediately, the possibility of bringing the bodies to immediate burial by the Respondents – in light of the concern that such a situation would compromise national security – would be weighed. The Court mentioned the agreed position that such burial, if performed by the Respondents, would be done in an appropriate and respectful way, while ensuring respect for the dead, with no differentiation between located bodies, or between bodies of armed terrorists and civilians.

The Court ruled that there was no real argument between the parties, as the location, identification and burial of bodies are very important humanitarian acts; that these acts are deduced from the principle of respect for the dead – respect for all dead; and that these acts are at the base of Israel's values as a Jewish and democratic state. In order to prevent rumours, the Court saw it fitting to include Red Crescent representatives during the location stage and Palestinians during the identification stage, and that burial should be performed respectfully, according to the religious customs, by local Palestinians, all in as timely a manner as possible, subject to the security situation in the field, and to the judgment of the Military Commander.

The Petitioners claimed that a massacre had been committed in Jenin, but the Respondents disagreed most strongly, and the Court ruled that the Petitioners had not lifted the burden of evidence. The Court ruled that in Jenin there was a battle, in which many Israeli soldiers fell. The army fought from house to house, not by bombing from the air, in order to prevent, to the extent possible, civilian casualties. The Court noted the Respondents' claim that they have nothing

to hide, a position expressed by the pragmatic agreement reached.

The Court viewed the understanding reached as desirable, as it respects the living, and the dead, and avoids rumours. The Court recorded the Respondents' declaration that the army is constantly advised by the Chief Military Attorney, and emphasised that even during combat, the law applying to combat must be upheld, and that all must be done in order to protect the civilian population. The Court stated that it will take no position regarding the way the combat is being managed, and that as long as the soldiers' lives are in danger, these decisions will be made by the commanders.

In light of the arrangement detailed above, it was acceptable to all the parties before them that the petitions be rejected.

Cross-references:

H.C. 2901/02, H.C. 2936/02, H.C. 2977/02, H.C. 3022/02.

Languages:

Hebrew, English (translation by the Court).



Italy Constitutional Court

Important decisions

Identification: ITA-2001-3-007

a) Italy / **b)** Constitutional Court / **c)** / **d)** 06.11.2001 / **e)** 371/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

1.6.8.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
 2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
 3.4 **General Principles** – Separation of powers.
 4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
 4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

Keywords of the alphabetical index:

Province, autonomous, Community regulation / Agriculture.

Headnotes:

A decree implementing a Community regulation, which does not include provisions allowing for it to be disregarded even in cases where a province has adopted the implementing measures contained in the Community regulation, for which the province is competent, and has therefore ensured that Italy is in full compliance with Community law even if subsequently the province fails to honour its obligations, represents a permanent and established change to the attribution of powers as laid down by the rules of constitutional force relating to the status of the region. As such it violates the competences of the province and is unconstitutional.

Summary:

The autonomous province of Trento referred to the Constitutional Court a conflict of powers with central government in connection with Decree no. 458

of 1999, which contains the provisions necessary for the implementation of EC Regulation no. 2815/98 on marketing standards for olive oil. The province asked the Court to declare that “central government did not have competence to carry out the controls provided for in EC Regulation no. 2815 of 1998 and that it could not grant the Ministry of Agricultural Policies the power to lay down by decree the implementing arrangements for such controls.” It also asked the Court to annul Decree no. 458 of 1999.

The Province of Trento submitted that Decree no. 458 of 1999 encroached upon its own sphere of competence as defined by the Constitution, since Article 1.3 of the said Decree authorised the Ministry of Agricultural Policies to carry out the controls provided for in EC Regulation no. 2815 of 1998 and the minister to lay down, by decree, the arrangements for such controls.

The province considered that this decree was prejudicial to the powers conferred upon it by the constitutional laws implementing the provisions governing the special status of the Trentino-Alto Adige region, which (i) assigned to the autonomous provinces of Trento and Bolzano exclusive legislative powers in agricultural matters and shared or concurrent powers with central government in matters of trade, and (ii) granted the autonomous provinces administrative power in respect of each legislative competence assigned to them.

Moreover, it claimed that Decree no. 458 of 1999 (an act of subordinate legislation), which the province was asking to be annulled, was contrary to Legislative Decree no. 266 of 1992 on the relationship between the laws of the central state and the laws of the Trentino-Alto Adige region and the autonomous provinces of Trento and Bolzano, under which the law – and even less so the decree at issue – could not “assign to central government bodies administrative duties, including those relating to supervision, administrative procedure, and registration of administrative violations, other than those reserved to central government under the provisions relating to the special status of the Trento-Aldo Adige Region.”

The case brought before the Court concerned the power of supervision and prevention in the preparation and marketing of agricultural products: this power had been assigned to the province whereas central government’s powers related to legislation on fraud in this sector, in accordance with the implementing regulations relating to the status of the Trento-Alto Adige Region dating from 1974. Subsequent laws had not amended this regulation vis-à-vis regions with a special status (amongst which was Trentino-Alto Adige).

With regard to the implementation and application of Community regulations, Legislative Decree no. 526 of 1987 provided that in matters falling within their own powers, the region of Trentino-Alto Adige and the autonomous provinces of Trento and Bolzano should have responsibility for implementing Community regulations wherever the practical application of such regulations required further rules or administrative procedures. In the instant case, implementation of EC Regulation no. 2815 of 1998 required no legislative or regulatory rules, but merely an administrative procedure. There was no provision in the Decree referred to the Court which would allow for it to be disregarded even in cases where the province had adopted the implementing measures contained in the Community regulation, for which it was competent, and had therefore ensured that Italy was in full compliance with Community law even if subsequently the province failed to honour its obligations. This therefore represented a permanent and established change to the attribution of powers as laid down by the rules of constitutional rank relating to the status of the region.

Decree no. 458 of 1999, the subject of the appeal, violated the competences of the appellant province; the appeal was upheld and the part of the decree affecting the appellant was annulled. In view of the fact that the provinces of Trento and Bolzano were in exactly the same situation with regard to the provincial attributions in question, the judgment applied equally to the province of Bolzano.

Cross-references:

The powers assigned to the regions and autonomous provinces concerning the implementation of non self-executing Community regulations in those areas falling under their fields of competence (agriculture, craftwork, hunting, etc) has been recognised by the Court on several occasions. The Court has also confirmed that central government can use all the instruments at its disposal (depending on whether it is regional or provincial competence which is at issue) to ensure that the national interest is upheld. See Judgments nos. 398 of 1998, 126 of 1996, 284 of 1989, 433 of 1987 and 304 of 1987. The Court has ruled that a regulatory act of the government or a minister cannot lawfully restrict the exercise of the competences of the provinces of Trento and Bolzano. See Judgments nos. 84 of 2001, 209 of 2000, 420 of 1999, 352 of 1998, and 250 of 1996.

Languages:

Italian.



Identification: ITA-2001-3-008

a) Italy / **b)** Constitutional Court / **c)** / **d)** 03.12.2001 / **e)** 405/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

3.20 **General Principles** – Reasonableness.

5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.

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

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

Keywords of the alphabetical index:

Motherhood, protection / Contract, termination, benefit, consequences.

Headnotes:

A rule providing for no maternity benefit to be paid in cases where an employee has been dismissed “on lawful grounds” during the mandatory period of absence from work prior to the birth is not in conformity with the protection of motherhood provided for under the Constitution. Furthermore, the absence of any maternity benefit represents an unjustified prejudice which is in conflict with the principle of reasonableness.

Summary:

The Prato court referred to the Constitutional Court the question of the legitimacy of a rule contained in the law on the protection of working mothers insofar as it provided for no maternity benefit to be paid in cases where the employee had been dismissed “on lawful grounds” during the mandatory period of absence from work prior to the birth. Maternity benefits would be paid in cases where the dismissal, notified during the period of maternity leave, was due to the shutdown of activities in the company concerned, the completion of the task for which the employee had been recruited or expiry of the work contract. Maternity benefits would not be paid in the event of misconduct which constituted sufficient grounds for termination of the same work contract. The referring court ruled that this disparity interfered

with the principle of equality in that it created differences of treatment between working mothers depending on the grounds for dismissal and that it violated the constitutional principles which provided particular protection for motherhood, childhood (Article 31 of the Constitution), working mothers and their children (Article 37 of the Constitution).

In many decisions relating to the protection of working mothers, the Court has stressed the dual aim of the economic support paid to working mothers during the period of mandatory maternity leave: first, to safeguard the health of the mother and the baby she is carrying (by removing the absolute obligation to work) and second, to ensure that the situation of expecting a baby did not give rise to economic disadvantages (by guaranteeing an income in all cases). The Court has acknowledged that protection of motherhood could be regulated in different ways, in line with each actual situation, provided that the regulations did not result in there being no form of protection whatsoever. There had to be some form of protection irrespective of the reasons for the termination of the contract. In the case brought before the Court, however, no protection had been afforded.

Legislative developments showed that in the majority of cases, the basis of protection was to be found in the position of motherhood as such, independently of any relation with paid employment: the maternity allowance had been extended to self-employed workers and women exercising a profession (Law no. 546 of 1987 and Law no. 379 of 1990). Furthermore, economic assistance had to be given to mothers on low income (Law no. 388 of 2000; Legislative Decree no. 151 of 2001).

The rule at issue in this case did not provide for the protection of motherhood set forth in Articles 31 and 37 of the Constitution, as it ruled out the possibility of maternity benefit if there were reasons justifying dismissal. Accordingly, the dismissal took on greater importance than the state of pregnancy and childbirth, both of which were afforded protection under the Constitution.

The principle of reasonableness was also affected by the rule referred to the Court. The absence of any maternity benefit represented an unjustified prejudice whereas dismissal itself was a sanction proportionate to the misconduct which had given rise to it.

The Court therefore declared as unconstitutional the rule which allowed for no maternity benefit to be paid in cases where dismissal, occurring during the mandatory period of cessation of work prior to childbirth, was due to “serious misconduct” on the part of the employee.

Cross-references:

In the field of protection of motherhood, see Judgments nos. 179 of 02.04.1993, *Bulletin* 1993/2 [ITA-1993-2-007], and 150 of 14.04.1994, *Bulletin* 1994/1 [ITA-1994-1-007].

Languages:

Italian.

*Identification:* ITA-2001-3-009

a) Italy / **b)** Constitutional Court / **c)** / **d)** 03.12.2001 / **e)** 411/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Real property, restrictions / Town planning, extension, restrictions, compensation / Industrial zone, development / Constraint, time limits.

Headnotes:

Town planning restrictions introduced prior to compulsory purchase or which constitute a genuine erosion of property rights if renewed, must make provision for compensation in view of the prejudice caused by the prolongation of the validity of the restrictions. A law allowing for the extension of the period of restrictions on land use prior to compulsory purchase (town planning restrictions introduced prior to compulsory purchase or limiting the right to build) must therefore be declared unconstitutional, not in its entirety, but in the part authorising the administrative authorities to renew, without compensation, restrictions on land use which had already expired.

Summary:

This question of constitutional validity concerned an article in the single text of the laws on the economic development of the *Mezzogiorno* of 1978, providing for the extension, beyond the 10 year period provided for by law, without any compensation, of the restrictions on the use of land which had been introduced prior to a compulsory purchase order or which themselves constituted forms of compulsory purchase as set out in the development plans relating to industrial zones.

The Court criticised the violation of Article 42.3 of the Constitution as it had been interpreted in Judgment no. 179 of 1999, in which the Court declared as unconstitutional several rules in the field of town planning, similar to the one which had prompted the referral at issue here. The said rules enabled the administrative authorities to extend for a further period, without compensation, restrictions in the field of town planning which had in fact expired and which had been introduced prior to a compulsory purchase order or which included a prohibition on construction.

The law provision referred to the Court had replaced the rules contained in the single text of the laws on the economic development of the *Mezzogiorno* of 1967, which the Court had declared to be unconstitutional, “insofar as the said rules make it possible, without there being any provision for compensation, for restrictions on the use of land prior to a compulsory purchase order to be imposed on privately-owned properties by the development plans relating to industrial zones, where there is no application time-limit” (Judgment no. 260 of 1976).

With regard to restriction on the use of land prior to a compulsory purchase order imposed by the general development plan, following the Court's Judgment no. 55 of 1968, which had criticised the failure to provide for any compensation for restrictions imposed without any time-limit, the law had set down time-limits equal to the same restrictions which were introduced prior to compulsory purchase or which comprised a prohibition on construction.

The Court, in a progressive interpretation of the constitutional guarantee in matters relating to compulsory purchase, contained in Article 42.3 of the Constitution, asserted that the town planning restrictions which were introduced prior to compulsory purchase or which constituted a genuine erosion of property rights if renewed, must make provision for compensation in view of the prejudice caused by the prolongation of the validity of the restrictions.

In its Judgment no. 179 of 1999, the Court stipulated that the obligation to provide compensation arose following the expiry of the first period of restrictions on the use of land introduced prior to compulsory purchase (for which no compensation was required). In order for this restriction to be regarded as acceptable, it was nonetheless necessary for legislation to confine this first period within reasonable time limits.

The law allowing for the extension of the period of restrictions on land use prior to compulsory purchase (town planning restrictions introduced prior to compulsory purchase or limiting the right to build) must therefore be declared unconstitutional, not in its entirety, but in the part authorising the administrative authorities to renew, without compensation, restrictions on land use which had already expired.

Cross-references:

See the text of the judgment.

Languages:

Italian.



Identification: ITA-2001-3-010

a) Italy / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** 435/2001 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette) / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.

3.13 **General Principles** – Legality.

4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.

Keywords of the alphabetical index:

Region, executive, services, rates, setting / Personal services, compulsion.

Headnotes:

A provision in a law of a region granting the regional executive body (“*Giunta regionale*”) the power to set the rates of the “hygiene inspection fees” charged by the “*Unità sanitarie locali*” (administrative branches of the national hygiene authorities) for services rendered by these branches to private individuals is unconstitutional, insofar as it lacks certain precise features or objective criteria to determine the exact nature of the imposed fee and leaves the “*Giunta regionale*” with unfettered discretion in this regard.

Summary:

The Administrative Court referred to the Constitutional Court a question concerning the constitutionality of a provision in a law of the Italian region of Apulia which granted the regional executive body (*Giunta regionale*) the power to set the rates of the “hygiene inspection fees” charged by the “*Unità sanitarie locali*” (administrative branches of the national hygiene authorities) for services rendered (hygiene inspections and surveys) by these branches to private individuals. According to the referring court, Article 23 of the Constitution had been violated in that these “hygiene inspection fees” (in the case in question this was a fee paid for a hygiene inspection relating to construction) were compulsory fees payable by property owners, and regulated as such by the aforementioned article. The regional law should therefore have defined the criteria, limits and necessary controls in order to reduce the scope of the discretionary power available to the Giunta in setting these fees.

The amount paid for hygiene inspection given in construction matters by the “*Unità sanitarie locali*” was a compulsory fee payable by property owners, and subject as such to the rules laid down in Article 23 of the Constitution which required that the law stipulate the fundamental features of the service; furthermore, such services could not be forced upon individuals except where provided for by law.

The fees for services falling under the category of compulsory fees payable by property owners included not only services of a fiscal nature, but also services which although incurring a charge for a service rendered by the administration, were also imposed by law. Private individuals in effect had no alternative but to turn to the administrative authority to obtain the service required. The Constitutional Court had held on numerous occasions that the conditions defined by Article 23 of the Constitution would be deemed to be fulfilled insofar as the law stipulated the key features of the imposed service while at the same time providing for the possibility of regulatory norms and

the regulatory power of the administrative authority to clarify or supplement the regulatory framework laid down.

In the case brought before the Court, the conditions required for the imposed measure were to be found in the request for a service from the administrative authority and those subject to the imposed measure were private individuals submitting the application. However, the law lacked certain precise features or objective criteria to determine the exact nature of the imposed service. Consequently, the latter was entirely left to the discretionary power of the *Giunta regionale*. Furthermore, the law made no provision for the involvement of a technical body which could assist the Giunta in reaching its conclusions. Accordingly, the latter's decision to set the charge of the service in proportion to the value of the construction for which the opinion had been requested or, in other cases, in line with a scale of fees it itself had adopted, was without any foundation in the law.

The Court therefore declared the regional law incompatible with the Constitution with regard to the part which allowed the Giunta to set the cost of hygiene and sanitation opinions produced for private individuals, in the cases provided for by the law, by the departments of the "*Unità sanitarie locali*".

Cross-references:

On the conditions required for compliance with Article 23 of the Constitution, see Judgments nos. 64 of 1965, 148 of 1979, 180 of 1996, and 269 of 1997. In order for there to be no encroachment on the area reserved to the law, the law in question must stipulate the criteria and the objective or technical limits which the administrative authority must take into account in determining the extent of the legal service provided.

Languages:

Italian.

Japan Supreme Court

Summaries of important decisions of the reference period 1 September 2001 – 31 December 2001 will be published in the next edition, *Bulletin 2002/1*.



Kazakhstan Constitutional Council

On the results of the work carried out by the Constitutional Council of the Republic of Kazakhstan in 2001

In 2001, the Constitutional Council examined nineteen applications: two concerning the constitutionality of laws adopted by parliament, ten concerning the official interpretation of constitutional provisions and seven at the request of the courts.

Two laws adopted by the Kazakh parliament were examined for compliance with the Constitution. In particular, the Law "Amending and supplementing certain legislative instruments of the Republic of Kazakhstan" was examined with regard to the legal rules governing private ownership of land. The law was found to be compliant with the Kazakh Constitution.

At the request of the Prime Minister, the Law "Amending and supplementing the Law on the parliament of the Republic of Kazakhstan and the status of its members" was likewise examined for constitutionality. Having considered the application, the Council concluded that the law failed to comply with the Kazakh Constitution in a number of respects. In particular, it violated the rule laid down in Article 61 § 6 of the Constitution, under which any draft laws liable to entail a reduction in state revenues or an increase in expenditure may be submitted only with the approval of the government. No such approval had ever been given. The law in question also involved a widening of parliamentary powers, something that is only possible when introducing amendments or addenda to the Constitution.

The Constitutional Council provided official interpretations of certain constitutional provisions dealing with the powers of the various branches of state authority in Kazakhstan, the grounds for terminating the powers of members of parliament, the application and ratification of international treaties and other matters.

The Council was asked by members of parliament to interpret the constitutional provisions concerning the grounds for terminating the powers of a member of the Kazakh parliament and for depriving them of such powers. The Council essentially ruled that a member of parliament's powers may be terminated in cases other than those directly specified in the Constitution. Such cases flow from the provisions of the Constitu-

tion: death of a member of parliament, loss of Kazakh citizenship by a member of parliament, a final court decision declaring someone who is a member of parliament to be a missing person, dissolution of the political party or termination of membership of the party on whose lists the member of parliament was elected. On the basis of the said ruling, a member of the lower house of parliament who had entered it on a party list and subsequently left the party was compelled to resign.

On application by a group of members of parliament, the Council provided interpretation of certain provisions of the Constitution concerning the conferral on chambers of trade and industry of the right to authenticate certificates of origin relating to goods.

The Council also provided interpretation of the constitutional provisions relating to the ratification of certain international treaties. It pointed out that the list of international treaties which are subject to ratification and the ratification procedure itself are established by the legislation of the Republic of Kazakhstan. The Kazakh parliament independently decides matters relating to the ratification and termination of international treaties of the Republic of Kazakhstan.

Also submitted for official interpretation were the provisions of the Constitution whereby the Republic of Kazakhstan proclaims itself a social state, whose highest values are man, his life, rights and liberties, and those concerning the procedure for introducing amendments and addenda to any draft laws which may have been submitted.

At the request of one of the courts, the Council revoked certain provisions of international treaties relating to the "Baikonur" complex. In the case of two applications accepted for consideration, the Council failed to find sufficient grounds for declaring the regulatory legal instruments in question to be incompatible with the Constitution. In particular, the Council failed to find any grounds for declaring certain provisions of the regulatory legal instruments concerning the introduction of time-based billing for local telecommunication services to be unconstitutional.

Because they did not fall within its jurisdiction, the Constitutional Council dismissed applications from the courts for official interpretation of the provisions of the law "On the social protection of citizens, who were victims of the effects of nuclear testing at the Semipalatinsk nuclear test site" and to have one of the articles of the law "On the rehabilitation of the victims of mass political repression" declared unconstitutional.

The rulings of the Constitutional Council are a source of law and help to strengthen legality in Kazakhstan.



Latvia Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

Number of cases: 3

Important decisions

Identification: LAT-2001-3-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** 2001-05-03 / **f)** On Compliance of the Ministry of Justice Instruction Transitional Provisions on the Procedure of Keeping the Suspected, Accused, Detained and Sentenced Persons in Investigation Prisons with Articles 95 and 111 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 187, 22.12.2001 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
3.13 **General Principles** – Legality.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Prison, food parcel / Prison, treatment, unfavourable, legality.

Headnotes:

An external activity of a state institution may be based only on the Constitution, the laws, and the Cabinet of Ministers' regulations, i.e., on the external normative acts but not on an instruction, which is an internal normative act. According to the law a state institution may pass an administrative act or carry out an activity which is unfavourable towards any individual only on

the basis of the Constitution, the laws, and international legal norms.

The regulation of the relations between the state and prisoners by internal normative acts is permissible only if the consequences of the above regulation are not unfavourable to prisoners. The limitation of the fundamental rights of prisoners is permissible only on the basis of the law.

Summary:

Mr Aivars Andersons and Mr Kaspars Zandbergs appealed to the Constitutional Court on the conformity of the Ministry of Justice Instruction on Transitional Provisions on the Procedure of Keeping Suspected, Accused, Detained and Sentenced Persons in Investigation Prisons (“the Transitional Provisions”) with Articles 95 and 111 of the Constitution.

According to the Transitional Provisions, the arrested and sentenced persons may keep food as regulated by the Regulations of the Internal Order in the Investigation Prisons (confirmed by the Department of Imprisonment Places). The appendix of the Regulations of the Internal Order establishes that the arrested persons may keep only those products which have been bought in the prison shop. The applicants pointed out that by prohibiting food parcels, the greatest part of the arrested persons are denied the possibility of getting the needed amount of food. They therefore claimed that the right of prisoners to the protection of health established by Article 111 of the Constitution and the right to protection of honour and dignity as well as the prohibition of torture established by Article 95 of the Constitution are violated.

The Constitutional Court noted that the Transitional Provisions and the Regulations of the Internal Order are internal normative acts. An internal normative act is binding only on the subject of public rights, who has passed it, as well as to its institutions, departments and employees. Therefore the addressees of the Transitional Provisions are only the personnel of the Department of Prisons and the personnel of the institutions subordinated to it. However, in fact, the relations between the state and prisoners are also indirectly regulated by the Provisions.

The Court recalled that according to the law, a state institution may pass an administrative act or carry out an activity which is unfavourable towards any individual only on the basis of the Constitution, the laws, and international legal norms. Thus, regulation of the relations between the state and prisoners by internal normative acts is permissible only if the

consequences of the above regulation are not unfavourable to prisoners.

It is essential for prisoners to receive additional food, because almost a half of them can not buy food at the prison shop because their relatives cannot send enough money to them. The Ministry of Justice’s information about a link between the received food and infectious diseases, narcotics and psychotropic substances in prisons is not sufficient. Thus, for prisoners the consequences of the prohibition on food parcels are unfavourable.

This prohibition follows from the Appendix of the Regulations of the Internal Order, which establishes that prisoners shall keep only the food purchased at the prison shop. The Court held that the norm of the Regulations of the Internal Order, establishing the prohibition on receiving food parcels, was issued *ultra vires*.

By forbidding food parcels the Department of Prisons, an executive institution, has strayed into the ambit of the legislature and violated Article 64 of the Constitution, which establishes that the parliament and the people have the right to legislate. The limitation of the fundamental rights of prisoners is permissible only by law.

The Constitutional Court decided that the Regulations of the Internal Order in Investigation Prisons (confirmed by the Department of Imprisonment Places Instruction) in the Part on Prohibition of Receiving Food Parcels violated Article 64 of the Constitution.

Cross-references:

- Decision of 11.03.1998 (no. 04-05(97)), *Bulletin* 1998/1 [LAT-1998-1-002];
- Decision of the Federal Constitutional Court of Germany, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 92, 203.

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 (Latvian, English).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
 2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
 3.16 **General Principles** – Proportionality.
 4.3.1 **Institutions** – Languages – Official language(s).
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.31 **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 20th 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:

- *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];
- Decision of the Constitutional Court of Lithuania of 21.10.1999 On writing of names and family names in passports of citizens of the Republic of Lithuania (14/98), *Bulletin* 1999/3 [LTU-1999-3-011].

Languages:

Latvian, English (translation by the Court).



Liechtenstein State Council

Important decisions

Identification: LIE-2001-3-003

a) Liechtenstein / **b)** State Council / **c)** / **d)** 17.09.2001 / **e)** StGH 2001/22 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.

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

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

Keywords of the alphabetical index:

Tax, professional / Regulation, retrospective effect.

Headnotes:

Applying of regulations on liability for the tourism tax retroactively constitutes a flagrant violation of the principle of legality, when it is based on neither the spirit nor the letter of the regulations and has negative effects for the person concerned. Using the regulations as a legal basis for doing this violates the prohibition on abuse of right.

Summary:

A photographic business was required to pay tourism tax for the first time for 1995 on the basis of regulations which came into force on 1 January 1996. The assessment made in the contested decision was itself based on these regulations. The constitutional appeal was allowed, and the decision was set aside.

Languages:

German.



Lithuania Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

Number of decisions: 4

All cases – *ex post facto* review and abstract review.

The main content of the cases was the following:

- Returning the driving licence as a measure of ensuring administrative proceedings (principle *ne bis in idem*): 1
- State pensions of officials and soldiers of the systems of interior affairs, state security, defence and prosecutor's office (powers of the government): 1
- Government decision to concentrate market structures: 1
- The official salaries of customs officers: 1

All final decisions of the Constitutional Court were published in the Lithuanian *Valstybės žinios* (Official Gazette).

Important decisions

Identification: LTU-2001-3-011

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 02.10.2001 / **e)** 11/2000 / **f)** On not returning the driving licence as a measure of ensuring administrative proceedings / **g)** *Valstybės Žinios* (Official Gazette), 85-2977, 05.10.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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.

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

5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Driving licence, withdrawal / Driving licence, temporary, conditions to use.

Headnotes:

The non-returning of the driving licence until the payment of the fine imposed for committed violation of the Road Traffic Rules, as provided for of Article 269.4 of the Code of Administrative Violations of Law (CAVL), is not a penalty for the committed violation but a measure of ensuring the legal proceedings in administrative cases (namely that the imposed fine will be paid). In other words, the contested provision of the law regulates not the relations of imposition of the administrative penalty for the committed violation of law but those arising in the course of ensuring the fulfilment of the imposed administrative penalty. Therefore, the withholding of the driving licence until the payment of the imposed fine may not be regarded as violating the constitutional principle of *ne bis in idem*.

In establishing liability for violation of law and its implementation, one must sustain a fair balance between the interests of society and those of a person so as to avoid unreasonable restrictions of the rights of the person. On the basis of this principle, the rights of a person may be restricted by laws only to the extent necessary for protection of the public interest, and there must be a reasonable relationship between the adopted measures and the legitimate and commonly important objective being sought.

The right to drive a vehicle is an acquired right, confirmed by the driving licence. The withholding of the driving licence until the payment of the imposed fine and issuance of a temporary permit to drive a vehicle constitute a restriction of the acquired right as the deprivation of the right to drive a vehicle is not imposed as an administrative penalty.

Furthermore, a temporary permit to drive a vehicle also means that the implementation of the right to drive a vehicle guaranteed to a person is limited to Lithuania, considering that such a permit is valid only for a certain period of time, and its validity must be extended regularly.

Summary:

The case was initiated by the Vilnius Regional Administrative Court which appealed to the Constitutional Court requesting it to establish whether Article 269.4 CAVL, providing that in cases of

decisions to impose a fine, the driving licence shall not be returned until the payment of the imposed fine, is in compliance of Articles 31.5 and 32.1 of the Constitution.

The request was based upon the fact that Article 30 CAVL provided that a penalty for an administrative violation of law shall be imposed under the limits specified in the normative act providing for liability for the committed violation of law, and strictly in line with this code and other legal acts concerning administrative violations of law. Among other measures provided by law, in order to ensure the legal proceedings in administrative violations of law, Article 269.4 of this Code provided for seizure of the driving licence until the payment of the imposed fine.

In the opinion of the petitioner, after a fine has been imposed on the driver, an additional restriction of his rights is applied, which is not provided for in the sanction set laid down by the article concerning the committed violation of law.

Furthermore, considering Article 31.5 of the Constitution stating that no person may be punished for the same offence twice, the Administrative Court had doubts whether Article 269.4 CAVL was in compliance with Article 31.5 of the Constitution and the provision of Article 32.1 of the Constitution guaranteeing all citizens the freedom of movement (within Lithuania and abroad) and the right to choose their place of residence in Lithuania freely, as upon imposition of the fine, due to the withholding of the driving licence until the payment of the fine, the right of the person to travel abroad by car was restricted.

The Constitutional Court considered that the right to leave Lithuania at one's own will means that no specific permission procedure to leave Lithuania may be established, i.e. a procedure whereby a citizen would have to request a state institution for a permit to leave Lithuania. The constitutional right to leave Lithuania at one's own will pre-supposes the duty of the state to establish such a procedure for leaving Lithuania so that the citizen would not experience unreasonable restrictions.

The Constitutional Court concluded that Article 269.4 CAVL, stating that in cases of decisions to impose a fine the driving licence shall not be returned until the payment of the imposed fine, violated the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2001-3-012

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.10.2001 / **e)** 10/2000 / **f)** On state pensions of officials and soldiers of the systems of interior affairs, state security, defence and prosecutor's office / **g)** *Valstybės Žinios* (Official Gazette), 93-3288, 07.11.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.

3.13 **General Principles** – Legality.

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

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

Keywords of the alphabetical index:

Pension, determination / Pension, pensionable service, period / Government, resolution, normative content.

Headnotes:

One of the guarantees ensuring a proper realisation of the right to social maintenance is the legal force of the legal acts whereby the social maintenance rendered by the state is regulated. Law must regulate the relationships pointed out in Article 52 of the Constitution.

Article 52 of the Constitution guarantees pensions and various types of social maintenance for the entities, as well as the bases and amounts of these pensions, which are to be provided for by law. Article 16.4 of the Law on Pensions of Officials and Soldiers in the Departments of Internal Affairs, State Security, Defence and the Prosecutor's Office ("the Law") established time periods that had been given prior to the Law coming into force. These are equal to the time of service on the grounds of which state pensions are granted to the officials and soldiers in the concerned departments. No sub-statutory act may establish such legal regulation whereby the bases to receive this kind of pensions, their size, or the conditions of their granting and payment would be changed, and whereby the individuals who are not entitled to these pensions would be specified.

Furthermore, the extent of the said right cannot be extended by a sub-statutory legal regulation, or otherwise the hierarchy of legal acts and harmony of the legal system would be disturbed.

In accordance with the Constitution, the government shall resolve the affairs of state administration at its sittings by adopting resolutions which must be passed by a majority vote of all members of the government (Article 95.1 of the Constitution) The formula "under the procedure established by the government", used in Items 1 and 6 of Article 16.4 of the Law therefore means that the said procedure must be established by a government resolution. The government may not commission any other institution to establish this procedure.

However, this resolution must be of normative content but it must not contain any provisions whereby, not on the basis of common norms, time periods not provided for by law are equated to the time of service (or which might be included into the time of service) for the purpose of granting state pensions to officials and soldiers.

Summary:

The case was initiated by the Higher Administrative Court. It requested the Constitutional Court to establish whether Item 8 of the Regulations of Granting and Payment of State Pensions to Officials and Soldiers of the Departments of Internal Affairs, State Security, Defence and the Prosecutor's Office approved by Government Resolution no. 83 "On the Approval of the Regulations of Granting and Payment of State Pensions to Officials and Soldiers of the Departments of Internal Affairs, State Security, Defence and the Prosecutor's Office and the Establishment of the Time of Service Necessary in Order to Receive a Respective Percentage Extra Pay for the Years of Service" of 20 January 1995 was in compliance with Article 94 of the Constitution and Article 16 of the Law on Pensions of Officials and Soldiers of the Departments of Internal Affairs, State Security, Defence and the Prosecutor's Office.

In its claim, the petitioner pointed out that Article 16.4 of the Law on Pensions of Officials and Soldiers of the Departments of Internal Affairs, State Security, Defence and the Prosecutor's Office laid down a final list of the time periods which had been made prior to the said law coming into force and which are equated to the time of service on the grounds of which state pensions are granted to the individuals engaged as officials and soldiers in the departments of internal affairs, state security, defence and the prosecutor's office. As, under the Constitution, the government does not have the right to change any legal norms,

the petitioner was of the opinion that the said law does not grant the right to the government to equate other time periods, i.e. those not pointed out in the law, which had been prior to the law coming into force, to the time of service of the said individuals.

The Constitutional Court recalled that it is only the law that may establish the bases on the grounds of which state pensions are granted as well as the sizes of such pensions and conditions of their granting and payment (Constitutional Court ruling of 10 February 2000, *Bulletin* 2000/1 [LTU-2000-1-002]).

In addition, in its rulings of 3 December 1997, *Bulletin* 1997/3 [LTU-1997-3-012] and 6 May 1998, the Constitutional Court held that it is not possible to establish conditions of recognising the right to social assistance of individuals, and to limit the extent of this right by a sub-statutory regulation of the relationships pointed out in Article 52 of the Constitution.

It was furthermore noted that under the provision of Article 94.2 of the Constitution, the government implements laws, and thus the duty of the government to adopt sub-statutory acts necessary for implementation of laws stems directly from the Constitution.

The legislator, considering that it is necessary to adopt sub-statutory acts so as to implement laws, may establish such a duty for the government either by the law or by a parliament (*Seimas*) resolution concerning the implementation of laws.

The duty of the government to adopt sub-statutory acts which are necessary so as to implement laws stems from the Constitution, while in case there is a commissioning by the parliament to do so, it also stems from the laws and parliament resolutions concerning implementation of laws.

The Constitutional Court recognised that Item 8 of the Regulations of Granting and Payment of State Pensions to Officials and Soldiers of the Departments of Internal Affairs, State Security, Defence and the Prosecutor's Office (wordings of 20 January 1995 and 18 July 2000) approved by the government resolution, was not conform to Article 94.2 of the Constitution and Article 16.4 of the Law on Pensions of Officials and Soldiers of the Departments of Internal Affairs, State Security, Defence and the Prosecutor's Office (wordings of 13 December 1994 and 10 October 2000).

Cross-references:

- Judgments nos. 25/98, 31/98, 10/99, 14/99, 20/99, 21/99, 22/99, 28/99 of 10.02.2000 (*Bulletin* 2000/1 [LTU-2000-1-002]);
- Judgment no. 8/97 of 03.12.1997 (*Bulletin* 1997/3 [LTU-1997-3-012]).

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2001-3-013

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.11.2001 / **e)** 12/2000 / **f)** On a government decision to concentrate market structures / **g)** *Valstybės Žinios* (Official Gazette), 102-3636, 05.12.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
- 1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
- 3.13 **General Principles** – Legality.
- 3.15 **General Principles** – Publication of laws.
- 3.25 **General Principles** – Market economy.
- 4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

Dominant position / Monopoly.

Headnotes:

Article 2 of the Law “On Procedure of Publication and Coming Into Force of Republic of Lithuania Laws and Other Legal Acts”, stating that government resolutions must be published in the Official Gazette (*Valstybės Žinios*), is inseparably linked with Article 3 of the said law under which the government resolutions in which legal norms are not established, amended or acknowledged as no longer valid may, in the estimation of the persons who have signed them, remain unpublished in the Official Gazette.

Laws may not always be public. One of the elements of the principle of a state governed by law (the state of law) is that only published legal acts are effective. It means that acts of the government must be published regardless of whether these acts are normative or individual, and regardless of the fact as to what entities or groups of entities they are meant to regulate.

Summary:

The case was initiated by a group of parliament (*Seimas*) members. They requested the Constitutional Court to establish whether the Government Decision “On the request of the ‘Danisco Sugar’ company to acquire certain shares of sugar sector enterprises” (the “Government Decision”) entered into the minutes of the session of 22 July 1998 of the government was in compliance with Articles 46.1, 46.4, 46.5 and 95.1 of the Constitution, Articles 6 and 11 of the Law on Competition (enacted on 15 September 1992), Article 2 of the Law on the Government and Articles 2 and 8 of the Law “On Procedure of Publication and Coming Into Force of Republic of Lithuania Laws and Other Legal Acts”.

The request of the petitioner was based on the fact that the challenged government decision created an opportunity for one economic entity to attain a dominant position in the sugar market. It permitted this company to monopolise sugar production in Lithuania, and the disputed decision restricted the interests of consumers. The monopolisation of the sugar market is a prerogative of the legislator but not of the government. The government, while adopting the challenged decision, violated the requirements of the Law on Competition, and exceeded the powers granted to it. In the opinion of the petitioner, according to its form and the procedure of adoption and its signing, the government decision contradicts Article 95 of the Constitution which provides that the government shall resolve the affairs of state administration at its sessions by adopting resolutions which must be passed by a majority vote of all members of the government. The Prime Minister and the appropriate minister sign such resolutions, and they enter into force the next day after their publication.

The Constitutional Court held that the Government Decision allowed for the concentration of the sugar market in the country. The regulation of the market concentration is an affair of state administration. The Court noted that the Government Decision was entered into the minutes of the government committee that were signed by the Prime Minister. However, the decision has not been published; the government resolution has not been adopted.

The Constitutional Court concluded that, according to its form and the procedure of its signing, the disputed government decision conflicted with Article 95 of the Constitution, while under the procedure of publication and coming into force it violated the principle of a state governed by law as established by the Constitution.

The Constitutional Court also recognised that the provision of Article 3 of the Law “On Procedure of Publication and Coming Into Force of Republic of Lithuania Laws and Other Legal Acts” whereby the resolutions of the government in which legal norms are not established, amended or acknowledged as no longer valid may, in the estimation of the persons who have signed them, remain unpublished officially – as well as the provision of Article 8.2 of the same law, whereby the resolutions of the government by which legal norms are not established, amended or acknowledged as no longer valid may come into force without their official publication – violated the principle of a state governed by law as established by the Constitution.

The administration of constitutional justice presupposes the fact that a legal act (or a part thereof) which conflicts with the Constitution must be removed from the legal system. Therefore, after it has established that a law, the compliance of which with the Constitution is not challenged by the petitioner but upon which the disputed sub-statutory act is based conflicts with the Constitution, the Constitutional Court stated also this fact.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2001-3-014

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 18.12.2001 / **e)** 16/2000 / **f)** On the official salaries of customs officers / **g)** *Valstybės Žinios* (Official Gazette), 107-3885, 21.12.2001 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

- 3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.6.9.3 **Institutions** – Executive bodies – The civil service – Remuneration.
 4.10.2 **Institutions** – Public finances – Budget.
 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Salary, state administration, coefficients.

Headnotes:

As regards civil servants, the right to adequate compensation for work as established of Article 48.1 of the Constitution, means, in general, that the remuneration for their work, which is one of the main pre-conditions to realise their other legitimate interests, must be established by law and paid at the time fixed in these laws. The right to adequate compensation for work is directly related to the principle of equality of all persons before the law, the courts, and other state institutions. The right to adequate compensation for work entrenched in the Constitution is inseparably linked with the constitutional principle of a state governed by law, which also includes the principle of protection of legitimate expectations.

The constitutional principle of protection of legitimate expectations means that in cases when certain remuneration for work has been established for a person by legal acts, it must be paid throughout the duration of the established time. On the other hand, this principle does not mean that the remuneration for work paid to civil servants from the finances of the state budget and those of local government budgets may not be reduced. However, this may be done only in exceptional cases and only if it is necessary to protect the values entrenched in the Constitution. But even in such exceptional cases the remuneration for work may not be reduced in violation of the balance established in the Constitution between the interests of the person and those of society. The principle of legitimate expectations also means that reduction of remuneration for work must be in line with the constitutional principle of proportionality.

Remuneration for work may not be reduced only to certain categories of employees who are compen-

sated for their work from the finances of the state budget and local government budgets.

Summary:

A regional administrative court appealed to the Constitutional Court concerning the conformity of Items 6, 7 and 7.1 of Government Resolution no. 942 “On the Partial Amendment of the Conditions of Remuneration for Work of Employees of Budgetary Establishments and Organisations” of 27 August 1999 with Articles 48, 94.2, 131 of the Constitution and Article 22 of the Law on Employment Contract.

The request was based upon the fact that the said resolution had been adopted prior to the enactment of the Law on Amending the Law on Approving the Financial Indices of 1999 State Budget and Budgets of Local Governments. The petitioner doubted whether this was in conformity with Article 131.2 of the Constitution providing that expenditures established by law might not be reduced as long as such laws are not amended. The petitioner also pointed out that the said resolution had been adopted without making any reference to laws, which to its opinion seemed contrary to Article 94.2 of the Constitution. It claimed, in the petition, that following this resolution coming into force there had not been created any conditions for the employers to implement the requirements established in Article 22 of the Law on Employment Contract.

The Constitutional Court held that the said resolution had not reduced the previously established official salaries for particular persons under the increased coefficients. The resolution had not created a legal basis to change the formerly increased official salary coefficients in the same budgetary year when the resolution was adopted. Nor did the said resolution reduce the allocations for the salaries of customs officers provided for in the law on approving the financial indices of the state budget and budgets of local governments. The Constitutional Court noted that until 1 October 2001 the procedure of the establishment and the amount of remuneration for work for public servants used to be established by governmental resolutions, therefore the provisions of Article 22 of the Law on Employment Contract were not applicable to customs officers.

The Constitutional Court ruled that the disputed provisions of Items 6 and 7.2 of Government Resolution no. 942 “On the Partial Amendment of the Conditions of Remuneration for Work of Employees of Budgetary Establishments and Organisations” of 27 August 1999 were in compli-

ance with the Constitution and the Law on Employment Contract.

Languages:

Lithuanian, English (translation by the Court).



Malta Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

- Number of judgments: 22

Important decisions

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:

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

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

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

5.3.30 **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:

- *Boeckmans v. Belgium* (1965);
- *Golder v. United Kingdom* (1975), 21.02.1975, *Special Bulletin ECHR* [ECH-1975-S-001];
- *Moreira de Azevedo v. Portugal* (1990), 23.10.1990, Series A, no. 189;
- *Helmets v. Sweden* (1991), 29.10.1991, Series A, no. 212-A;
- *Tomasi v. France* (1992), 27.08.1992, Series A, no. 241-A, *Special Bulletin ECHR* [ECH-1992-S-005];
- *Fayed v. United Kingdom* (1994), 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 of Constitutional Law** – Categories – Written rules – International instruments.

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

2.1.3.2.1 **Sources of Constitutional Law** – 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 ECHR* [ECH-1968-S-003];
- *Abdulhaziz, Cabales and Balkandali Case v. the United Kingdom*, 28.05.1985, Series A, no. 94, *Special Bulletin ECHR* [ECH-1985-S-002].

Languages:

Maltese.

*Identification:* MLT-2001-3-004

a) Malta / **b)** Constitutional Court / **c)** / **d)** 18.11.2001 / **e)** 18/01 / **f)** Ronald Agius v. Advocate General / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

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

Keywords of the alphabetical index:

Appeal, effect / Appeal Court, procedure / Extradition, safeguard.

Headnotes:

Where domestic law provides for judicial proceedings in determining a request for extradition, the conduct of such proceedings is to be in conformity with the rules that guarantee a fair trial in terms of Article 6 ECHR and Article 39 of the Constitution.

Summary:

Extradition proceedings were filed against the applicant. In the appeal stage the prosecution produced fresh evidence, and the applicant contended that Article 22.3 of the Extradition Act (Chapter 276 of the Laws of Malta) was in breach of his fundamental rights as safeguarded by Article 6

ECHR and Article 39 of the Constitution. In terms of Article 22.3 of the Act, “it shall be lawful for the Commissioner of Police or for the Attorney General as the case may be, as well as for the person whose return is requested, to produce evidence before the Court of Criminal Appeal even though such evidence shall not have been produced before the court of committal”.

The Extradition Act is a special law that regulates the extradition to and from other countries of persons accused or convicted of offences. Under Maltese law, the ultimate decision whether or not to extradite an individual is an executive decision. However, the law provides for a judicial process to establish the circumstances which motivated the request for extradition and the issue of a warrant of arrest. The Magistrates Court is competent to decide the matter, and either party has a right to appeal. As an ultimate resort the person committed to custody has also the right to file a constitutional application if he believes that any provision of the Constitution is, has been, or is likely to be, contravened (Article 16 of the Extradition Act).

The Court observed that case-law has established the principle that in extraditions the arguments an individual might successfully raise under the European Convention on Human Rights are correspondingly narrower. In fact, with respect to the substantive rights, which an individual can invoke as protection of his fundamental rights under the European Convention on Human Rights, these arguments are limited only to allegations of a high probability that the individual being extradited could be subjected to serious maltreatment prohibited under Article 3 ECHR. However, in the current proceedings the Court was dealing with the procedural aspect. The Court also considered the constant jurisprudence of the Strasbourg organs that the decision to deport a person does not involve a determination of a civil right and obligation or a criminal charge against him within the meaning of Article 6 ECHR.

Notwithstanding, where domestic law (Malta is a case in point) provides for a judicial process in determining a request for extradition, the conduct of such proceedings is to be in conformity with the rules that guarantee a fair trial in terms of Article 6 ECHR and Article 39 of the Constitution. The provisions of the Extradition Act reflect such principles, thereby ensuring the right of the accused to make submissions against a request for extradition, the right to have the case reviewed by a Court of second instance and equality of arms between the parties to the proceedings.

Article 22.3 of the Extradition Act provides an additional guarantee in favour and against extradition, in that the person whose extradition is being requested has the opportunity to produce further evidence whilst the proceedings are pending in front of the Court of Criminal Appeal. Such a guarantee places both parties on an equal footing. Furthermore, the law does not impose any limitation or restriction on either party to verify and control the evidence that is produced in the appeal stage or to rebut and contradict such evidence.

The Court also dismissed the complaint that Article 22.3 deprived the applicant of his right to appeal from the decision of a Court of Criminal Appeal based on fresh evidence. The Court held that Article 6.1 ECHR does not guarantee a right of appeal from a decision of a court. However, where a state in its discretion provides such a right, then proceedings before the appellate court are governed by Article 6.1 ECHR.

The Constitutional Court reiterated that extradition proceedings were a substantive right of the person whose return is requested. Judicial proceedings are to be conducted in terms of the guarantees established by the European Convention and the Constitution.

Languages:

Maltese.



Netherlands Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 2001 – 31 December 2001.



Norway

Supreme Court

Important decisions

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*.

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

2.1.3.2.1 **Sources of Constitutional Law** – 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.

5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards 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 Retstidende*, 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, para. 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:

- *Neves e Silva v. Portugal*, 27.04.1989, Series A, no. 153-A, para. 37;
- *B and P v. The United Kingdom*, 24.04.2001;
- *Stubbings and others v. The United Kingdom*, 22.10.1996, Reports 1996-IV; *Bulletin* 1996/3 [ECH-1996-3-014].

Languages:

Norwegian.



Identification: NOR-2001-3-007

a) Norway / b) Supreme Court / c) / d) 20.11.2001 / e) 2001/19 / f) / g) to be published in *Norsk Retstidende* (Official Gazette) / h) CODICES (Norwegian).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Rape, allegation / Confidence, circumstances, legitimate.

Headnotes:

Made under certain circumstances, defamatory remarks concerning an alleged rape are deemed to be protected by principles of freedom of expression guaranteed by Article 10 ECHR, and therefore legitimate for the purpose of Section 247 of the Penal Code.

Summary:

A. alleged that she had been raped by B. following a college party. B. denied the allegation of rape and contended that the sexual intercourse had been consensual on both sides. A. and B. were pupils in the same class at college. A. confided to a number of people that she had been raped, and B. brought an action for damages for defamation and a declaration that the remarks A. had made were null and void. A. failed to provide sufficient proof of the truth of the accusation of rape. In both the district Court and the Court of Appeal, B. was awarded damages amounting to NOK 20,000 for non-pecuniary loss and judgment was given declaring the remarks to be null and void. After hearing the evidence, the Court of Appeal stated that it was no more probable that the accusation was true than that it was not. Consequently, there was no reason to consider the requirements of the standard of proof in Section 249.1 of the Penal Code.

A. had spoken of the rape to 11 people. The Court of Appeal found that as far as 7 of these people were concerned – friends, fellow pupils and health workers – the conversations took place in close proximity to the event and as part of the mental healing process. Consequently, these remarks were made with impunity pursuant to Section 249.3 of the Penal Code (protection of one's own benefit), in that A. in all respects had exercised due and proper care. The other four remarks were made in conversations during class sessions with two teachers and two fellow pupils during the following autumn term. The Court of Appeal found that these fell outside the scope of Section 249.3 of the Penal Code.

A. appealed against the application of law to the Supreme Court, and invoked, *inter alia*, Article 100 of the Constitution and Article 10 ECHR.

The main issue before the Supreme Court was to balance the principle of the freedom of expression as protected by Article 10.1 ECHR against the principle of protection of reputation pursuant to Section 247 of the Penal Code, *cf.* Article 10.2 ECHR. The matter under consideration was the four statements that had led to the Court of Appeal's finding in favour of B.

A majority of the Supreme Court – three justices – found that the remarks were protected by the principles of freedom of expression and, consequently, legitimate in the terms of Section 247 of the Penal Code. A.'s appeal was thus successful. The Court found that she had acted in good faith when she made the allegations that she had been raped. Her remarks were to be regarded as confidences made in connection with her personal needs arising in the

classroom situation, which situation must have been strongly affected by the fact that B. was still a pupil in the same class. From A.'s point of view, the remarks were made particularly to enable her to cope with the school situation. When considering whether the remarks were legitimate, it was necessary *inter alia* to bear in mind the victim's need for support following a sexual assault.

The Supreme Court found that the newly enacted Section 208 of the Penal Code concerning legitimate confidences following sexual assault, which was passed on 11 August 2000 and motivated by the district court's judgment in this case, did not apply to the current case. However, in view of the status of the European Convention on Human Rights in Norwegian law, it could clearly not be ruled out that Norwegian criminal law was already in line – at least in part – with Section 208.

The Supreme Court referred to the general principles in the European Court of Human Rights Judgment of 2 May 2000 in case no. 26132/95, *Bergens Tidende and others v. Norway*, and the Judgment of 20 May 1999 in case no. 21980/93, *Bladet Tromsø and Stensaas v. Norway*.

A minority of the Supreme Court – two justices – considered the balance between freedom of expression and protection of reputation differently. A.'s accusations were extreme and were a direct attack on B.'s integrity. A high standard of care had to be exercised in circumstances where the circle to which the confidences were made increased. The same applies as time passes. Finally, a certain amount of weight was attached to the fact that A. only remembered the incident piecemeal. The minority voted to uphold the judgment of the Court of Appeal.

Cross-references:

- *Bergens Tidende and others v. Norway*, 02.05.2000, no. 26132/95;
- *Bladet Tromsø and Stensaas v. Norway*, 20.05.1999, no. 21980/93, *Reports of Judgments and Decisions*, 1999-III.

Languages:

Norwegian.



Poland

Constitutional Tribunal

Statistical data

1 September 2001 – 31 December 2001

I. Constitutional Review

Decisions:

- Cases decided on their merits: 17
- Cases discontinued: 0

Types of review:

- *Ex post facto* review: 17
- Preliminary review: 0
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 14
- Courts referrals ("legal questions"), Article 25 of the Constitutional Tribunal Act: 3

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 12
- Cases on the legality of other normative acts under the Constitution and statutes: 5

Decisions:

- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 7
- Upholding the constitutionality of the provision in question: 10

Precedent decisions: 1

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 17
- Motions requesting such interpretation rejected: 0

Statistical data

1 January 2001 – 31 December 2001

I. Constitutional review

Decisions:

- Cases decided on their merits: 52
- Cases discontinued: 3

Types of review:

- *Ex post facto* review: 54
- Preliminary review: 1
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 45
- Courts referrals ("legal questions"), Article 25 of the Constitutional Tribunal Act: 10

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 43
- Cases on the legality of other normative acts under the Constitution and statutes: 12

Decisions:

- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 19
- Upholding the constitutionality of the provision in question: 35

Precedent decisions: 5

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 54
- Motions requesting such interpretation rejected: 0

Judge Ferdynand Rymarz finished his term of office in February 2001. The parliament appointed Judge Janusz Niemcewicz in his place.

On 1 October 2001 two changes to the Act on the Constitutional Tribunal came into force.

The Office of the Constitutional Tribunal is now run by a manager who is appointed by the General Meeting of the Judges of the Constitutional Tribunal.

Furthermore, provisions have been introduced, stating that a court filing a legal question with the Constitutional Tribunal should be treated as a participant in the proceedings relating to such a question before the Constitutional Tribunal, provided that this Court filed a motion to be accepted as the participant in the proceedings and appointed its representative from judges holding positions in this Court.

Important decisions

Identification: POL-2001-3-020

a) Poland / b) Constitutional Tribunal / c) / d) 21.05.2001 / e) SK 15/2000 / f) / g) Conclusion of a

judgment: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 54, item 572; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 85 / **h**) CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Collective premises, property right / Ownership, transformation.

Headnotes:

The content of the collective right to premises should be interpreted in such a way that its protection is similar to the protection prescribed for the right to private property.

Although an interference in the mechanism of transfer of the ownership right to collective premises to the legal successor of a member of a co-operative does not directly limit the transfer of this right, it does make it impossible – in certain situations and by setting strict formal conditions – to maintain rights acquired as a result of the succession.

The succession right guaranteed in the Constitution should be implemented through the creation of relevant legal conditions which would prevent a legal fiction arising in relation to the successors.

Summary:

Provisions of the Act on Co-operatives providing for a deadline within which a successor of a member of a co-operative must present confirmation of acquisition of an inheritance or commencement of relevant proceedings are discordant with the constitutional rule on property and succession. The provisions were highlighted in a reading before the entering into force of the act dated 21 October 1999 on amendments to the Act on Co-operatives.

In its constitutional claim to the Constitutional Tribunal, the applicant argued that the aforementioned provisions may deprive a successor of an ownership right to collective premises only because

he failed to comply with a time limit stated in the provisions of the act.

The Tribunal considered that the ownership right to collective premises is not subject to exactly the same protection as the right to private property. On the contrary, it is a special right, which should be treated as a “specific property right”, which was used in place of a fully-fledged right to private property in times of the People’s Republic of Poland.

Protection of the succession right guaranteed in the Constitution cannot be exclusively understood with a reference to formal categories, as only a guarantee of a transfer of the rights of the deceased to his or her successors. Instead the right should be implemented through the creation of relevant legal conditions which would prevent a legal fiction arising in relation to the successors. Acceptance of any other position in this case would deform the substance of the constitutional guarantee.

Cross-references:

- Decision of 02.06.1999 (K 34/98), *Bulletin* 1999/2 [POL-1999-2-019];
- Decision of 31.01.2001 (P 4/99), *Bulletin* 2001/1 [POL-2001-1-006].

Languages:

Polish.



Identification: POL-2001-3-021

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.06.2001 / **e)** K 18/2000 / **f)** / **g)** Conclusion of a judgment: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 64, item 657; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 5, item 118 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.

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

Keywords of the alphabetical index:

Liability, state / Tort action / Succession, public authority.

Headnotes:

It is generally not possible and admissible to change, by the provisions of an act, a subject liable for damages (a *powiat*, local unit of self-government, instead of the State Treasury) without the prior consent of the injured party.

Summary:

The case was examined by the Tribunal as a result of a joint motion filed by two *poviats* – local units of governmental administration with regard to certain provisions of the Act reforming aspects of public administration.

In its decision, the Tribunal noted that “the commonly accepted rule, that a legal successor assumes the rights and obligations of his predecessor” relates only to universal succession, the best example of which is inheritance. This succession arises from the end of the “legal existence” of the predecessor. This was not the case, in the Tribunal’s opinion, in the present case. Here, the State Treasury – which was liable for damages – still exists; the new subject – the *powiat* – appeared alongside it.

The Tribunal was therefore of the opinion that a correct interpretation of the analysed provisions requires one to accept that they do not cover civil liability for obligations created before 1 January 1999. Therefore, if all elements of legal action constituting, according to the provisions of the Civil Code, a source of obligation (causing a right to damages through the lack of performance of an agreement for which a debtor is liable in damages) occurred before the end of 1998, the State Treasury is liable for them. The analysed provisions, which are interpreted as not covering liability for damages in tort relating to newly created units of local self government if such torts were caused before the creation of the units are concordant with the constitutional rule of democracy and the rule of governmental authorities acting on the basis of and within provisions of law provided for in the Constitution.

Cross-references:

- Decision of 27.06.2000 (K 20/99).

Languages:

Polish.

*Identification:* POL-2001-3-022

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.06.2001 / **e)** K 23/2000 / **f)** / **g)** Conclusion of a judgment: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 69, item 724; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 5, item 124 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.

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

Keywords of the alphabetical index:

Collective premise, property / Property, acquisition / Co-ownership, “one subject” rule / Spouse, property / Co-operative, lease of premises, approval.

Headnotes:

The collective property right to premises is a transferable, patrimonial and enforceable right.

The “one subject” rule allowing only one person or a married couple to have a collective property right to premises, established in the Act on co-operatives, represents a limitation of the freedom to acquire collective property rights via co-ownership.

Furthermore, in the light of the principle of equality, there is no rational justification for a different treatment of subjects willing to jointly acquire the collective right to property.

Summary:

The Tribunal examined the case as a result of a motion filed by the Ombudsman.

The examined provisions of the Act on co-operatives introduce a rule on the collective right to premises. This rule precludes the joint acquisition of collective property rights to premises by several persons.

The Tribunal decided that the functioning of this “one subject” rule in the current economic climate limited the property rights of citizens. The rule of proportionality and the concept of particular rights and freedoms governs the limits of interference in constitutional rights and freedoms. In the Tribunal’s opinion, it would be difficult to identify the constitutional values justifying the introduction of such far-reaching limitations on the freedom to acquire collective property rights via co-ownership.

The examined provisions also infringed the principle of equality. They put spouses and successors of members of a co-operative in a privileged position. The Tribunal underlined that in the light of the principle of equality, there was no rational justification for a different treatment of subjects willing to jointly acquire the collective right to property. The Tribunal therefore decided that by obliging divorced spouses to divide their estate under pain of expiry of their collective right to premises, the legislator infringed the limits of permissible interference in the property rights of citizens. A rational legislator cannot create legal situations which infringe the maintenance of property rights, without this being justified by the Constitution.

The Constitutional Tribunal also decided that the requirement of obtaining approval from the co-operative for the lease of a whole premises is too strict. The above-mentioned construction is discordant with a concept adopted in the decisions of the Tribunal, which states that the legislator should adjust provisions of the law on co-operatives to new economic conditions, in particular those arising from rules of the market economy.

Provisions of the Act on co-operatives, introducing a rule on the collective right to premises, were declared discordant with the constitutional right to acquire private property rights, as well as the principles of equality, democracy and social justice.

As regards provisions of the Act imposing on divorced spouses an obligation to divide their rights of ownership of premises under pain of loss of this right, they were considered discordant with the constitutional rule of protection of the right to private property and other property rights.

The obligation to receive the approval of a co-operative for a lease of premises constitutes too great an interference in the sphere of property rights by the members of the co-operative.

Cross-references:

- Decision of 05.11.1997 (K 22/97), *Bulletin* 1997/3 [POL-1997-3-023];
- Decision of 18.01.2000 (K 17/99);
- Decision of 12.12.2000 (SK 9/00).

Languages:

Polish.



Identification: POL-2001-3-023

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.07.2001 / **e)** SK 1/2001 / **f)** / **g)** Conclusion of a judgment: *Official Gazette of Ministry of Internal Affairs*, 2001, no. 9, item 31; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 5, item 127 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
- 3.13 **General Principles** – Legality.
- 4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

Administrative act, internal / Administrative act, effects / Ministerial notice.

Headnotes:

In accordance with the Constitution, the internal administrative acts can be issued only by way of their being universally binding acts. Such acts cannot be relied upon in decisions concerning citizens, legal persons and other subjects.

The Notice given by the Minister of the Interior introducing an indicator of valorisation for pension benefits for certain categories of civil servants is not a source of law which is universally binding.

Summary:

The case was examined by the Constitutional Tribunal as a result of a constitutional claim related to the Notice given by the Minister of the Interior introducing an indicator of valorisation for pension benefits for policemen, officials in the National Protection Office, and in the Border Guard, the National Fire Brigade and the Prison Services, as well as their families.

The Tribunal mentioned that due to the fact that only a set number of provisions of law could have universal effect, the notice could not be treated as binding. None of the provisions of the Constitution mentions it as a source of law, which is universally binding. However, this is not the case when dealing with internal administrative acts, where there is no set number of types of law, which could have universal effect.

The Tribunal pointed out that the constitutionality of the notice depended on whether its introduction and content stayed within the limits set for this kind of act by the Constitution. It was of the opinion that the notice was to be treated as being in breach of the Constitution insofar as:

1. the introduction of the notice was not based on the provisions of the Act on pensions for state officials; and
2. the provisions of the notice constituted the necessary element of a ground for a decision concerning the validation of pensions for policemen, since it would not be possible to perform such a validation without explaining the reasons. As a result of this, the provisions of the notice covered issues reserved for universally binding acts.

Therefore, the Notice given by the Minister of the Interior introducing an indicator of valorisation for pension benefits for certain categories of civil servants and their families, is in breach of the constitutional rule that the scope and form of social security should be introduced in such a form as is set out by the Constitution.

Cross-references:

- Decision of 21.06.1999 (U 5/98).

Languages:

Polish.

*Identification:* POL-2001-3-024

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 14.09.2001 / **e)** SK 11/2000 / **f)** / **g)** Conclusion of a judgment: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 103, item 1130; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 6, item 166 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Market, local, definition / Law, provisions, contradictory.

Headnotes:

The rule of the protection of citizens' trust in the government and the law derives, *inter alia*, from the principles of democracy. Therefore, issuing an act, which uses definitions which are mutually contradictory or allow for a free interpretation, should be treated as infringing these principles.

Summary:

The case was examined by the Tribunal as a result of a constitutional claim. In the opinion of the applicant, a definition of "local market" adopted in the Act, which covered all places where selling took place, could lead to the creation of an obligation to pay local market charges even for sales in places where trading is prohibited.

The Tribunal recalled that it has often emphasised in its judgments that the rule of the protection of citizens' trust in the government and the law derives, *inter alia*, from the principles of democracy. Therefore, issuing an act, which uses definitions which are mutually contradictory or allow for a free interpretation, should be treated as infringing these principles.

In this situation, in the Tribunal's opinion, no infringement of the above-mentioned rules of the creation of law could be ascertained in the provisions at issue. The legislator cannot be permitted to give a specific meaning to the notions used in the text of an

act. Furthermore, it should be noted that in this case the legislator very precisely described a meaning of the notion in question. The Tribunal decided that the objections of the complainant, relating to the legislator using different legal concepts which had different meanings, could not therefore be acknowledged here.

Cross-references:

- Decision of 30.01.2001 (K 17/2000), *Bulletin* 2001/1 [POL-2001-1-005].

Languages:

Polish.



Identification: POL-2001-3-025

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.10.2001 / **e)** K 11/2001 / **f)** / **g)** Conclusion of a judgment: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 118, item 1271; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 210 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

Keywords of the alphabetical index:

Municipality, councillor, activity, commercial / Interests, conflict / Company, board, members / Municipality, councillor, incompatibility.

Headnotes:

The need to introduce limitations on the right of public bodies to wield power in commercial concerns cannot be challenged. Therefore, the legislator has a right to impose on the councillors different kinds of limitations concerning their professional activity, on the condition that these limitations are in the public interest and that their scope will cover a range of interests.

The limitations imposed on persons performing public functions cannot be interpreted as being a curb on the rights and freedoms of these persons but should be treated as measures to ensure the correct functioning of public institutions.

Summary:

The case was examined by the Tribunal as a result of a motion filed by a local authority. The motion raised the question of whether the abolition of provisions allowing for appointment of councillors to the boards of companies dealing with municipal property issues resulted in the limitation by a self-governing authority of its right to perform a direct management and control over municipal activity.

The Tribunal noted that there is no doubt that property connections between persons performing public functions and subjects who may have a vested interest in the adoption of certain decisions could constitute a threat to the independence of persons performing public functions. Therefore, by preventing members of local authorities from sitting on company boards, the possibility of conflicts of interest is eliminated and the protection of the authority of self-governmental bodies is enhanced.

Provisions of the Act on the remuneration of managers of certain types of corporation, abolishing rules allowing for the appointment of councillors to the boards of companies dealing with municipal property issues, were not in breach of democratic principles.

Cross-references:

- Decision of 26.04.1995 (K 11/94);
- Decision of 23.04.1996 (K 29/95), *Bulletin* 1996/1 [POL-1996-1-007];
- Decision of 13.04.1994 (W 2/94), *Bulletin* 1994/1 [POL-1994-1-006];
- Decision of 31.03.1998 (K 24/97), *Bulletin* 1998/1 [POL-1998-1-007].

Languages:

Polish.



Portugal

Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

Total: 230 judgments, of which:

- Preventive review: 1 judgment
- Abstract *ex post facto* review: 4 judgments
- Review of unconstitutionality through omission: 1 judgment
- Appeals: 73 judgments
- Complaints: 87 judgments
- Property and income declarations: 1 judgment
- Electoral disputes: 43 judgments
- Political parties and coalitions: 17 judgments
- Political parties' accounts: 3 judgments

Important decisions

Identification: POR-2001-3-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 09.10.2001 / **e)** 423/01 / **f)** / **g)** *Diário da República* (Official Gazette), 258 (Series I-A), 07.10.2001, 7080-7089 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

4.11 **Institutions** – Armed forces, police forces and secret services.

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

5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.

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

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

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

Keywords of the alphabetical index:

Decolonisation / Disabled, war victim / Pension, invalidity, military personnel / Social justice, principle.

Headnotes:

Article 15 of the Constitution enshrines the principle of equal rights and duties for all, by making it possible for foreigners (or stateless persons) living in Portugal to enjoy the same rights and be subject to the same duties as Portuguese nationals. This equality is nonetheless restricted by two constitutional provisions: it cannot include political rights or the performance of public duties not predominantly technical in nature, and the Constitution empowers parliament to confer certain rights solely on Portuguese nationals, that is to say to rule out the equality principle's application to certain rights.

Extending the applicability of legislation concerning rights to assistance or benefits to foreigners living in Portugal who, as members of police forces or in a civilian capacity, became invalid as a result of participating in military operations in support of the armed forces, is justified on grounds of justice. The principle of justice means that any discrimination in this field, for which there is no justification on grounds of either necessity or adaptation of the relevant rules, qualifies as arbitrary.

Summary:

The Ombudsman (*Provedor de Justiça*) applied to the Constitutional Court for a generally binding finding of unconstitutionality concerning the provisions of legislative Decree no. 43/76 of 20 January and legislative Decree no. 319/84 of 1 October, which restricted to Portuguese nationals the status of invalid member of the armed forces or the equivalent. Legislative Decree no. 43/76 recognised that invalid members of the armed forces were entitled to pecuniary and non-pecuniary compensation and introduced ways and means of furthering their full integration into society. Legislative Decree no. 319/84 extended the applicability of legislative Decree no. 43/76 to Portuguese nationals who, as members of police forces or other similar bodies or in a civilian capacity, had participated in military operations in support of the armed forces in the former overseas territories and had suffered an accident resulting in a reduction in their overall earning capacity.

In his application the Ombudsman argued that these provisions breached Articles 13 and 15 of the Constitution, since they restricted to Portuguese

nationals the status of invalid member of the armed forces or the equivalent.

The Court was asked to determine whether:

- a. the principle of equality established in Article 15.1 of the Constitution applied to the rights in question (those enjoyed by invalid members of the Portuguese armed forces);
- b. those rights were excluded from the principle of equality under the same Article 15.2 of the Constitution or reserved for Portuguese nationals under the Constitution;
- c. parliament, availing itself of the possibility afforded at the end of Article 15.2 of the Constitution, could restrict these rights solely to Portuguese nationals.

The Court noted that, since the difference in treatment resulted from adoption of an arbitrary, discriminatory criterion, a breach of the principle of equality was at issue. However, because parliament had defined a separate legal solution on the basis of a nationality condition and since, as regarded that nationality requirement, the principle of equality was discussed and given specific form in Article 15 of the Constitution, the question of constitutionality was examined in the light of that article and the specific rules defined therein, as this special principle absorbed the general principle of equality.

The Portuguese Constitution made membership of the armed forces, which, according to Article 275.2, were to be composed solely of Portuguese nationals, subject to a requirement of citizenship and thereby settled in a completely clear, conclusive manner an issue which had long been a matter of dispute under military law. All this ruled out any possibility of foreigners' choosing to join the Portuguese army because that would entitle them to the invalid status granted under legislative Decree no. 43/76. However, the fact that they were deprived of any choice in this matter did not necessarily mean that they were deprived of the rights to assistance or benefits provided for in the remaining legislation under consideration.

The principle of equality could be seen to apply to the entitlements and privileges granted to all invalid members of the Portuguese armed forces, although these were not rights, freedoms or guarantees and could be deemed not to qualify as fundamental rights; it was doubtful whether it could be said that these rights were guaranteed by the Constitution and did not simply derive from statute law.

By reason of the circumstances in which they became invalid, at a time when they had Portuguese nationality, and the circumstances of their losing that nationality, discrimination against the foreigners in question, who were living in Portugal, was incompatible with the principle of justice that necessarily prevailed in a democratic state governed by the rule of law. There was no justification for it on grounds of either necessity or appropriateness, and it was consequently arbitrary and disproportionate, constituting a breach of the principle of equality enshrined in Article 15.1 of the Constitution.

This part of the legislation under consideration was therefore unconstitutional.

However, given the considerable time that had already elapsed, the difficulty of remedying past situations and the related uncertainty, in many cases, as to how to eradicate the effects of the legislation deemed unconstitutional, a situation which would seriously disrupt public services, the Constitutional Court decided to limit the consequences of this finding of unconstitutionality solely to the period following official publication of the judgment.

Supplementary information:

The Constitutional Court has a large body of case-law concerning invalid members of the armed forces. Mention can be made of:

- Judgment no. 46/86, whereby it found that legislation concerning simultaneous receipt of an army invalidity pension and income from the performance of new duties was not unconstitutional;
- Judgment no. 330/93, whereby it found that legislation on calculation of parachutists' service bonuses for retirement pension purposes was not unconstitutional;
- Judgment no. 563/96, whereby it found that legislation making it possible, through a revision of benefits granted to invalid members of the armed forces, to apply those benefits to persons who had not requested the revision was not unconstitutional. The aim was to ensure that all army invalids had the possibility of opting for active service (this case-law was moreover recently upheld in Judgment no. 414/01);
- Judgments nos. 319/00 and 378/00 concerning the automatic return to active service of invalid members of the armed forces.

The Constitutional Court has also established a line of decisions (not very numerous) on the Constitution's treatment of foreigners (at least as regards the subject in the case under consideration):

- in a series of judgments the Court found that legislation which did not require civil servants and public-sector employees in the former overseas territories to have Portuguese nationality in order to be granted a retirement pension was not unconstitutional;
- in Judgment no. 54/87, concerning the legal definition of exceptions to the principle of equality between nationals and foreigners, the Court held that the Constitution made it possible for certain rights to be restricted to Portuguese nationals by law, but the law clearly could not do so in an arbitrary, pointless or disproportionate manner, if it was not to invalidate the principle of equality between foreigners or stateless persons and Portuguese nationals.

Languages:

Portuguese.



Identification: POR-2001-3-003

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 24.10.2001 / **e)** 470/01 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
- 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Claim, preferred / Claim, in respect of wages / Wage, right / Vessel, impounding / Confidence in the law, principle / Wage, unpaid / Wage, discrimination.

Headnotes:

Creditors' ranking for payment of their claims out of the proceeds of the sale of a specific item of property – a vessel – must be determined in accordance with Article 578 of the Commercial Code.

The solution resulting from application of Article 578 is not arbitrary, nor does it lack sufficient objective foundation. It reflects the priority given to payment of docking and moorage fees over claims in respect of wages. These fees correspond to services and costs attributable to keeping a vessel in a harbour and are inherent in its normal use. This legislation is also consistent with the principle that Portugal is a democratic state based on the rule of law, enshrined in Article 2 of the Constitution, in particular as regards the rule of law, together with the principle of confidence in the law.

Summary:

Six Ukrainian nationals, in their capacity as the crew of the vessel "Lanzheron", which had docked in a Portuguese harbour and had been impounded, had filed claims for overdue wages, on the basis of their employment contracts, against the company Old Navy Lda., seizure and sale of whose property had been ordered.

In this specific case the Constitutional Court was asked to decide whether, regarding certain preferential claims on the vessel, the provisions of Article 578.4 and 578.6 of the Commercial Code (included in the chapter on "Creditors' preferential claims and mortgages") were constitutional. The applicants argued that, as a general rule, there must be strict equality between a ship's crew and all other employees. They also maintained that, in comparison with all other claims deriving from employment contracts held by other employees also subject to specific working arrangements, the system provided for in these paragraphs of the Commercial Code did not allow strict equality.

The Constitutional Court noted that, as a result of the ranking determined in Article 578 of the Commercial Code, sums due to the harbour authority in respect of docking and moorage fees took precedence over crews' claims in respect of wages. These sums, on which the law conferred a payment preference, were intended as remuneration for use of public property – harbour facilities – and were a direct consequence of normal use of the property – the vessel – against which a lien was granted. This system, which had the result of giving this tangible guarantee precedence over that deriving from either the Civil Code or the

Commercial Code in respect of debts arising from employment relations, put into practice certain principles underlying the civil-law provisions governing the ranking of claims: first, the priority given to certain preferential claims of public authorities; second, the principle whereby certain expenses incurred for the maintenance or use of the property against which the lien was granted must be paid first, taking precedence over other preferential claims.

The Court consequently found that the legislation under consideration was not unconstitutional. This decision endorsed the priority given to payment of certain docking and moorage fees and expenses incurred by a harbour authority over crews' claims in respect of wages. Since the general principle that employees' wage-related claims took absolute precedence did not exist in Portuguese law, there was no inequality that might be reprehensible from a constitutional standpoint between members of a ship's crew and all other workers.

Languages:

Portuguese.



Identification: POR-2001-3-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 21.12.2001 / **e)** 588/01 / **f)** / **g)** *Diário da República* (Official Gazette), 30 (Series II), 05.01.2002, 2435-2438 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 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.
- 5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Lawyer, incompatibility / Ethics, professional / Professional association / Legal profession.

Headnotes:

When seeking to safeguard lawyers' independence in practising their profession, it is difficult to predetermine how public interests will affect other occupations, given the almost infinite number thereof and the virtually unforeseeable variety of circumstances. However, the public interest cannot be upheld to the detriment of the essential substance of the right freely to choose one's occupation in a democratic society, to the point where individuals are forced to carry on an occupation against their will or prevented, in an arbitrary, unreasonable manner, from practising or continuing to practice their occupation.

Since legal representation by counsel contributes to the administration of justice – a fundamental task of the state – there would seem to be no question that it must be governed by rules based not only on protection of lawyers' own status, and the professional dignity inherent therein, but also on the public interest.

Freedom to work entails free choice of the type of work, which consists in the right to choose one's preferred occupation, entails a right to change jobs at will and includes the possibility of choosing the working conditions that best suit one's needs, in terms of working hours, remuneration or other conditions. Yet, it is clear that both of these freedoms must respect certain limits, which restrict their scope. The constitutional provisions on free choice of an occupation uphold certain restrictions imposed in the public interest or inherent in individual capabilities. In other words, parliament can in principle lawfully subject enjoyment of a fundamental right, such as that at issue here, to conditions or restrictions. A restriction is unlawful only if it violates the principles set out in Article 47.1 of the Constitution or if it serves no purpose or is unreasonable or disproportionate in its effects, with the result that it disregards the limits laid down in Article 18.2 and 18.3 of the Constitution.

Summary:

An appeal was lodged with the Constitutional Court against a decision by the Bar Association to suspend a lawyer's membership on the ground that practice of the profession of lawyer was incompatible with performance of the duties of auditor. The appeal referred to Article 68 of the Bar Association Regulations, according to which “practice of the

profession of lawyer shall be incompatible with any other occupation or office which may undermine the independence and dignity of the profession”.

The appellant maintained that the Bar Association's interpretation, whereby the simultaneous performance of the two above-mentioned occupations was deemed incompatible, failed to respect the rights freely to choose and to carry on more than one occupation. Both followed from the right to free choice of an occupation enshrined in Article 47.1 of the Constitution. The appellant further asserted that, since this right was part of the corpus of rights, freedoms and guarantees, it could be limited only under the conditions laid down in Article 18.2 and 18.3 of the Constitution and came within parliament's legislative preserve, as provided for in Article 165.1.b of the Constitution.

The Constitutional Court noted that parliament was clearly concerned to lay emphasis on the Bar's ethical and social role and, consequently, to guarantee that its members' professional and civic conduct, both in the practice of their profession and in other capacities, distinguished them as servants of justice and the law. This aim was obvious from the section of the Bar Association Regulations devoted to professional ethics, particularly with regard to the requirement of professional secrecy, the system of incompatibilities and the impediments to practising the profession laid down therein. The incompatibilities provided for were based on an ethical model. Preventing simultaneous practice of the profession of lawyer and performance of other occupations or duties from jeopardising the ethical principles and code of conduct which must govern the profession was hence a constant underlying objective.

According to the Constitutional Court's reasoning, parliament was in principle lawfully entitled to subject the exercise of a fundamental right, such as that at issue here, to conditions or restrictions. It therefore held that there had been no breach of Article 47.1 of the Constitution nor of the principles of necessity, appropriateness and proportionality in relation to the desired ends, which made the reference to Article 18.2 and 18.3 of the Constitution irrelevant. There had also been no interference with the partially exclusive legislative powers of the Assembly of the Republic in this field.

Supplementary information:

The Constitutional Court had already had occasion to give judgment on the incompatibility rules applying to the profession of lawyer, although under different angles.

In its Judgment no. 143/85 it gave a generally binding finding of unconstitutionality concerning a rule of the Bar Association Regulations “in the part stating that teaching of subjects disconnected with the law is incompatible with practice of the profession of lawyer”. The possibility of including the rules on incompatibility among the measures designed to safeguard lawyers' status was then envisaged, since safeguarding the profession's independence and dignity entailed guaranteeing lawyers' availability and devotion to their duties. This was a means of simultaneously guaranteeing lawyers' skills and their related professional reputation.

Later, in Judgments nos. 169/90 and 106/92, the Court gave decisions on the incompatibility of practice of the profession of lawyer with performance of the duties of a civil servant or any other central, regional or local government employee. The Court held, in particular, that, if parliament wished performance of public duties to be generally incompatible with practice of the profession of lawyer, it could make this plain either by listing the duties or activities attaching to the profession of lawyer which were incompatible with the performance of public duties or when laying down the rules applicable to public-sector employees.

Languages:

Portuguese.



Romania

Constitutional Court

Statistical data

Total: 354 appeals lodged, settled as follows:

- In accordance with Article 144.a of the Constitution: 6
- In accordance with Article 144.b of the Constitution: 1
- In accordance with Article 144.c of the Constitution: 347

Appeals admitted: 19

Important decisions

Identification: ROM-2001-3-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 01.11.2001 / **e)** 287/2001 / **f)** Decision on the objection to the constitutionality of the provisions of Articles 11.2.b and 10.1.g of the Code of Criminal Procedure and the provisions of Articles 121.1 and 124 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 14/2002 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Criminal liability, effects / Statute of limitations / Penalty, enforcement, limitation.

Headnotes:

The statute of limitations has the effect of extinguishing the state's right to incur the criminal liability of a person guilty of an offence either of its own motion or on the basis of a complaint lodged by the injured

party, together with its right to impose the corresponding judicial penalty on the sentenced person. The statute of limitations is necessary to eliminate the negative consequences of the obligation to answer fully before the courts and submit to the corresponding penalty in cases where a long period of time has elapsed since perpetration of the offence or implementation of the penalty, thus removing the need for such measures. Such rules would even be liable once again to disrupt the social relations which have meanwhile been restored.

Summary:

The provisions of Article 121.1 of the Criminal Code on the effects of limitation and of Article 124 of the said Code on special limitation, taken in conjunction with the provisions of Article 11.2.6 combined with Article 10.1.g of the Code of Criminal Procedure, are compatible with the Constitution. These provisions relate to the establishment of criminal liability and the effects of such liability.

An objection was raised before the Constitutional Court concerning the constitutionality of the provisions of Articles 11.2.b and 10.1.g of the Code of Criminal Procedure and the provisions of Articles 121.1 and 124 of the Criminal Code.

The grounds given for the objection included the allegation that these provisions infringed the provisions of Articles 21, 16.1, 123.1 and 125.1 of the Constitution concerning, respectively, freedom of access to the courts, equal rights, the administration of justice and the courts. It was argued that in cases where a statutory limitation applies, the courts must simply terminate the criminal proceedings without delivering judgment, and the defendant's guilt is deemed no longer to be demonstrable. It was further argued that the law must provide for statutory limitations on criminal liability only in exceptional cases.

Examining the objection as to constitutionality, the Court found that the establishment of statutory limitations corresponded to an objective necessity in terms of the legal regulation of community life.

The Court stresses that the legislation on limitation of criminal liability and of enforcement of penalties, as well as the effects of limitation, are based on the very essence of the statute of limitations, which obviously cannot be considered unconstitutional.

The Court rejected the contention that the provisions of the Code of Criminal Procedure and the Criminal Code on limitation of criminal liability were contrary to Article 16.1 of the Constitution. Limitation periods are

established according to the severity of the penalty provided for in law, or, in the case of limitation of penalty enforcement, of the penalty imposed, and not on the basis of the race, nationality, or ethnic origin of the defendant or sentenced person, or any other criterion listed in Article 4 of the Constitution as being discriminatory. Moreover, the legal provisions complained of do not establish any kind of preferential treatment, as the measure in question is applied equally to defendants or sentenced persons in respect of whom the limitation period laid down in Article 122 and respectively 126 of the Criminal Code has expired.

The Court notes that the prescription of criminal liability also does not hamper the freedom of access to the courts to the extent that no obstacles are placed in the injured party's way; nor is the person lodging the objection prevented from addressing the courts in an attempt to secure a decision on this particular point of criminal law.

Furthermore, the legal texts complained of do not infringe the provisions of Article 123.1, because here again "justice (is) rendered in the name of the law", i.e. in accordance with the provisions of the Code of Criminal Procedure on the statute of limitations.

The Court points out that Article 125.1 of the Constitution on the administration of justice by the Supreme Court of Justice and other courts is irrelevant to the provisions complained of in the objection as to constitutionality.

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2001-3-007

a) Romania / **b)** Constitutional Court / **c)** / **d)** 08.11.2002 / **e)** 303/2001 / **f)** Decision on the objection to the constitutionality of Article II.1 and II.2 of Government Emergency Order no. 89/2001 amending and complementing specific provisions of the Criminal Code on offences relating to sexuality / **g)** *Monitorul Oficial al României* (Official Gazette), 809/2001 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

3.13 **General Principles** – Legality.

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

Keywords of the alphabetical index:

Sexuality, restrictions / Penalty, enforcement / Law, optional implementation.

Headnotes:

In line with Article 15.2 of the Constitution, which stipulates that only "the more favourable penal law" can constitute an exception to the principle of non-retroactivity of the law more severe penalties cannot be applied to facts committed prior to their entry into force.

Summary:

I. An objection was raised before the Constitutional Court concerning the constitutionality of the provisions of Article II.2 of Government Emergency Order no. 89/2001 amending and supplementing specific provisions of the Penal Code on offences relating to sexuality.

Examining the objection, the Court found that it had been submitted in the context of a particular case where the defendant had been finally sentenced for the offence provided for in Article 200.2 and 200.3 of the Criminal Code (in force at the time of perpetration of the offence), namely a 5-year prison sentence and an additional penalty of prohibition of certain rights for a 3-year period, for perpetration of the offence of sexual intercourse between persons of the same sex, committed by coercion on a minor. Article 200.2-4 of the Criminal Code was repealed under Article I.3 of Government Emergency Order no. 89/2001, but the facts mentioned in the repealed texts are now defined as offences by Articles 197 and 198 of the Penal Code, in the wording set out in Article I.2 of the Order.

The new formulation makes the facts for which the defendant was convicted a more serious offence, and Article II.2 of the Order complained of in the objection as to constitutionality concerns the situation of defendants who have been finally sentenced for the facts provided for in Article 200.2-4 of the Criminal Code and whose sentences are currently being enforced.

In such cases the Order provides that the enforcing body must immediately re-examine the facts in the light of these texts, either of its own motion or at the request of the public prosecutor or the sentenced person.

This being the case, the Court finds that the provisions of the new criminal law, and in particular Article II.2 of the Order complained of, are unconstitutional, because the clearly more severe penalties cannot be applied to facts committed prior to their entry into force, and the provisions of Article II.2 of the Order on their application to previously committed facts contravene Article 15.2 of the Constitution, which stipulates that only “the more favourable penal law” can constitute an exception to the principle of non-retroactivity of the law. But the fact is that the legal provisions complained of require the facts to be re-examined in the light of the new law, even though this legislation is more severe.

The Court notes that the new law should not mention re-examining the facts, as this is contrary to the Constitution. It would have been sufficient to apply properly the principles on the succession of criminal laws as enshrined in Articles 10-16 of the Criminal Code. According to Article 12.1 of the Criminal Code, “the criminal law does not apply to acts committed under the old law if they are not mentioned in the new law”.

Moreover, the Court points out that even though, according to Article I.3 of the Order, Article 200 has been repealed, the acts mentioned in Article 200.2-4 of the Criminal Code have been made more severely punishable offences under Article 200.1 and 200.2.

The Court further finds that in connection with the acts set out in Article 200.2-4 of the Criminal Code which are now criminal offences under Articles 197 and 198 of the Criminal Code, the applicable provisions are those set out in Article 13 of the Criminal Code enshrining the principle of applying the more favourable criminal law, as well as those of Articles 14 and 15 of the Code, concerning, respectively, the compulsory and optional application of the more favourable criminal law.

II. In accordance with Article 25.2 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the latter Court extended its supervision of constitutionality to Article II.1 of the Order, since it is impossible to treat this article separately from the provisions mentioned in the objection. This text stipulates that the said texts shall be applied to such acts mentioned in Article 200.2-4 as are currently being prosecuted or adjudicated, if

they are mentioned in other texts of the Criminal Code or special laws.

The Court finds that these provisions are contrary to the provisions of Article 15.2 of the Constitution and Articles 2 and 13 of the Criminal Code because they require retroactive application of the new criminal law which, for the aforementioned reasons, is less favourable.

Supplementary information:

Article II.2 of Government Emergency Order no. 89/2001 amending and supplementing specific provisions of the Criminal Code on offences relating to sexuality as published in the Romanian Official Journal, Part I, no. 338 of 26 June 2001, provides as follows:

“Where a decision has been given finally convicting a person of the acts set out in Article 200.2-4 and the corresponding sentence is currently being enforced, and if these facts are provided for in other texts of the Criminal Code or special laws, the enforcing body must immediately re-examine the acts committed in the light of these texts, either of its own motion or at the request of the public prosecutor or the sentenced person”.

Article 200.2 and 200.3 of the Criminal Code provides that:

“A person of full age who has sexual relations with an under-age person of the same sex is liable to be imprisoned for 2 to 7 years and deprivation of certain rights.

A person who has sexual relations with a person of the same sex who is unable to defend him/herself or to express his/her will is liable to be imprisoned for 3 to 10 years and deprivation of certain rights.”

Article 197.1 and 197.3 of the Criminal Code stipulates that:

“A person who commits any kind of sexual act, whether with a person of the same or the opposite sex, effected by coercion or taking advantage of his/her inability to defend him/herself or to express his/her will, is liable to be imprisoned for 3 to 10 years and deprivation of certain rights. [...]”

The offender is sentenced to 10 to 20 years imprisonment and deprivation of certain rights if the victim is under the age of fifteen, and if the act leads to the death or suicide of the victim the offender is

sentenced to 15 to 25 years' imprisonment and deprivation of certain rights.

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2001-3-008

a) Romania / **b)** Constitutional Court / **c)** / **d)** 15.11.2001 / **e)** 311/2001 / **f)** Decision on the objection to the constitutionality of the provisions of Article 252.2 of the Code of Civil Procedure, which became Article 253.2 under Government Emergency Order no. 138/2000 / **g)** *Monitorul Oficial al României* (Official Gazette), 25/2002 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.17 **General Principles** – Weighing of interests.
4.7.2 **Institutions** – Judicial bodies – Procedure.

Keywords of the alphabetical index:

Time-limit / Status procedure / Appeal, starting point / Appeal, deadline.

Headnotes:

Enforcing time-limits is a procedural sanction based on the need to terminate situations of uncertainty in connection with specified legal relationships brought before the courts. No constitutional text makes it mandatory to set a time-limit on the submission of an appeal starting from the date of communication of the court decision.

Summary:

An objection was raised before the Constitutional Court concerning the constitutionality of the provisions of Article 253.2 of the Code of Civil Procedure, which states that: “an appeal may be lodged against a decision concerning the expiry of

time-limits within a period of 5 days from the date on which the decision was pronounced”.

The appeal alleged non-compliance with the following provisions of the Constitution:

- Article 21.2 of the Constitution on freedom of access to the courts;
- Article 24 of the Constitution on the right to defence, and
- Article 20 of the Constitution on international treaties on human rights, which refers to Article 6 ECHR.

Examining the objection, the Court noted that enforcing time-limits was a procedural sanction based on the need to terminate situations of uncertainty in connection with specified legal relationships brought before the courts, because of the twelve-month delay in dealing with a court summons, caused by negligence on the part of one of the parties. Time-limitation and, by implication, its consequences as set out in Article 254 of the Code of Civil Procedure could have been avoided if the parties had reacted within a twelve-month period from the date of interruption of proceedings (or a six-month period, in commercial cases) before the trial court. At the same time the Court noted that no constitutional text makes it mandatory to set a time-limit on the submission of an appeal starting from the date of communication of the court decision, and that the Code of Civil Procedure provides for other situations in which the period within which the appeal must be lodged starts when the decision is given, not when it is communicated (e.g. Article 582 on appeals against a presidential order). Pursuant to the provisions of Articles 125.3 and 128 of the Constitution, these matters must be settled by law, not by the Constitution.

Where non-compliance with Article 21.2 of the Constitution is concerned, the Court held that it is precisely Article 253.2 that governs the exercise of the right of everyone to apply to the courts to defend his/her rights and legitimate interest, as a fundamental constitutional right.

Similarly, the Court found that the right to defence as set out in Article 24 of the Constitution was not infringed either because the right of the parties to assistance by a lawyer was not restricted given that they had been informed in due time and could consequently have exercised their defence rights.

The Court found that there was no infringement of Article 6.1 ECHR and Article 20 of the Constitution, because Article 253.2 of the Code of Civil Procedure

only governs the existence of a remedy against a decision concerning the expiry of a time-limit and the arrangements for lodging this type of appeal (within a five-day period from the pronouncement of the decision concerning the expiry of a time-limit). The European Convention on Human Rights nowhere provides that the time-limit for exercising a right of appeal starts from the time of communication of a court decision. Quite the reverse: the right of states signatory to the Convention to establish their own remedies is recognised, and the European Court of Human Rights can only intervene after all domestic remedies have been exhausted, in accordance with Article 35 ECHR.

The provisions of Article 253.2 of the Code of Civil Procedure stipulating that appeals can be lodged against decisions concerning the expiry of time-limits within a period of 5 days from the date on which the decision is pronounced, was held constitutional.

Languages:

Romanian, French (translation by the Court).



Russia Constitutional Court

Statistical data

1 May 2001 – 31 December 2001

Total number of decisions: 10

Categories of cases:

- Rulings: 10
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 10
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:

- Claims by state bodies: 1
- Individual complaints: 8
- Referral by a court: 3
(some cases were joined)

Important decisions

Identification: RUS-2001-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 05.07.2001 / **e)** 11-p / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 18.06.2001 / **h)** CODICES (Russian).

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.

1.6 **Constitutional Justice** – Effects.

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

4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.

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.

5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

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

Keywords of the alphabetical index:

Amnesty, proclamation / Amnesty, proclaimed, revocation / Decree, corrigenda, social basis / Legal position, criminal, worsening, constitutional ban.

Headnotes:

In deciding who may be granted an amnesty, and for what conduct, parliament must ensure that it does not violate the rights of others or the law and does not undermine the legal system and public security. Measures modifying the conditions attached to an amnesty that has already been granted must not be enacted if they worsen the situation of the amnestied persons.

Summary:

On 26 May 2000 the State Duma (the lower house of parliament) adopted a decree proclaiming an amnesty on the occasion of the 55th anniversary of the victory in the Great Patriotic War of 1941 to 1945. In particular, people who had been awarded medals and other decorations were to be exempted under the decree from serving sentences and from prosecution, regardless of the seriousness of the crimes they had committed.

The decree was published and came into force on 27 May 2000. However, a new State Duma decree adopted on 28 June 2000 ruled that the amnesty already granted to persons who had committed serious or particularly serious crimes could not subsequently be applied. This did not, however, concern persons to whom the amnesty had already been applied.

The Constitutional Court was asked to review the constitutionality of the above-mentioned decrees by a court and by several citizens who were to be amnestied under the first decree but who, following the above-mentioned amendments, did not see criminal proceedings against them dropped, were not exempted from serving their sentences or were not released.

The Constitutional Court noted that the State Duma decree concerning the amnesty differed from all its decrees on other matters. The adoption of amnesty decrees by the State Duma is provided for directly in the Constitution, with the result that such decrees differ from other rule-making instruments, including most laws. The Constitution does not prevent parliament from passing a law on the general conditions attached to an amnesty but, in the absence of such a law, the amnesty decrees can and should serve a legislative function, especially as the passing of laws on amnesty-related matters is not provided for in the Constitution as a necessary and compulsory function of parliament. The State Duma's amnesty decrees are therefore simply equivalent to laws passed by it.

Given that amnesty decrees are recognised as having force of law, a review of their constitutionality by the Constitutional Court in response to a complaint by citizens and at the request of the courts is admissible.

The exercise of the State Duma's constitutional power to proclaim an amnesty as an act of clemency presupposes that certain categories of people are exempt from prosecution and from serving all or part of their sentences not only for reasons of economic or political expediency but also, and more particularly, by virtue of a faith in good and justice and of the social basis for a humane act of this kind in a democratic state governed by the rule of law. In proclaiming the amnesty, however, and in performing any other state function, the State Duma is subject to the provisions of the Constitution concerning the basis of the constitutional system, which require the state to recognise and respect citizens' rights and freedoms and protect them against, *inter alia*, criminal acts and the abuse of power, in order to uphold the law and the legal system and protect public security. It is for this reason that, in exempting a category of people from prosecution and from serving their sentences, the State Duma is also required to weigh up competing constitutional values and must not allow violations of the rights of others or of the law, or permit the legal system or public security to be undermined.

Nevertheless, because of certain omissions during the preparation of the amnesty decree, the State Duma manifestly distorted the objectives and purpose of the amnesty as an institution. When discussing the need to amend the initial amnesty decree, the State Duma itself subsequently observed that to apply the decree without correcting it would upset the balance of values to be protected under the Constitution in connection with crime control.

The legal consequence of the decree of 28 June 2000 was that criminal law again applied to persons who had not yet been released under the amnesty, but who were to have been released pursuant to the decree of 26 May 2000, regardless of the nature and seriousness of their crimes. If the decision to exempt them from prosecution or from serving their sentences had not yet been taken, these persons could no longer be granted an amnesty.

The Court considered that this was contrary to the constitutional ban on worsening the legal position of the persons concerned as it stood when decisions concerning the institution of criminal proceedings and execution of sentences were taken. In addition, regardless of the social basis for the corrigenda to the amnesty decree, the persons who were eventually deprived of the opportunity to benefit from the amnesty that had been granted previously had to endure additional suffering that was inconsistent with the purposes of criminal liability; this is contrary to the constitutional ban on degrading treatment that undermines human dignity.

Furthermore, when the two decrees were adopted, there were procedural irregularities concerning the number of readings and their content.

The Constitutional Court held that the provisions of the two decrees whereby application of the amnesty to certain categories of people who had committed serious or particularly serious crimes was ruled out only after the adoption of the decree of 28 June 2000 were unconstitutional.

Given that the provisions of the decree of 26 May 2000, as reformulated on 28 June 2000, are not legally binding because they are unconstitutional, criminal law again applies to the persons indicated above who have not been exempted from prosecution or from serving their sentences.

Languages:

Russian.



Identification: RUS-2001-3-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 25.10.2001 / **e)** 14-p / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 14.11.2001 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

3.12 **General Principles** – Clarity and precision of legal provisions.

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

5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.

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

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

5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.

5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Lawyer, person charged, visit / Lawyer, person charged, communication.

Headnotes:

The requirement that the lawyer (defence counsel) obtain, without fail, authorisation to take part in the case in order to communicate with the suspect (person charged) restricts the constitutional right of the suspect (person charged) to a lawyer's assistance.

Summary:

The proceedings resulted from complaints by a number of citizens that their constitutional rights had been violated by certain provisions of the legislation on criminal proceedings and by the internal implementing regulations of the remand centres of the Ministry of Justice. In particular, under the provisions in question suspects and persons charged are not allowed to communicate with the lawyer acting as defence counsel in the case unless the latter presents a document entitling him or her to take part in the proceedings, issued by a person or body

dealing with the case on the authority of the legal advice office.

The complainants contended that, in their experience, it often took an unjustifiably long time to obtain such authorisation, with the result that the lawyer's visit was delayed.

The Constitutional Court observed that, under Article 48.2 of the Constitution, anyone who is held in police custody, imprisoned or charged is entitled to the assistance of a lawyer (counsel) from the time when he or she is taken into custody, imprisoned or charged.

In specifying the time from which the lawyer is entitled to intervene, the contested provisions of the Code of Criminal Procedure do not provide for a particular order of intervention or a particular order for the statutory decisions allowing defence counsel to take part in the proceedings. Nor must they be considered as the basis for the system for authorising the right to visits. Exercise of the constitutional right of suspects and persons charged to receive the assistance of a lawyer (counsel), including the right to communicate with him or her, must not be conditional on authorisation from the person or body dealing with the criminal case in question.

The order of events and the conditions enabling defendants and suspects to communicate with their lawyers are governed not only by the Code of Criminal Procedure but also by the federal law on the imprisonment of suspects and persons charged with crimes. This law does not, however, lay down exhaustive, exact and clear criteria as to the conditions in which the visit takes place and the order of events, entrusting the right to establish these to the relevant ministries. It therefore allows essential aspects of constitutional law to be dealt with by means of regulations, whereas they could be directly covered in the law on criminal procedure.

This uncertainty allows the above-mentioned law to be interpreted and applied in different ways and, consequently, arbitrarily, an example being that a lawyer may not be allowed to visit if he or she does not have a special document entitling him or her to take part in the proceedings, issued by the person or body dealing with the case. In practice, therefore, permission for such visits must be obtained from the investigating officer, the prosecutor or the Court.

The contested provision of the law – as applied in practice – unacceptably restricts the right of the person charged (suspect) to receive the assistance of a lawyer (counsel).

In addition, the requirement that the lawyer (counsel) obtain, without fail, authorisation to take part in the proceedings means that suspects and persons charged may be deprived of timely assistance from a qualified lawyer, and that the lawyer (counsel) may be unable to fulfil his or her professional and procedural obligations if objective circumstances (the absence of the investigating officer) or subjective circumstances (the investigating officer's unwillingness to allow the lawyer to visit) make it impossible to obtain such permission. In short, there is the possibility of a violation of the constitutional principle of the adversarial nature of proceedings and equality of arms.

The Constitutional Court held that the contested provisions of the Code of Criminal Procedure were constitutional. It considered that the contested provisions of the federal law on the imprisonment of persons suspected of and charged with crimes to be unconstitutional.

Languages:

Russian.



Identification: RUS-2001-3-009

a) Russia / **b)** Constitutional Court / **c)** / **d)** 25.12.2001 / **e)** 17-p / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.12.2001 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

5.3.39.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

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

5.3.39.3 **Fundamental Rights** – Civil and political rights – Electoral rights – Freedom of voting.

Keywords of the alphabetical index:

Election, judicial review / Election, judgment, appeal.

Headnotes:

The immediate entry into force of judgments on the violation of citizens' electoral rights, by making it impossible to appeal and, in particular, to rectify a miscarriage of justice, restricts the constitutional right to judicial protection.

Summary:

The proceedings are based on complaints by a number of citizens concerning the violation of their constitutional rights by the provisions of the Code of Civil Procedure whereby judgments concerning the violation of citizens' electoral rights enter into force as soon as they are delivered (except in the case of judgments in cases contesting the results of elections and referendums).

According to the applicants, this provision deprives them of the opportunity to appeal on a point of law against the decisions in question and violates their right to defend themselves in court, which is safeguarded by the Constitution.

The Constitutional Court first noted that it has consistently held that a judgment cannot be recognised as just and fair if there is no possibility of rectifying a miscarriage of justice. The right to have a judgment reviewed applies not only to criminal cases but also to civil and administrative law cases.

The Court also noted that regular elections, held within strict time limits and subject to judicial review, are essential to the democracy and legality of the governing authorities of the state and local authorities. There is a special procedure for appealing against decisions and actions in this field, designed to protect citizens' rights against various violations which may, in certain circumstances, undermine the very principle of the free expression of the will of the people in elections, casting doubt on their constitutional value and constituting grounds for annulling them. In particular, the legislation setting out safeguards for electoral rights provides for shorter time limits for the examination by the courts of complaints concerning the violation of citizens' electoral rights so as to ensure operational solutions to legal disputes arising in the course of an election campaign.

The contested provision of the Code of Civil Procedure implies that such court decisions be executed immediately and that their execution should not be subject to any conditions. The provision applies to decisions adopted both before and after the ballot and rules out appeals on points of law.

Decisions delivered just before the ballot or on election day and decisions concerning violations that

do not affect the substance of citizens' electoral rights, do not prevent the free expression of the will of the people on the occasion of the election and do not consequently influence the results are a special case. To apply to them the general rules on the entry into force of judgments – on the expiry of the time limit specified for appealing on points of law, after the case has been heard by a higher court or after there has been a retrial – would drag out the electoral process for an unjustified length of time and make it impossible to keep to the statutory time limits for the subsequent stages of the electoral process.

In order to ensure the stability of the electoral process, the free expression of the will of the people and effective judicial protection for citizens' electoral rights, the law may provide for special time limits for the examination of the relevant cases, for appealing against judgments in these cases and for their review. The contested provision was included in the Code of Civil Procedure in order to help ensure that election campaigns took place within strict time limits by making sure that cases were properly heard by the courts and the judgments delivered were executed immediately. By making it impossible to appeal against the judgments on points of law, however, the provision destroys the balance between the constitutional values protected, since full, effective judicial protection for citizens' electoral rights is not guaranteed, even when they are substantially infringed.

The contested provision has also made it difficult to identify and eliminate miscarriages of justice and hence to reinstate violated electoral rights, since the facts established by a judgment that has come into force in a civil case are not reviewed in other civil cases involving the same people. Moreover, when the judgment comes into force, the parties may not make the same claims in court and contest the facts and legal reports established by the Court in a fresh case. The shortcomings of the regulations, which are the result of the contested provision, cannot be offset by an examination of the case under the review system, since whether the relevant procedure is set in motion at this stage depends not on the wishes of a citizen whose rights have been violated but on a decision taken by the competent officials.

The Constitutional Court declared that the contested provision was unconstitutional.

Languages:

Russian.



Slovakia

Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 1
- Decisions on the merits by the panels of the Court: 32
- Number of other decisions by the plenum: 6
- Number of other decisions by the panels: 50

Important decisions

Identification: SVK-2001-3-004

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 22.11.2001 / **e)** II. US 58/01 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
 3.10 **General Principles** – Certainty of the law.
 3.13 **General Principles** – Legality.
 4.6.3 **Institutions** – Executive bodies – Application of laws.
 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
 5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Administration, information, reasonable access / Environment, protection / State, duty to guarantee the protection of fundamental rights and freedoms.

Headnotes:

When a decision affecting the exercise or the protection of a fundamental right or freedom is to be taken on the basis of special proceedings carried out

by a state authority or other authority, the state has an obligation to guarantee that provision for such proceedings has not only been made but also implemented. Access to such proceedings must be provided without discrimination to every bearer of fundamental rights and freedoms. Furthermore, such proceedings must guarantee a real, and not only theoretical, exercise or protection of a fundamental right or freedom. Accordingly, they must be subject to valid and enforceable statutory regulation, and therefore cannot take place on the basis of draft legislation.

The above conditions apply to a full extent also to the right to full and timely information on the state of the environment and the causes and consequences thereof.

Summary:

The petitioners, combining a group of citizens and a civic association, argued that the Ministry of Environment violated their right to full and timely information on the state of the environment and the causes and consequences thereof as guaranteed by Article 45.1 of the Constitution. The petitioner saw this violation as lying in the fact that in the case at hand (a dam construction), the Ministry carried out the process of environmental impact assessment before the relevant statutory regulation became valid and enforceable, and then stipulated the outcome of that assessment as having been produced according to the respective statute and thus a sufficient basis for the continuance of the building permit proceedings. As the precise content of the given draft statute was at the time of the assessment known only to a narrow group of state officials, the affected would-be parties to the assessment procedure were unable to familiarise themselves with their rights and the extent of their operability within that procedure. The petitioner also thought the assessment as performed by the Ministry had both contradicted the purpose of the Environment Act as later adopted and had serious material deficiencies.

The Constitutional Court reiterated its previous decision from an unrelated case that the government must ensure that there are avenues available for adjudication of claims related to fundamental rights and freedoms and that the remedies provided through these avenues guarantee a real protection of the given rights. Accordingly, any such proceedings must take place within the framework as anchored by the relevant statutory regulation, i.e. they may not take place on the basis of acts lacking validity and/or enforceability. The same applies to a situation in which the Ministry of Environment carries out an environmental impact assessment partially on the

basis of a statute in force and partially on the basis of a statute yet to become enforceable, even if the relevant draft legislation has come into force before the Ministry issued its final report.

The court also found that even though the Ministry could have applied the then-valid legislation, it opted for the application of the then draft regulation “in order to test in practice the proposed assessment procedure”. Upon the coming into force of the Environment Act, the Ministry then held the assessment procedure to have been carried out under the mandate and within the framework of the Act. The court therefore concluded that the Ministry did not perform the assessment procedure within the framework mandated by the Constitution to regulate the exercise and the protection of the contested right at the given time and found this right to have been violated.

Languages:

Slovak.



Identification: SVK-2001-3-005

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 19.12.2001 / **e)** I. US 49/01 / **f)** / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

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

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

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

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

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

5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.

Keywords of the alphabetical index:

Appeal Court, procedure / Evidence, witness, written statement.

Headnotes:

Depriving a litigant of the possibility to comment on evidence which the court has dealt with and which contained findings relevant for its decision, results in subjecting the affected litigant to conditions for presenting his/her claim that are substantially less favourable than are the conditions for the other litigant, and thus violates not only the right to comment on all evidence presented to the court as guaranteed by Article 48.2 of the Constitution but also the principles of adversarial proceedings and equality of arms, which are the fundamental features of the right to a fair trial.

The European Convention on Human Rights and the associated case-law are binding interpretive guidelines for the domestic law-implementing bodies in their interpretation and application of the statutory regulation of the different components of the right of access to courts and thereby postulate the framework within which it is possible to apply for the protection by these agencies of the different aspects of the right to a fair trial.

Summary:

Following the concluding presentations by both parties to a dispute, a district court adjourned the hearing for the purpose of declaring its verdict. Subsequently, it inserted into the case file a statement by a witness on which statement the adversely affected litigant had no possibility to comment and to which the court referred in the *dictum* of its decision. The affected litigant appealed to a higher court, alleging violation of the applicable statutory rules on evidentiary procedure. The appellate court upheld the ruling.

The petitioner challenged the courts' action, arguing that it amounted to a violation of the right to comment on all evidence as guaranteed by Article 48.2 of the Constitution and the right to a fair trial as guaranteed by Article 6.1 ECHR.

In interpreting the constitutional right to comment on all evidence, the Constitutional Court relied on the applicable case-law of the European Court of Human Rights, arguing that such right is both, an integral part of the right to a fair trial and a specific articulation of the adversarial principle. On the other hand, it observed that if the domestic constitutional regulation faithfully transposes the country's international human rights commitments into the national legal order, it is indeed the constitutional regulation that should serve as the primary basis for the implementation in the legal practice of the Slovak Republic of these commitments. Therefore, if the petitioner alleges a violation of both a constitutional right and a corresponding right guaranteed by the respective international agreement, and if there is no relevant difference between the two rights, then the finding of a violation of the constitutional right exhausts the purpose of concrete constitutional review and there is no need to assess the allegations relating to the right guaranteed by the respective international agreement.

In the case at hand, however, the Constitutional Court found the courts' action to have broader implications for the quality of the contested proceedings than could be subsumed under the right to comment on all evidence. It stated that by depriving the petitioner of the possibility to obtain knowledge of, and comment on, evidence executed and relied upon within the adjudication of his claim, the district court created for the petitioner conditions for presenting his claim that were substantially less favourable than were those available for the other litigant in whose favour the contested evidence was presented.

It therefore considered that there has been violation of the adversarial nature of the civil procedure, and of the principle of equality of arms, two of the fundamental features of the right to a fair trial as interpreted by the European Court of Human Rights.

The Constitutional Court also held that the appellate court did not remedy the district court's deficient action by means of relying in its reasoning on anything other than the contested evidence, as such a measure could not have remedied the lack of protection that the petitioner suffered and that was in conflict with the purpose of the right to a fair trial as guaranteed by the Convention. The failure of the appellate court to concern itself with the alleged defects in the district court's action therefore interfered both with the petitioner's constitutional right to comment on all evidence and those aspects of his right to a fair trial under the European Convention on Human Rights that relate to the

principles of adversarial proceedings and equality of arms.

Languages:

Slovak.



Slovenia Constitutional Court

Summaries of important decisions of the reference period 1 September 2001 – 31 December 2001 will be published in the next edition, *Bulletin* 2002/1.



South Africa Constitutional Court

Important decisions

Identification: RSA-2001-3-011

a) South Africa / **b)** Supreme Court of Appeal / **c)** / **d)** 31.08.2001 / **e)** 493/2000 / **f)** The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v. Ngxuzza and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.4.7.4 **Constitutional Justice** – Procedure – Documents lodged by the parties – Formal requirements.
- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
- 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
- 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Class action, requirements / Social security, termination / Evidence, hearsay, strict rules, applicability.

Headnotes:

Applicants for a class action must demonstrate that:

1. the class is so numerous that joinder of all its members is impractical;
2. there are questions of law and fact that are common to all the members of the class;
3. the claims of the applicants are typical of the claims of the rest and
4. the applicants will fairly and adequately protect the interests of the class. Once an applicant has

established a jurisdictional basis for his or her own suit, the fact that other members of the class do not fall within that jurisdiction cannot impede the progress of the action.

Summary:

The applicants had been receiving disability grants from the provincial government of the Eastern Cape in terms of the Social Assistance Act 59 of 1992. These grants had been terminated by the provincial government without notice or hearing despite a constitutional obligation upon it to act in accordance with the law. The applicants instituted an action in the Eastern Cape division of the High Court (the High Court) in which they sought two-fold relief. First, the reinstatement of the disability grants and secondly, an application to institute a class action, in terms of Section 38.c of the Constitution, on behalf of tens of thousands of similarly situated people.

An order was given that the applicants could proceed with the class action. The order had three essential features. First, it permitted the applicants (assisted by the Legal Resources Centre) to litigate as representatives on behalf of anyone in the whole of the Eastern Cape province whose disability grants had been, between specified dates, cancelled or suspended by or on behalf of the Eastern Cape government. Secondly, the provincial government was required to furnish counsel for the applicants with their records, detailing the members of the class. Thirdly, the applicants had to disseminate information through various print and radio media about the class action so that those wishing to opt out of the proceedings could do so.

On appeal to the Supreme Court of Appeal (the SCA), appellants (the provincial government of the Eastern Cape) submitted that the order did not adequately define the class and that it wrongfully included persons falling outside of the jurisdiction of the Eastern Cape Division of the High Court but who nevertheless lived in the Eastern Cape.

Cameron JA, writing for a unanimous court, discussed the nature and benefits of class actions. He stated that class actions are new to our law. Prior to the advent of the Constitution, a person had to have a direct and personal interest in the proceedings and had to be formally associated with the proceedings through joinder. However, the Constitution provides that other members of a definable class although not formally and individually joined, may benefit from and are bound by the outcome of the litigation unless they invoke the procedures to opt out of the proceedings. The benefit of a class action is that a large number of litigants who are in a poor

position to seek legal redress individually, and who each have a small claim, may have one action instituted on behalf of all of them. This avoids the legal complexities of joinder and other factors which may make it difficult or impossible to pursue individual applications. Cameron JA stated that it is applicants such as these who constitute the poorest sector of our population and whom the Constitutional Court has emphasised must animate our understanding of constitutional provisions.

He stated that although class actions are clearly provided for in terms of Section 38.c of the Constitution, the Constitution does not state how they should be developed and implemented. This is left to the courts. In this respect, the courts must be guided by Section 39.2 of the Constitution, which states that when developing the common law, courts must promote the spirit, purport and object of the Bill of Rights. The Constitutional Court has also stated that the provisions on standing in Section 38 of the Constitution must be generously and expansively interpreted.

Cameron JA found that the arguments put forward by the provincial government could not succeed. In respect of the first argument, that the class was not adequately defined, he held that the quintessential requirements for a class action were present since:

1. the class was so numerous that joinder of all its members was impractical;
2. there were questions of law and fact common to all the members of the class;
3. the claims of the applicants were typical of the claims of the rest and
4. the applicants would fairly and adequately protect the interests of the class.

He further held that strict rules in respect of hearsay evidence are not applicable in class actions since few class actions could be maintained without some element of hearsay.

In terms of the second argument, that some of the members of the class fell outside of the jurisdiction of the Court, he held that the jurisdictional objection arises out of the fact that the previous Apartheid dispensation provided for different High Courts in respect of the previous homelands. The necessary rationalisation of the courts had not yet occurred in the Eastern Cape. It was therefore an anomaly that there were High Courts for the Transkei and Ciskei jurisdictions. This could not allow the applicants to fail. Since the Eastern Cape Division had jurisdiction

over the original applicants and over the members of the class entitled to payment of their pensions within its domain, this was sufficient to give the Court jurisdiction over the whole class. Further, the Constitutional Court has recognised that in developing class actions the principles of convenience, justice and good sense must be used. Thus, once an applicant has established a jurisdictional basis for his or her own suit, the fact that other members of the class do not fall within that jurisdiction cannot impede the progress of the action. This is the position in other countries where class actions are allowed.

The SCA was scathingly critical of the manner in which the provincial government had conducted the litigation. The application for the institution of a class action was upheld.

Cross-references:

Unlawful action on the part of Provincial government in respect of social security benefits:

- *Bushula and Others v. Permanent Secretary, Department of Welfare, Eastern Cape and Another*, 2000 (2) *South African Law Reports* 849 (E);
- *Rangani v. Superintendent-General, Department of Health and Welfare, Northern Province*, 1999 (4) *South African Law Reports* 385 (T).

Standing under the Constitution:

- *Ferreira v. Levin NO and Others, Vryenhoek and Others v. Powell NO and Others*, 1996 (1) *South African Law Reports* 984 (CC); 1996 (1) *Butterworths Constitutional Law Reports* 1 (CC), *Bulletin* 1995/3 [RSA-1995-3-010].

Languages:

English.



Identification: RSA-2001-3-012

a) South Africa / **b)** Supreme Court of Appeal / **c)** / **d)** 25.09.2001 / **e)** SCA 1/2000 / **f)** Nkosi and Another v. Buhrmann / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.

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

5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

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

Keywords of the alphabetical index:

Religion, burial land, choice, limits / Deceased, burial land, consent by owner / Land, ownership, protection / Servitude, unregistered, acquisition.

Headnotes:

The appellant's rights as an occupier in terms of the provisions of the Extension of Security of Tenure Act 62 of 1997 do not entitle her to take burial land without the owner's consent.

Summary:

The appellant's claim was based on the fact that as an occupier as defined in the Extension of Security of Tenure Act 62 of 1997 (the Act) she was entitled to have her deceased son buried on the farm where she resided. When the appellant indicated her intention to have her son buried on the farm, the respondent, the owner of the farm, refused consent and sought an interdict in the Pretoria High Court (the High Court).

The appellant first came to the farm with her family in 1966, while the farm was owned by the respondent's late father. The appellant and her husband had been farm workers from an early age. In return for their labour they had been afforded the right to live on the land, to graze their stock in areas allocated by the land owner and to raise their own crops. They established a homestead on the farm. The respondent became the owner of the farm in 1970 and the appellant and her husband worked for him until 1981 when they moved to another farm. In 1986 the appellant's husband died and, with the consent of the owner of that property, he was buried. The appellant maintained that that burial, not being on the respondent's farm, was contrary to her custom and religious beliefs. In 1987 the appellant and her family returned to the respondent's farm and she lived there with the respondent's consent.

In the High Court Cassim AJ held that although the Act did not afford the right she sought, she had nonetheless acquired it by way of an unregistered servitude granted by the respondent's father. On

appeal to the full bench of the Pretoria High Court, the majority held that in the absence of evidence that the respondent took ownership of the farm with the knowledge that his father had agreed that burials could occur without the owner's consent, any unregistered servitude did not bind the respondent. It also held that on a proper construction of the Act the occupier had no right to bury someone on the owner's land without the owner's consent.

On appeal to the Supreme Court of Appeal (SCA) the appellant contended that the fundamental rights conferred by the Constitution, were imported into Section 5.d of the Act to ensure that occupiers could use and enjoy these rights effectively where they lived and pursued their livelihood, and not merely in the abstract. The section therefore requires owners to tolerate the exercise of these rights on their land. The appellant further argued that because the land she occupied was the only resource by means of which she could exercise her religious right and manifest its practice, such right had to include the right to bury her dead on that land. Therefore, the right of ownership had to yield to the right to bury one's dead on the land.

Howie JA discussed the Section 5.d right to religious freedom. He stated that if that right includes the right to effect burials on the land without the owner's consent, then "use" in Section 6.1 would have to be interpreted as including that entitlement. On the other hand, if the right claimed by the appellant was not included within the ambit of Section 5.d, then one had to enquire whether the other provisions of the Act nevertheless confer that right. He stated that the required analysis must in the end cover all the relevant statutory provisions read as a whole.

The Court held that it is the right of all citizens to observe and carry out their religious practices when burying their dead. But it said that it was not referred to any legal provision or authority for the proposition that everyone is totally free to choose where such burials are to be effected. Everyone living within a municipal area can only acquire burial ground in a lawfully established cemetery. Burial elsewhere requires not only the necessary acquisition of a site but special permission as well. Outside the jurisdiction of a local authority one is necessarily dependent on the consent of the land owner, be it the state, a legal person or an individual. These are legal constraints that bind everyone. No one religion can demand more than another.

The Court concluded that the right to freedom of religion and religious practice has internal limits. It does not confer unfettered liberty to choose a grave site nor does it include the right to take a grave site

without the consent of the owner of the land concerned. Further, Section 5.d of the Act does not, when viewed in isolation, confer the right which the appellant claimed. Section 6.1 of the Act confers the rights of residence, use and services, subject to the owner's consent or agreement. Nothing in that scheme of things conveys expressly or even impliedly that occupiers have the additional right to bury their dead on the land and to take ground for that purpose even against the owner's will.

The appeal was dismissed.

Cross-references:

The right to religious freedom and practice:

- *Christian Education South Africa v. Minister of Education*, 2000 (4) *South African Law Reports* 757 (CC), 2000 (10) *Butterworths Constitutional Law Reports* 1051 (CC), *Bulletin* 2000/1 [RSA-2000-1-010];
- *Lawrence v. State and Another, Negal v. State and Another, Solberg v. State and Another*, 1997 (4) *South African Law Reports* 1176 (CC); 1997(10) *Butterworths Constitutional Law Reports* 1348 (CC), *Bulletin* 1997/3 [RSA-1997-3-010].

Languages:

English.



Identification: RSA-2001-3-013

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 26.09.2001 / **e)** CCT 59/2000 / **f)** De Beer and Others v. The North Central Local Council and the South Central Local Council and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.4.10.1 **Constitutional Justice** – Procedure – Interlocutory proceedings – Intervention.
- 1.4.11.7 **Constitutional Justice** – Procedure – Hearing – Address by the parties.
- 3.16 **General Principles** – Proportionality.
- 3.20 **General Principles** – Reasonableness.

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

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

Keywords of the alphabetical index:

Rate, payment, obligation / Rate, collection, procedure, constitutionality / Notice, delivery / Land, taxation.

Headnotes:

The right of access to court (Section 34 of the Constitution) is not infringed by a municipal rate collection procedure which is concerned with the collection of tax from property owners. It permits the court summarily to order immovable property on which rates are owing to be sold by public auction if prescribed notices have been given to the ratepayer concerned.

Summary:

This matter concerns the constitutionality of a rate collection procedure provided for in Section 105 of the Durban Extended Powers Consolidated Ordinance no. 18 of 1976 (Natal) (the Ordinance). The appellant, Mr De Beer, was a liquidator of a partnership that owned immovable property in Durban. Rates on the property had not been paid, and the North Central Local Council and the South Central Local Council (Local Council) made use of the procedure provided for in the Ordinance. The Local Council sent the prescribed notices to De Beer and obtained an order pursuant to Section 105.9 of the Ordinance authorising the sale in execution of the partnership property, which was later sold to the third respondent, Mr Khan. De Beer, on the basis that he had not received any notices, brought an action in the Durban and Coast High Court (the High Court) to have Section 105.9 declared unconstitutional on the ground that it failed to afford a fair hearing and had thus infringed the right of access to court provided for in Section 34 of the Constitution.

Section 105 of the Ordinance provides for three notices to be given to a ratepayer on whose property rates are outstanding. The first must inform the ratepayer of the amount of rates owing on the property, its description and value, as well as the final date for payment of the amount owing. The second notice, to be given if a balance is owing on the final date, must call for payment of that balance and inform the ratepayer that an application will be made to court for an order for the sale of the property if the amount

is not paid within six months of a specified date. If the amount owing is not paid, the third notice must inform the ratepayer of the time, date and place of the court hearing. The section requires the first notice to be sent by post and the second and third by registered post to an address chosen by the ratepayer, or, if the ratepayer has not chosen an address, to the address of the property shown in the valuation roll. If the ratepayer has not chosen an address and there is no address shown on the valuation roll, appropriate notices must be fixed on the notice board of the city hall at least fifteen days before the final date for payment for a period of at least thirty days. Section 105.9 is to the effect that, upon the application of the Council showing that the notices have been given, a court may summarily order any such rateable property to be sold by public auction; payment of the proceeds of the sale into court, and payment to the Council out of those proceeds of outstanding rates, related charges and other money owing to it.

In the High Court, De Beer argued that the Section 105 procedure infringed the right to a fair hearing because it dispensed with the service of notices of proceedings as ordinarily required by the Rules of the High Court, and further, contrary to the Rules of Court, it allowed an order for the sale in execution of immovable property without any prior sale of movables being required and without any writ of execution being served on the owner before the sale.

The High Court rejected De Beer's argument and pointed out that service in terms of the Rules of the High Court did not necessarily ensure that court proceedings would come to the attention of any person sued. The Court said that it was difficult to use the ordinary court procedure to collect rates, and emphasised that a property owner knew that rates were payable on property. De Beer consequently appealed to the Constitutional Court.

In a unanimous decision written by Yacoob J, the Constitutional Court dismissed the appeal. The Court said that it was not necessary to determine the scope of the whole of Section 34 because it was concerned only with the scope of the fair hearing component. It said that the Section 34 fair hearing right affirms the rule of law which is a founding value of the Constitution. For a hearing to be fair, the notice provisions have to be reasonable in all the circumstances. The Court pointed out that there is a special relationship between a municipal council and each ratepayer in that the ratepayer is obliged to pay rates and that the municipal council has the right to collect them and the obligation to use the proceeds for the delivery of services. It emphasised that property owners benefit from these services and that they must take reasonable steps to apprise themselves of their

obligations. A court considering whether to grant an order for the sale of the property is not obliged to grant the order merely because all three notices have been given. It has a discretion not to grant an order if the way in which the notice was given renders the hearing unfair in the particular circumstances of the case. It is, in the final analysis, this judicial control that renders the hearing fair.

The Court held further that the sale of the property without the prior sale of movables and without a writ of execution being served, does not render the hearing unfair as rates are owing on the property concerned and because the property owner is informed in advance that an order for the sale of the immovable property will be sought.

The Umhlatuzana Civic Association, a voluntary community organisation, as *amicus curiae*, supported the challenge regarding the constitutionality of Section 105.9. The arguments raised by the *amicus* were rejected by the Court, in particular on the basis that an *amicus* is not entitled to raise a new cause of action, raised for the first time in oral argument.

Cross-references:

Right of access to courts:

- *Tooze and another v. City Council of Durban and others*, [1996] 3 *All South African Law Reports* 229 (D).

Languages:

English.



Identification: RSA-2001-3-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.10.2001 / **e)** CCT 13/2001 / **f)** Minister of Education v. Doreen Harris / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.17 **General Principles** – Weighing of interests.
4.6.2 **Institutions** – Executive bodies – Powers.

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

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

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

Keywords of the alphabetical index:

Executive, powers to initiate legislation / Education, school, private, national education policy, application / Child, best interests.

Headnotes:

Where a Minister, a member of the national executive, is empowered to make national policy under a particular statute, such policy does not have the effect of binding legislation. Where such effect is intended, it exceeds the powers granted to such Minister.

Summary:

On 18 January 2000 the National Minister of Education (the Minister) published a notice under Section 3.4 of the National Education Policy Act 27 of 1996 (the Act) which provided that a learner might only be admitted to grade one at an independent school if he or she turned seven in the course of the grade one calendar year. The purpose of the notice was to bring independent schools in line with public schools, in which such a requirement apply.

Talya Harris formed part of a group of children who had for three years been attending pre-primary school in preparation for entry to grade one at an independent school at the start of the 2001 school year. Talya was to turn six in early January 2001. Since she would not reach the age of seven in the 2001 calendar year, the notice prevented her from entering grade one. Her parents approached the Transvaal High Court (the High Court) challenging the validity of the notice on a variety of grounds, amongst others, that it unfairly discriminated against similarly situated children on the ground of age and was against the best interests of children such as Talya.

Coetzee J in the High Court found in favour of the Harris parents and declared the notice unconstitutional and invalid. He found that the notice constituted unfair discrimination on the ground of age and that such discrimination was not justified and consequently violated the right to equality in Section 9 of the Constitution. Further, the notice violated Section 28.2 of the Constitution which provides that the best interests of the child are of paramount importance in

every matter concerning the child. The notice was outside the powers of the Minister as Section 3.4 of the Act merely authorised the Minister to determine national policy in respect of a number of issues relating to the education system, including the age of admission to schools, but not to make law. The Minister, as part of national executive, usurped a provincial executive power in conflict with both Sections 125 and 41 of the Constitution, by requiring the provincial Members of the Executive Councils (MECs) to apply the age requirement as one of the prerequisites for the registration of independent schools. Finally, even if the notice was valid, it only enunciated national policy, which was not binding on private institutions or on provincial education authorities. Coetzee J thus declared that there was no legal barrier to Talya being enrolled in grade one in the 2001 school year.

The Minister appealed to the Constitutional Court against the whole of the judgment and the order. In a judgment concurred in by all the justices who heard the matter, Sachs J held that the matter was best decided not upon the broad constitutional questions raised, but upon whether the Minister had the power under the Act to issue the notice. In declining to pronounce on the correctness or otherwise of determinations of constitutionality made in the High Court, Sachs J endorsed the principle that where it is possible to decide a case without reaching a constitutional issue, that is the approach which should be followed.

He held that the Act only gave the Minister the power to determine policy and not to impose binding law. National legislation in this regard may only be introduced after extensive consultation and publication has been completed, as required by Sections 6 and 7 of the Act. There is a difference between the determination of guiding policy and its translation into binding law. Policy made by the Minister does not create legally binding obligations upon provinces or parents or independent schools. In requiring the notice to have this effect, by stipulating that the age requirement be applied by the MECs in the different provinces in addition to the conditions for the registration of independent schools, the notice had exceeded the powers granted to the Minister by Section 3 of the Act and had thus infringed the constitutional principle of legality.

The issue whether or not the Minister had in fact had the power to impose a binding age requirement under Section 5.4 of the South African Schools Act did not have to be decided, since the Minister had clearly chosen to exercise his powers under the National Education Policy Act.

The appeal was therefore dismissed.

Cross-references:

Policy determinations under the National Education Policy Act:

- *Ex Parte Speaker of the National Assembly: in re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995*, 1996 (3) *South African Law Reports* 289 (CC); 1996 (4) *Butterworths Constitutional Law Reports* 518 (CC), *Bulletin* 1996/1 [RSA-1996-1-003].

Languages:

English.



Identification: RSA-2001-3-015

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.10.2001 / **e)** CCT 14/2001, CCT 29/2001 / **f)** Minister of Defence v. Pottsane and Another; Legal Soldier (Pty) Ltd and Others v. Minister of Defence and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.

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

4.7.11 **Institutions** – Judicial bodies – Military courts.

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.

5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

Keywords of the alphabetical index:

Military prosecution, constitutionality.

Headnotes:

The word “single” qualifying “prosecuting authority” in Section 179.1 of the Constitution does not preclude the establishment of separate military prosecutions. The unique nature of the military service calls for separate and specialised adjudication over matters arising out of the Military Discipline Supplementary Measures Act 16 of 1999, if the military has to function effectively in terms of Section 200.1 of the Constitution.

Summary:

This case concerned the constitutionality of military prosecutions introduced by the Military Discipline Supplementary Measures Act 16 of 1999 (the Act). There were two cases consolidated for hearing. The first was *Potsane*, an appeal from the Free State High Court (the High Court) by the Minister of Defence (the Minister), supported by the National Director of Public Prosecutions (NDPP) as *amicus curiae*. The second was *Legal Soldier*, an application brought on behalf of four soldiers who had been charged with civil offences. The proceedings had started in the Pretoria High Court and were then stayed to allow an application for direct access to the Constitutional Court.

The High Court found the provisions of the Act which subjected military prosecutions to the control of the Director of Military Prosecutions, and not to the Director of Public Prosecutions, to be unconstitutional on the basis that Section 179.1 of the Constitution provides for a single national prosecuting authority. In coming to this conclusion the High Court relied on the reading of the word “single” as contained in the section. It also found that the challenged provisions of the Act unjustifiably infringed the equality rights guaranteed by Section 9 of the Constitution. The equality challenge was that the sections unfairly discriminated against members because civilians were tried before ordinary courts and members of the military could only be tried before a military court for the same offence.

In the Constitutional Court counsel for the soldiers argued that the inclusion of Section 179 in the Constitution ensured that at the end of the country’s prosecuting authority there was a single, non-partisan presidential appointee with the power to institute prosecutions on behalf of the state. Therefore the introduction of the military prosecution structure conflicted with the object of Section 179 of the Constitution. As a result there were two separate prosecuting authorities with overlapping and possibly conflicting jurisdictions in respect of offences committed by soldiers.

The Minister and the NDPP argued for a different construction of Section 179 of the Constitution. In their interpretation, the section has nothing to do with the establishment of a separate prosecuting authority for military courts, but has to be understood in its broader historical context. They submitted that the purpose of including Section 179 in the Constitution must be seen against the historical backdrop of the large number of prosecution authorities during the apartheid era of balkanisation. On their reading, Section 179 was intended to cut down the number of the existing prosecution authorities, to bring order and direction to the national prosecuting authority in a structured professional hierarchy. It was further argued that the military justice was not so much concerned with the prosecution of crime but with the maintenance of discipline. Thus it was essential to read Section 179 together with Section 200 of the Constitution, so as not to undermine the capacity of the South African National Defence Force (SANDF), through its military discipline system to perform its primary constitutional obligation in terms of Section 200.2. Counsel also pointed out that in terms of Section 179 of the Constitution the authority of the NDPP is confined to the borders of the Republic and do not extend extra-territorially, unlike the military prosecution authority.

In a unanimous decision, the Constitutional Court, per Krieger J, pointed out that it was the identity of the authority which controls prosecutions in military courts that was in dispute, and not the system of the military courts itself. In upholding the Minister’s submissions, the Court found that when speaking of a “single” authority, Section 179 of the Constitution did not intend to say “exclusive” or “only” but that it denoted the singular, “one”, and therefore, that where there used to be many, there will now be a single authority. It was found that the Court a quo’s interpretation of the word “single” had overlooked the realities of military service, military life and military discipline.

The Court set aside the decision of the High Court in the *Potsane* matter. Based on the same reasoning, the Court refused the application for direct access in the *Legal Soldier* matter. The equality challenge was also dismissed as constitutionally unfounded as the differentiation was found to be rationally connected to the legitimate government purpose of establishing and maintaining a disciplined military force with a viable justice system.

Cross-references:

Equality:

- *Harksen v. Lane NO and Others*, 1998 (1) *South African Law Reports* 300 (CC); 1997 (11) *Butterworths Constitutional Law Reports* 1489 (CC), *Bulletin* 1997/3 [RSA 1997-3-011].

Judicial Independence:

- *De Lange v. Smuts NO and Others*, 1998 (3) *South African Law Reports* 785 (CC), 1998 (7) *Butterworths Constitutional Law Reports* 779 (CC), *Bulletin* 1998/2 [RSA 1998-2-004];
- *South African National Defence Force Union v. Minister of Defence and Another*, 1999 (4) *South African Law Reports* 469 (CC), 1999 (6) *Butterworths Constitutional Law Reports* 615 (CC), *Bulletin* 1999/2 [RSA 1999-2-007];
- *Freedom of Expression Institute and Others v. President, Ordinary Court Martial and Others*, 1999 (2) *South African Law Reports* 471 (CC); 1999 (3) *Butterworths Law Reports* 261 (CC).

Languages:

English.



Identification: RSA-2001-3-016

a) South Africa / b) Constitutional Court / c) / d) 08.10.2001 / e) CCT 28/2000 / f) Niemand v. The State / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

- 1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.16 **General Principles** – Proportionality.
- 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
- 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 and fair trial – Access to courts.

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

Keywords of the alphabetical index:

Criminal, “habitual”, sentence, indeterminate, imposition / Imprisonment, duration, maximum.

Headnotes:

Being declared an habitual criminal results in an indeterminate prison sentence which constitutes cruel, inhuman or degrading punishment in terms of Section 12.1.e of the Constitution.

Summary:

This appeal concerns the constitutional validity of the indeterminate sentence imposed on habitual criminals. A person declared an habitual criminal must in terms of Section 286 of the Criminal Procedure Act 51 of 1977 (the CPA) read with Section 65.4.b.iv of the Correctional Services Act 8 of 1959 (the CSA) serve a sentence of at least seven years in prison before becoming eligible for parole. The appellant, Mr Niemand had a long history of committing criminal offences including theft, fraud, house breaking and parole violation for which he had served several terms of imprisonment. He had consequently been declared an habitual criminal. An appeal to the High Court and an application for leave to appeal to the Supreme Court of Appeal failed. The Constitutional Court thereafter granted him leave to appeal to it on the issue whether the impugned provisions were consistent with the Constitution.

The appellant argued that such punishment or treatment is cruel, inhuman and degrading and violated the provisions of Section 12.1.e of the Constitution. He also argued that it unfairly discriminates between habitual criminals and dangerous criminals (Section 9 of the Constitution). He argued further that his right to be sentenced by a court of law had been violated because the duration of the sentence is determined by the Parole Board and the Commissioner of Correctional Services, these being members of the executive branch of government. He thus argued that his right of access to court had been violated (Section 34 of the Constitution).

Madala J, writing for a unanimous court, found that even when read together, the relevant provisions of the CPA and the CSA did not prescribe any maximum period of incarceration. Without such a period, the habitual criminal could be detained for the rest of his/her life. This could amount to punishment which is

grossly disproportionate to the offence, particularly in cases where the crimes committed did not constitute violence or a danger to society. The Court said that because of this finding, it was not necessary to consider the other arguments raised.

It was stated in argument that a new Correctional Services Act 111 of 1998 had been assented to on 19 November 1998, and that a section thereof explicitly defined a period of 15 years as the maximum period of detention. It had been almost four years since that legislation was passed. It was held that this was an indication that the Department of Correctional Services had been neglectful of the fate of those persons who had been declared habitual criminals.

Although the appellant had succeeded in his appeal to the extent of persuading the Court of the constitutional invalidity of Section 65.4.b.iv of the CSA as read with Section 286 of the CPA, he could not succeed in the consequential relief sought by him, namely to have the sentence declaring him an habitual criminal set aside. In the reading-in order proposed, the Court said that Section 65.4.b.iv was to be read subject to the provision that no habitual criminal should be detained for a period exceeding 15 years. The Court said that its order would come into effect from the date of the judgment but that other persons currently detained in prison under Section 65.4.b.iv would also benefit from this order, even though they were declared to be habitual criminals before this order came into effect.

Cross-references:

Cruel, inhuman or degrading punishment:

- *S v. Dodo*, 2001 (3) *South African Law Reports* 382 (CC), 2001 (5) *Butterworths Constitutional Law Reports* 423 (CC);
- *S v. Tcoeb*, 1996 (1) *South African Criminal Law Reports* 390 (NmS), 1996 (7) *Butterworths Constitutional Law Reports* 996 (NmS);
- *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];
- *S v. Williams and Others*, 1995 (3) *South African Law Reports* 632 (CC), 1995 (7) *Butterworths Constitutional Law Reports* 861 (CC), *Bulletin* 1995/3 [RSA-1995-3-004].

Just and Equitable:

- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, 2000 (2) *South African Law Reports* 1 (CC),

2000(1) *Butterworths Constitutional Law Reports* 39 (CC), *Bulletin* 2000/1 [RSA-2000-1-001];

- *S v. Manamela and Another* (Director-General of Justice Intervening), 2000 (3) *South African Law Reports* 1 (CC), 2000 (5) *Butterworths Constitutional Law Reports* 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-005];
- *Hoffmann v. South African Airways*, 2001 (1) *South African Law Reports* 1 (CC), 2000 (11) *Butterworths Constitutional Law Reports* 1211 (CC).

Languages:

English.



Identification: RSA-2001-3-017

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 08.10.2001 / **e)** CCT 26/2001 / **f)** Potgieter v. Lid Van Die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng en Andere / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
- 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Prescription.

Headnotes:

Section 68.4 of the Mental Health Act 18 of 1973 gives a person 3 months within which to sue for damages for conduct under the Act. But for Section 68.4, a plaintiff would have three years to

institute legal proceedings in terms of the Prescription Act 68 of 1969. The section is a drastic restriction of a person's right to have a legal dispute resolved by a court of law (Section 34 of the Constitution).

Summary:

This case concerns the constitutionality of Section 68.4 of the Mental Health Act 18 of 1973 (the Act). This Section gives a person three months within which to sue for damages for conduct under the Act.

The applicant, Mr Potgieter was employed in the Presidential Protection Unit in Pretoria. Following allegations of family violence against him, three of his colleagues took him to the magistrates' offices in Pretoria, where they obtained certain documents. The applicant was then taken to the district surgeon, where he was asked certain questions. Thereafter he was detained at the Lyttleton police cells for two days. After that he was taken to the Weskoppies psychiatric hospital where he was detained for a further eleven days and then released. He returned to work upon his release. Mr Potgieter contended that those involved in his detention had acted unlawfully and he intended to sue them for damages. To do that, he needed information contained in his medical records in the possession of the respondents. In March 2001, he approached the Transvaal High Court (the High Court) for an order granting him access to his medical records, which the Court granted on the basis of his right of access to information (Section 32 of the Constitution).

One of the defences raised in the High Court was that Mr Potgieter was not entitled to such access as his claim had prescribed in terms of Section 68.4. This led the Court to question, of its own accord, whether the limitation imposed by this provision was constitutional. It found the section to be a drastic restriction of a person's right to have a legal dispute resolved by a court of law (Section 34 of the Constitution) and declared it constitutionally invalid, subject to confirmation by the Constitutional Court (in terms of Section 172 of the Constitution).

But for Section 68.4, Mr Potgieter would have had three years to institute legal proceedings in terms of the Prescription Act 68 of 1969. In the light of earlier decisions of the Constitutional Court, it was clear that three months did not give him a real and fair opportunity to argue his case in a court of law. Skweyiya AJ, writing for a unanimous court, held that the section provides extraordinary protection to the state and its employees. The limitation is particularly outrageous and drastic, having regard to the category of persons it strikes. The Court concluded that Section 34 of the Constitution is infringed in a way

that could not be justified. The High Court order declaring Section 68.4 unconstitutional was accordingly confirmed. It was further ordered that the declaration of invalidity would apply to all cases whether they arose before or after 27 April 1994 and which had not yet been finally determined.

Cross-references:

Prescription:

- *Mohlomi v. Minister of Defence*, 1997 (1) *South African Law Reports* 124 (CC), 1996 (12) *Butterworths Constitutional Law Reports* 1559 (CC), *Bulletin* 1996/3 [RSA-1996-3-018];
- *Moise v. Transitional Local Council of Greater Germiston and Others*, 2001 (8) *Butterworths Constitutional Law Reports* 765 (CC).

Retrospective Effect of an Order:

- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, 1999 (1) *South African Law Reports* 6 (CC), 1998 (12) *Butterworths Constitutional Law Reports* 1517 (CC), *Bulletin* 1998/3 [RSA-1998-3-009].

Languages:

English.



Sweden

Supreme Court Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 September 2001 – 31 December 2001.



Switzerland

Federal Court

Important decisions

Identification: SUI-2001-3-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 27.06.2001 / **e)** 1P.510/2000 / **f)** Wottreng v. the President of the Zurich Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 145 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
- 5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
- 5.4.20 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

File, archive, right to inspect / Data, protection, embargo period / Interest, scientific / Dead person, criminal file, disclosure.

Headnotes:

Inspection by third parties of criminal archive files; freedom of information and scientific freedom, Articles 16 and 20 of the Federal Constitution.

Cantonal law on archives (recital 2).

Basic elements in freedom of communication (recital 4b); freedom of information and scientific freedom do not generate a general right to information from sources which are not generally accessible

(archive files during the embargo period; recitals 4c and 4d).

Supervision of the application of cantonal law on archives; protection of the personality rights of deceased persons, their families and third parties (recital 5).

Summary:

Willi Wottreng, a journalist and historian, intended to write a book on Martin Schippert, alias "Tino", leader of the "Hell's Angels Switzerland", who achieved notoriety in Zurich and throughout the country in the 1960s. "Tino" and the members of his gang were charged on several occasions and convicted of various offences by the Zurich cantonal courts. "Tino" died in 1981.

To research the book, Wottreng applied to the President of the Zurich Cantonal Court for permission to inspect the relevant criminal files. This was refused, on the ground that access could not be granted during the embargo period specified in the cantonal law on archives, and might violate the interests of the persons concerned (particularly "Tino" and his family, as well as victims, informers and witnesses).

Wottreng brought a public law appeal in the Federal Court, arguing that this decision violated freedom of opinion and information, and also scientific freedom, guaranteed by Articles 16 and 20 of the Federal Constitution. The Federal Court rejected this appeal.

At cantonal level, archives are regulated by a law and various cantonal orders. These orders provide that third parties may not inspect court archives for 70 years after their compilation. They may, however, be given access to judgments, documents and records before expiry of this time-limit, if the parties consent, or if this is justified in the interests of science, and the interests of the parties or other persons concerned are not violated.

The Federal Constitution guarantees freedom of opinion as a basic aspect of freedom of communication; it gives everyone the right to form, express and disseminate his/her opinions freely. On the other hand, freedom of information, freedom of the media, scientific and artistic freedom are specific rights. In particular, freedom of information gives everyone the right to receive information freely, obtain it from generally accessible sources and disseminate it. Scientific research is also protected.

Under the Constitution, freedom of information applies only to generally accessible sources, such as television and radio programmes, parliamentary debates and public court hearings. Its scope is regulated by law. Access to the archives of government departments and courts, for example, is regulated by the law on archives. If the latter specifies a period during which files may be inspected only with special authorisation, then these files are not a freely accessible source. This means that there is no constitutional right to inspect them, and the appellant's claim that freedom of information has been violated is unfounded.

In terms of scientific freedom, the question of the extent to which researchers may consult archives before the embargo expires must also be raised. This basic freedom cannot be recognised as going further than freedom of information and offering broader access to archives which are not freely accessible. Protection of the privacy of the persons concerned and equality of treatment are also at issue here. It is true that scientific freedom extends to the human and social sciences, but the appellant may not rely on it in the present case. He can consult numerous generally accessible sources for his project, and is not dependent on access to the court files.

In his lifetime, "Tino" did not consent to inspection of the files. Even though he might now consent, the court was thus correct in refusing access under cantonal law. Protection of his personality rights may have ceased with his death, producing no present effects in his own case, but his family is still entitled to protection against violations of the deceased's personality rights. The fact that the family could bring proceedings to protect themselves against any such violation by the journalist is not decisive. The President of the Cantonal Court was thus entitled to take their interests into account. Third parties – such as witnesses, victims or informers – also merit protection against inspection of the files and disclosure of their names and situations.

The President of the Cantonal Court did not therefore violate the prohibition on arbitrary treatment contained in Article 9 of the Federal Constitution by refusing the appellant access to the court archives under the cantonal law on archives. The situation might change and need to be reviewed if the appellant obtained the family's consent and undertook not to disclose the names of third parties.

Languages:

German.



Identification: SUI-2001-3-008

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 07.09.2001 / **e)** 1P.247/2001 / **f)** B. v. the Prosecution Service and Cantonal Court of Basel-Land / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 213 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.

5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.

5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

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

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

Keywords of the alphabetical index:

Trial *in absentia*, condemnation / Accusation, merits / Defence counsel, official, lack / Trial, participation, renunciation.

Headnotes:

Article 6.1 and 6.3.c ECHR; Articles 29.2, 29.3 and 32.2 of the Federal Constitution (on, respectively, the right to have a case treated fairly and judged within a reasonable time, the right to be heard and the right of an accused person to be informed of the charges laid against them). Criminal proceedings. Conviction *in absentia*; right to attend the hearing in person; rights of the defence.

An accused person, duly summoned, who fails, without giving valid reasons, to appear at the hearing, may not be deprived of the defence rights enshrined

in Article 6.3.c ECHR, Articles 29.3 and 32.2 of the Federal Constitution (recital 3).

In principle, a re-trial must be granted to a person sentenced *in absentia*, who has not availed of his right to be present at the hearing, but has never been able to exercise his defence rights effectively (recital 4).

Summary:

In 1996, the Criminal Court of the Canton of Basel-Land sentenced B., *in absentia*, to 16 months' immediate imprisonment for various offences. B., who has dual Swiss and French nationality, was in France at the time of the trial, and did not attend, fearing arrest on the strength of an earlier conviction. The Cantonal Court struck his appeal off the list, on the ground that his failure to appear had lost him the right to appeal under the Code of Criminal Procedure.

In 2000, while serving a prison sentence in Basel, B. applied to the Cantonal Court to set the 1996 judgment aside. His application was rejected, and he brought a public law appeal against this decision in the Federal Court. Specifically, he relied on the right to defend oneself effectively, guaranteed by the European Convention on Human Rights and the Federal Constitution. The Federal Court allowed this appeal.

The right of an accused person to attend a criminal trial and defend himself/herself effectively is a fundamental right. It is, however, consistent with fundamental rights to provide for proceedings *in absentia*, if the convicted person may apply to have the judgment set aside, and the merits of the accusation reviewed. The court is not obliged to set the judgment aside if no valid reasons are given for the failure to appear.

B. cannot be said to have had valid reasons for failing to appear at his trials. The fact that he eventually came forward voluntarily to serve his earlier sentence does not alter this.

It is not disputed that B. decided, clearly and definitely, not to appear in person at his trials at first and second instance. However, he did ask to be assisted by an official defence counsel, and stated that he wished to continue with his appeal, in spite of his failure to appear. Although entitled to the services of an official defence counsel, he was not so assisted, either at first or second instance. This being so, he was never able to defend himself effectively. Refusing to grant defence rights, because the person concerned has failed to appear without good reason, is an inappropriate measure.

In considering his application to have the judgment set aside, the Cantonal Court should have allowed for the fact that he had not been able to defend himself. Its rejection of the application consequently violated the guarantees provided by the European Convention on Human Rights and the Federal Constitution.

Languages:

German.



Identification: SUI-2001-3-009

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 20.09.2001 / **e)** 1P.147/2001 / **f)** Labour party and others v. Municipality of Davos and Administrative Court of the Canton of Grisons / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 127 I 164 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **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:

Public property, use / Demonstration, authorisation / Area, use by the public, demonstration / Demonstration, postponement.

Headnotes:

Refusal to authorise a demonstration during the 2001 World Economic Forum in Davos; freedom of opinion and assembly; Articles 16 and 22 of the Federal Constitution; Article 11 ECHR and Article 21 of the International Covenant on Civil and Political Rights.

Principles of freedom of opinion and assembly in connection with demonstrations on public property: requirement of authorisation, assessing interests with reference to the theoretical content of fundamental rights, imposition of obligations and conditions, duty of organisers to co-operate (recital 3).

Examination of the application with reference to traffic conditions and risks of disturbance (recital 4).

In principle, the right to organise demonstrations extends to areas which are not public property, but are used by the public (recital 5b).

Assessment of postponement of a demonstration (recital 5c).

Summary:

As part of a co-ordinated anti-WTO campaign, the Labour Party applied in late November 2000 for permission to hold a protest march in Davos on Saturday 27 January 2001 against the World Economic Forum, which was due to be held in the town at that time. The Executive Council of the municipality of Davos refused permission, on the ground that traffic, already congested as a result of winter conditions and the influx of tourists (particularly on Saturdays), might be brought to a standstill. It also referred to the need to protect Forum participants effectively, and to the danger of acts of violence, of the kind which had marked anti-WTO demonstrations throughout the world. The Labour Party and a trade union appealed to the Administrative Court of the Canton of Grisons, which upheld the refusal, on the ground that restrictions on freedom of opinion and assembly were allowable under the Federal Constitution. In the special circumstances of the case, it held that forbidding the demonstration was consistent with the proportionality rule.

The Labour Party and the trade union brought a public law appeal against the Administrative Court's decision in the Federal Court. Specifically, they argued that it violated freedom of opinion and assembly, as guaranteed by the Federal Constitution, the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The Federal Court declared this appeal inadmissible.

The Federal Court does not insist that a present interest must exist if the issues raised by an appeal are general, and may arise again at any time in similar circumstances, and if the Constitutional Court is unlikely to be able to consider them in good time. However, it gives decisions on questions of principle only, and does not make a detailed examination of the interests that may be at issue in any given circumstances.

The Federal Constitution guarantees freedom of opinion and assembly in general. In the case of demonstrations on public property, these freedoms acquire a special character. Demonstrations constitute intensified public use of public property, and prevent individuals from using it normally. Prior authorisation may be required, but freedom of opinion and assembly mean that the authorities may not simply refuse permission. To some extent, they are required to make public property available to the demonstrators, or suggest other venues if the demonstration cannot be held in the place requested – and must also act to ensure that the demonstration can in fact take place. They must also, however, ensure the free flow of traffic, maintain order and protect non-demonstrators against any violation of their fundamental rights. They must assess the interests involved carefully. Imposing certain obligations or conditions on demonstrators may be the best solution in some cases.

Local conditions in Davos are such that traffic may well be brought to a standstill, particularly on a Saturday, when numerous visitors arrive; there are also security problems, and acts of violence are a danger. These are sufficient reasons for restricting freedom of opinion and assembly. The question must still be asked whether the authorities failed to observe the proportionality principle in forbidding the demonstration, and should have explored alternative solutions.

The appellants do not argue that the protest march could have been re-routed to avoid disrupting traffic, and could thus have been permitted. They do claim, however, that a static demonstration could have been held in an open space or square. In their decisions, the municipal authority and the Administrative Court both state that there is no public square owned by the municipality and under its authority. The question of ownership in the private law sense is not, however, decisive. Insofar as roads and squares are used by the public, they can be made available for demonstrations. The authorities are therefore required to explore these possibilities, and violate the Federal Constitution by failing to do so. However, since no present interest was involved in the instant case, the Federal Court did not allow the appeal on this point

and did not instruct the cantonal and local authorities to review the matter. The last question is whether it might have been possible to hold the demonstration on the Sunday, rather than the Saturday, or on some other day. Such a postponement is compatible with fundamental rights. As long as the demonstrators can disseminate their opinions freely and bring them to the notice of the journalists assembled for the World Economic Forum, there is no disproportionate interference. Since the organisers opposed postponement, the Executive Council was not required to examine this solution more closely.

Languages:

German.



Identification: SUI-2001-3-010

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 13.11.2001 / **e)** 2P.131/2001 / **f)** Municipality of Arosa v. Plakanda AWI AG and Administrative Court of the Canton of Grisons / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 I 3 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.2.1.6 **Constitutional Justice** – Types of claim – Claim by a public body – Local self-government body.
 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
 3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Bill-posting, monopoly / Advertising, monopoly / Site, protection / Monopoly, municipal.

Headnotes:

Article 27 of the Federal Constitution in conjunction with Article 94 of the Federal Constitution; Articles 36 and 50.1 of the Federal Constitution; economic freedom; municipal autonomy; monopoly of bill-posting on private property.

Municipal autonomy under the new Federal Constitution: capacity to appeal (recital 1c), scope and power of review (recital 2).

Compatibility of cantonal monopolies with (the principle of) economic freedom. Unlike a *de facto* monopoly of bill-posting on public property, a legal monopoly applying to private property constitutes disproportionate interference with economic freedom; making authorisation and compliance with certain standards compulsory suffices to ensure that the public interests involved are protected (change in case-law, recital 3).

Municipal autonomy in authorising bill-posting and advertising, i.e. in laying down aesthetic and site-protection standards (recital 5).

Summary:

The law on local administration in the municipality of Arosa contains a number of provisions on advertising. It makes all bill-posting on public or private property a matter for the municipality, and authorises the latter to grant a concession to a private firm. Its permission is required for all other advertising or installations on public or private property.

An advertising agency and a property-owner sought permission from the municipality to place a number of large advertisement hoardings on a building in the town centre. The municipality refused on the ground that, under the law on local administration, all advertising was subject to a municipal monopoly.

The Administrative Court of the Canton of Grisons allowed the appeal by the applicants and returned the matter to the municipality, instructing it to grant authorisation. It found that the municipal monopoly, insofar as it extended to private property, was incompatible with the proportionality principle and thus with the guarantees applying to property and economic freedom.

The municipality of Arosa brought a public law appeal against the Administrative Court's decision in the Federal Court, arguing that it violated municipal autonomy, and also that the Administrative Court had misapplied and misinterpreted the guarantees applying to property and economic freedom. The Federal Court dismissed this appeal.

A municipality may bring a public law appeal, alleging violation of its autonomy, against any cantonal decision which affects its exercise of public authority. This is the case with the contested decision, which obliges the municipality to issue an authorisation and declares the municipal law on public administration partly unconstitutional.

Municipal autonomy is guaranteed within limits determined by cantonal law. Municipalities are granted autonomy in the fields that are not regulated exhaustively by cantonal law but that remain within the powers of municipalities, thus giving them substantial decision-making powers. Municipalities in the Canton of Grisons have autonomy in the fields of local development and building regulations, and specifically regulations on advertising hoardings.

The Federal Constitution guarantees economic freedom. The Confederation and cantons are required to respect this principle. Economic freedom protects the free exercise of all economic activities. It covers the right to advertise on private property. It may be subjected to restrictions, which must have a basis in law, be justified on the grounds of a public interest and respect the proportionality principle – but may not be dictated by economic policy and pursue fiscal interests only. Within these limits, monopolies are not unconstitutional.

The monopoly whereby the municipality of Arosa has reserved to itself the right to post bills on public and private property, and granted a concession to a single private firm, has an adequate basis in municipal law. It is justified on the grounds of a public interest, allowing the municipality to ensure that road-users' safety is protected, and public property lawfully used, and it also protects urban sites and landscape. Insofar as it applies to advertising on private property, however, it may violate the proportionality principle. The erection of hoardings requires prior authorisation, similar to a building permit. This procedure allows the municipality to lay down general rules on bill-posting and reserve the right to intervene. It also allows it to ensure that the various regulations relating to road safety and protection of sites are respected. The monopoly of advertising on private property is thus disproportionate. This means that the Administrative Court's ruling that the municipal monopoly was partly unconstitutional did not itself violate the Constitution.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2001-3-008

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 12.09.2001 / **e)** U.br. 10/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 78/2001 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

- 3.5 **General Principles** – Social State.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 4.6.9 **Institutions** – Executive bodies – The civil service.
- 5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
- 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
- 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Civil servant, dismissal / Dismissal, different criteria / Employee, discrimination / Employment, termination / Labour law.

Headnotes:

The right to work is one of the fundamental human rights guaranteed by the Constitution, which cannot be specified or altered according to specific circumstances. Since the Constitution does not make any distinction between employees in the economic and non-economic sectors, the legislature is obliged to put individuals in an equal legal position with respect to rights, duties and responsibilities deriving from labour relations, the creation and termination of employment, social security and retirement.

The state is obliged to respect the constitutional obligation to treat the beneficiaries of these rights equally and to create such conditions where equal rights would refer to all persons being in same position.

Redundancies for public sector employees only, the lack of objective criteria and terms for its enforcement, as well as difference in the quality of rights of this category of employees violates the constitutional principles of equality, the rule of law and legal certainty.

Summary:

Judging upon a petition lodged by several individuals and legal entities, the Court repealed the statute amending the Law on labour relations. Under the disputed Law, the attainment of rights, duties and responsibilities of an employee and employer and the creation and termination of employment can be regulated by other laws besides the Law on labour relations.

The core issue of the petition was the introduction of a new method of redundancy, which was reserved for one category of employees only – those in the public sector.

The Law at issue introduced “redundancy due to office requirements” as a specific way of employment termination. It also provided for more accurate regulation of issues related to employment termination in this way.

The employment terminates by dismissal due to office requirements if:

1. state and local self-government units and bodies of the city of Skopje, public undertakings and institutions, funds and other organisations and institutions set up and owned by the state or set up by virtue of law would cease working or would be dissolved;
2. these institutions are undergoing internal reorganisation;
3. there is a loss of competencies or the scope of work has narrowed; and
4. there have been other organisational changes that bring about redundancy.

The Law has also defined the rights to which the newly redundant employee is entitled to:

1. the right to a retirement pension, if certain criteria are met; and
2. the payment of redundancy money under certain circumstances.

While judging the constitutionality of the disputed Law, the Court took into consideration the fundamental values of the constitutional order and provisions, which refer to individuals' equality, the right to work and the rights and positions of employees. It also examined the values inherent in social security and social insurance legislation.

Article 8 of the Constitution specifies the fundamental values of the constitutional order. Amongst these are: human rights and freedoms acknowledged in international law and established by the Constitution, the rule of law, humanism, social justice and solidarity.

Article 9 of the Constitution safeguards the equality of persons in respect to their rights and freedoms, as well as before the Constitution and laws.

Article 32 of the Constitution *inter alia* sets out that each person is entitled to work and material safety in time of temporary unemployment, provided that employees' rights are attained and their position is regulated by law and collective agreements.

Labour relations are determined by a contract established between the employee and employer stipulating some things to be done and rights and duties deriving there from to be enforced. The employee sets up the employment on voluntarily basis, under a method and terms stated by law and collective agreement. The Law on labour relations and collective agreements regulate the terms and processes of employment termination, including the forms and ways of employees' rights to protection in such cases. The Law prescribes several ways of employment termination: upon agreement, after the expiration of the period of employment, by virtue of law, or by dismissal due to economic, technological, structural or similar changes.

The Law, which was subject matter of Court examination in this case introduced an additional way of employment termination referring to public sector employees only: dismissal due to office requirements. Besides, it set out specific rights, different from those to which employees are entitled to in case of employment termination described above.

In the Court's opinion, the Constitution proclaims the right to work and material safety in case of temporary unemployment, provided that employees' rights are

regulated by law and collective agreements. Social protection and social security of persons, which are defined as common constitutional principles, are based on state social character, provided that the legislature regulates the rights and their scope. That means that the Constitution does not determine the attainment and scope of labour and social insurance rights, but it forces the legislature to regulate it. However, laws dealing with labour and social insurance issues must determine such principles, which would equally refer to all, i.e. employees or the unemployed.

After analysing the Law at issue, the Constitutional Court concluded that its provisions prescribed a specific way of employment termination in cases where the state was in the position of employer. Although it authorised the state to decide on possible rights to which the employee dismissed was entitled, it was obliged to ensure an effective protective mechanism regarding employees' legal safety.

In coming to its decision, the Court looked at several issues. As regards rights, duties and responsibilities deriving from employment, including its creation and termination, the legislature is bound to safeguard the equal legal position of persons.

Labour relations are a unique category of contractual relations between the employee and employer referring to all employees equally, regardless of their activities or sphere of work. The right to work is a universal one, and does not depend on the sector in which it is enforced. The Court judged that the principle of equality is also jeopardised as regards the quality of rights relating to employees, who have been made redundant due to office requirements. In the Court's opinion, the law at issue put the employees in the public sector in an advantageous position.

Since the Law in question did not establish terms and criteria to which the employer would be bound when dismissing employees due to office's requirements, the Court found that employees' legal safety was jeopardised as well. On the other hand, it also restricted the possibility for protection of employees, whose employment had ceased on these grounds. The lack of objective criteria, whereby the termination of employment would depend on an employer's will, was held by the Court to breach the fundamental principle of the rule of law. Due to the reasons stated, the Court ascertained the alleged unconstitutionality of the Law amending the Law on labour relations.

Languages:

Macedonian.



Identification: MKD-2001-3-009

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 19.09.2001 / **e)** U.br.15/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 79/2001 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Child, born out of wedlock / Child, right to determine the identity of father, age, limit / Parent, right / Family law.

Headnotes:

The legal meaning of family relations involves a specific legal category where rights and obligations between family members dominate.

The provision limiting the right of an illegitimate child to determine the identity of his or her father to the age of 21, whereas the parents have an unrestricted right during their life to lodge an appeal regarding their paternity or maternity, contradicts the constitutional principle of equality.

Summary:

The Court ascertained the alleged unconstitutionality of Article 60.1 of the Families Act, according to which an illegitimate child can lodge an appeal to determine the identity of his or her father up to the age of 21. In the petitioner's view, such a provision restricted the child's right to take proceedings relating to paternity, whereas the person claiming to be the father had an unrestricted right to take such proceedings irrespective of the child's age. The petitioner stated that such a provision was not in compliance with the constitutional principle of equality.

Bearing in mind the overall contents of the Families Act, the Court found that parents enjoy an unrestricted

right to lodge an appeal relating to their paternity or maternity, regardless of the child's age.

In constructing its opinion, the Court took into consideration the relations regulated by the Family Act in its entirety, especially relations between parents and children based on the following family law principles: the principle of equality, the principle of protecting children's interests and protecting the family. The Court concluded that the legal meaning of family relations involved a specific legal category where rights and obligations between family members dominate. These elements appear as: rights and duties of a non-proprietary nature (loyalty, assistance, respect), those of a proprietary nature (right of mutual maintenance between spouses, as well as between parents and children) and other rights and obligations existing between spouses and between parents and children.

The Court found that the law defines age limits for commencing or terminating the procedure for attaining certain rights. However, they should not represent an obstacle in attaining these rights. Therefore, as regards this particular case, the Court judged the provision at issue as unconstitutional. It based its opinion on the fact that the law entrusted parents with an unrestricted right to lodge an appeal regarding their paternity or maternity regardless of the child's age, whereas the child had no such unrestricted right. The Court found such differentiation as contrary to the principle of equality enshrined in Article 9 of the Constitution.

Languages:

Macedonian.



Identification: MKD-2001-3-010

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 03.10.2001 / **e)** U.br.119/2001 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.

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

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

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

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

5.3.26 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Military service, compulsory nature / Military service, voluntary nature / Woman, special protection.

Headnotes:

Although all persons are equal in their freedoms and rights, irrespective of their sex, as mothers, women enjoy special protection and rights.

In this sense, the existence of different legal regimes for military service for men and women (it is mandatory for former and voluntary for the latter) does not constitute a violation of human rights and freedoms nor does it create inequality among persons, according to their sex. Different regulation of terms for exercising military service for men and women confirms the interest and care the state provides for the special protection of women, which is its constitutional obligation.

Summary:

An association of citizens called “The World Macedonian Congress” lodged a petition with the Constitutional Court challenging the constitutionality of Articles 3.1 and 2 of the Law on Defence. In the petitioner’s view, the provisions at issue violated the principle of equality, discriminating persons according to their sex. This referred to national defence, enforcement of which the Constitution states as a right and obligation. Therefore, the petitioner claimed violation of Articles 9, 28, 51 and 54 of the Constitution.

Pursuant to the disputed provisions, all male citizens between 17 and 55 years of age are obliged to do military service. Women can serve in the military if they voluntarily register as military recruits at any time until the end of calendar year when they are 27.

In coming to its decision, the Court took into consideration those constitutional provisions that refer to citizens’ equality, defence of the state and the special protection and care of mothers and children.

According to Article 9 of the Constitution, all persons are equal in their freedoms and rights, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All are equal before the Constitution and laws.

According to Article 28 of the Constitution, the defence of the Republic is a right and obligation of each citizen. The Law determines the attainment of this right and obligation. In pursuance to Article 122 of the Constitution, military forces of the Republic protect the territorial integrity and the country’s independence.

Article 42 of the Constitution provides for country’s duty to exercise special protection of mothers and children. Children and mothers are entitled to special social security benefits.

The Constitution defines national defence not only as a right, but also as an obligation of each citizen, men and women, but the attainment of this right and obligation is within the scope of regulation.

The Law on Defence determines this right and obligation as a system of protection of the country’s independence and its territorial integrity, and defines the citizens, state bodies and military forces as defence subjects. Trade companies, public undertakings, institutions and offices and local self-government units can perform certain duties in the domain of defence.

The Law enumerates individual rights and obligations of citizens while enforcing national defence obligations. It also states the special terms, the manner and the time when each of these rights and obligations are exercised.

In the Court’s opinion, the meaning and objective of the disputed provisions should be assessed in relation to all human rights and freedoms enshrined in the Constitution, being recognised and accepted by international law, which finally determine their status and position in the society in general, including the system of defence.

Therefore, the Court found that the different legal regimes for military service for men and women represent, in the widest sense, a confirmation of the state’s interest and care for women, due to the fact that they may become mothers. Since the Constitution defines this special protection of women as a state obligation, the legislature is vested to define the forms, ways and terms for its enforcement. In addition to this special protection, the Law on defence consists of other provisions, which are in favour of women. For example, according to Articles 11 and

12, pregnant women and mothers who take care of children under 8 years are exempted from their obligations as regards the need to work.

Languages:

Macedonian.



Identification: MKD-2001-3-011

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 24.10.2001 / **e)** U.br. 177/2000 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

4.6.8 **Institutions** – Executive bodies – Sectoral decentralisation.

4.10.2 **Institutions** – Public finances – Budget.

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

Keywords of the alphabetical index:

University, assets, own / University, autonomy, fiscal / Budget, appropriation, particular purpose / Cultural institution, financing.

Headnotes:

All revenues earned by the beneficiaries of the state budget are paid and displayed therein, provided that they decide upon the amount and purposes of covering so-called "self-financed activities" by virtue of their own financial forecast. Registration of these revenues in a special account and their display within the state budget does not infringe the right to ownership and rights deriving from this, nor does it distort the freedom of market and entrepreneurship. Since public revenues earned by public entities set up by the state are at issue, such a provision aims to ensure a higher level of responsibility and transparency in their earning and spending patterns, as this is in the public interest.

Summary:

The Drama Theatre and the Faculty of Law in Skopje seized the Constitutional Court on the constitutionality of Article 26 of the statute amending the Law on budgets.

The petitioners sustained that the provision at issue was not in conformity with several constitutional provisions that regulate the right to ownership and the freedom of market and entrepreneurship. They also referred to the Law on higher education as being violated by the provision in question.

Furthermore, the petitioners pointed out that private revenues are gained by providing services or activities that were not financed by the budget. Thus, such revenues could not have been treated as public ones. According to the Faculty of Law, such a statutory provision put into question the autonomy of the University being safeguarded by the Constitution. It also contradicted the principles of market economy and the treasury system in general. Such a treatment of revenues gained from so-called self-financed activities restricted public institutions' rights to ownership, i.e. their right to manage and dispose of these revenues. It intruded upon the legal autonomy of the University, which should enjoy not only organisational and functional autonomy, but also financial autonomy. This referred primarily to the disposition of its own revenues.

According to the provision at issue, the revenues of self-financed activities gained by beneficiaries of the state budget by providing services not financed by the budget itself, are registered in a special account covering its own assets. All assets and liabilities of each state budget's beneficiary are registered within the budget itself. Entities receiving their own revenues adopt a financial forecast, by which they ascertain the amount and investment purpose of such revenues.

The Constitution guarantees the right to ownership and the freedom of market and entrepreneurship and considers them as fundamental values of the constitutional order. Rights deriving from ownership can be restricted and abolished only in cases of the public interest as determined by law. Moreover, the state safeguards the equal legal position of all market entities (Articles 8.6.7, 30 and 55 of the Constitution).

According to Article 46 of the Constitution, the University's autonomy is guaranteed, provided that the law regulates the conditions for the establishment, performance and termination of its activities.

In pursuance to the Law on higher education, the autonomy of the University comprises academic freedom, managerial autonomy and irrevocability of this autonomy. The managerial autonomy is reflected *inter alia* by the fact that the University receives grant funding and is allowed to raise its own funds. Besides the revenues given by the Higher Educational Fund, state owned higher educational institutions can raise money under different grounds: by performing educational services, selling scientific and expert services, interests and dividends, copyright earnings etc. The Law also entitles them to the right to introduce shared financing of study costs under certain terms.

The Court also determined that the Law on Culture defines the same financial regime as regards national cultural interest. Besides the state budget, funds for enforcing the national interest in culture can be raised from other sources: fund-raising, foundations, gifts etc. Since funds for enforcing higher educational activities and funding for cultural activities come primarily from the state budget, these institutions should be considered as budget beneficiaries.

In light of the above, the Court judged that public institutions in the domain of social activities (education, culture, child protection, science and sport) are basically financed by the state budget and that all of these institutions are set up by the state, with its own capital. It also stated that higher educational institutions and those in the sphere of culture, are entitled to raise money from sources besides state budgetary funds and to run and use these independently, under terms stated by law.

The Court rejected the alleged unconstitutionality of the disputed provision. It found no detrimental effect over ownership rights on revenues obtained by beneficiaries of the state budget, nor over freedom of enterprise. It based its decision on the fact that through the financial plan, the entities decide independently about the amount and investment purpose of funds deriving from their self-financed activities. In addition to this, the Law on Budgets provides for a separate budget for each budget beneficiary, wherein its own assets and liabilities are registered. Therefore, the Court concluded that faculties and other public institutions are not restricted on decisions regarding these revenues. It jeopardises neither the faculty's autonomy, nor their right to operate as market entities.

Languages:

Macedonian.



Identification: MKD-2001-3-012

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 31.10.2001 / **e)** U.br. 190/2001 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.

2.3 **Sources of Constitutional Law** – Techniques of review.

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

4.4.1.5 **Institutions** – Head of State – Powers – International relations.

Keywords of the alphabetical index:

Treaty, international, ratification / Interpretation, constructive / Political act, characteristics / Public peace / Public safety.

Headnotes:

The 2001 Framework Agreement is a political act signed by leaders of the biggest political parties in the country, aimed to overcome the current national crisis. It is not a legal act which may be subject to judicial review according to Article 110 of the Constitution enumerating the Court's competencies.

Summary:

An individual lodged a petition with the Court challenging the constitutionality of the Framework Agreement signed on 13 August 2001. In the petitioner's view, such an agreement should have been treated as a collective agreement signed by four political parties as legal entities, which expressed the collective will to come to such an agreement. Although this agreement referred to the public, all negotiations and talks related to its contents were enforced *in camera*. The applicant stated that the Agreement was conspiring against the Constitution, which was passed in a democratic way and proclaimed by the international community as democratic.

The Court determined that the Framework Agreement was concluded in Ohrid and signed in Skopje, with the English version being the only authentic one. It

was signed by the President of the Republic, the leaders of four political parties and the special representatives of the European Union and of the United States. Constituent parts of the Agreement are annexes for constitutional and legislative amendments, implementation and measures for confidence building.

The introductory part of the Agreement provided for an adjusted framework for safeguarding the future of democracy in the country and the development of closer and more integrated relations with the Euro-Atlantic community. It is also stated that the Agreement was to promote peaceful and harmonised development of civil society, observing the ethnic identity and the interest of all Macedonian citizens thereby.

The Agreement consists of several items, such as: basic principles, termination of conflicts, development of decentralised government, non-discrimination and equitable representation, specific parliamentary procedures, education and use of languages, expression of identity, implementation, annexes and final provisions.

The Court ascertained that the parliament did not ratify the Framework Agreement.

In coming to its decision, the Court took into consideration constitutional and statutory provisions that regulate the legal position and procedure for incorporating international agreements into domestic legal system.

Thus, according to Article 118 of the Constitution, the international agreements being ratified in accordance with the Constitution are part of the internal legal order and cannot be modified by virtue of law.

Article 119 of the Constitution sets forth that the President of the Republic concludes international agreements on the nation's behalf. The government can also conclude international agreements when this is stated by law.

The Law on the Conclusion, Ratification and Enforcement of International Agreements regulates the procedure and way the international negotiations are governed, the conclusion of international agreements and accession to multilateral international agreements, the initiation of the ratification procedure, as well as the their execution. The law also provides for definition of an international agreement: "an international agreement is one signed by the Republic with one or more countries or international organisations, which determines the rights and obligations for the state, irrespective of

whether it is stipulated in one or more mutually tied documents".

With this in mind, the Court rejected the petition due to lack of procedural presumptions for decision making. It referred to an act which had none of the characteristics of a legal act eligible for judicial review in respect to the Court's scope of references. In passing its decision, the Court judged all the evidence and facts related to legal nature of the Agreement. Thus, the Framework Agreement was run and signed under the auspices of State's President. It was also signed by the leaders of four political parties. The representatives of the European Union and the United States signed the Agreement as witnesses. According to this legal situation, the Court judged that the Framework Agreement is a political act of leaders of the biggest political parties in the country aimed to overcome the crisis. Therefore, the Court stated that the Agreement is not a legal act eligible for judicial review. The Court passed the decision by virtue of its powers set out in Article 110 of the Constitution.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2001-3-010

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 12.09.2001 / **e)** K.2001/333 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
 3.17 **General Principles** – Weighing of interests.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Housing, rent, maximum, fixing by the state.

Headnotes:

Placing restrictions on the annual increase rate of rental prices of real estate by law is not contrary to the Constitution. However, determining the maximum annual increase much below the general price increase represents a restriction that exceeds the aim pursued by law.

Summary:

While trying a case, the Adana 2 Peace Court applied to the Constitutional Court to annul the provision of Law 6570 which regulates the maximum annual interest rates on property rents.

The conditions of restrictions on fundamental rights and freedoms are determined in Article 13 of the Constitution. Fundamental rights and freedoms may only be restricted on the grounds set forth in the Constitution in order to ensure the requirements of a democratic social order. Any restriction on fundamental rights and freedoms shall not be more than the requirements of the pursued objective. It is not contrary to the Constitution to limit the maximum annual property rents because of public interest

concerns. However, the 10% increase envisaged in the disputed provision of Law 6570 was much lower than the general price increase, i.e. the general interest rate in 2001. Thus, the restriction exceeded the aim pursued and resulted in an imbalance between landlords and tenants. Consequently, it could not be asserted that the restriction was in conformity with the requirements of a democratic social order. The provision of Law 6570 is contrary to the Constitution and should be annulled.

The judgment was delivered unanimously.

Languages:

Turkish.



Identification: TUR-2001-3-011

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 27.10.2001 / **e)** K.2001/332 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 27.10.2001, 24566 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Imprisonment period, decrease / Judicial proceedings, suspension / Prisoner, benefits.

Headnotes:

Parliament has discretionary power to decide to which misdemeanours and felonies shall apply the Law on Conditional Release and Postponement of Actions and Penalties. It also has discretionary power regarding the name and application date of the law.

A differentiation between individuals having a different status and under different conditions conforms to the equality principle guaranteed by the Constitution when established for just reasons.

Summary:

Law 4616 (the Law on Conditional Release and Suspension of Sentences Stemming from Misdemeanours and Felonies committed before 23 April 1999) included some provisions in favour of offenders, detainees and prisoners.

While trying cases, some courts considered that some provisions of the law were contrary to the Constitution and applied to the Constitutional Court to annul these provisions. The number of applications of this kind reached 220.

The general provisions of the law may be summarised as follows:

With reference to misdemeanours and felonies committed before 23 April 1999:

- the death penalty shall not be executed but shall be commuted to life imprisonment;
- a 10 year reduction shall be applied to life imprisonment and penalties restricting liberty;
- after an application of reduction, if there is no time to be spent in prison, prisoners shall be released and if there is time to be spent in prison, after execution of the penalty, they shall be released also;
- the detainees at the time of promulgation of the law shall be released after examination of their status;
- inquiries and trials at the time of the promulgation of the law shall be postponed without considering the requests of individuals. If individuals do not commit any misdemeanour during one year and any felony during the next five years, no action shall be brought against them. If they commit any misdemeanour or felony, the inquiries and trials shall be continued;
- the provisions that are in favour of individuals shall be applied only to those misdemeanours and felonies enumerated in the law;
- those who shall not benefit from the provisions of the law include those who:
 - a. benefited from a provisional release and were pardoned before the promulgation of the law and went on to commit another offence or crime,
 - b. were disciplined because of their actions in prisons after the promulgation of the law,
 - c. if there is a conviction sentence or detention order against them, do not apply to the related authority within one month; and
- those individuals who benefit from the law shall not benefit from 6 days' reduction according to general execution provisions.

In their application to the Constitutional Court, the courts claimed that the law included some misdemeanours and some felonies while excluding some others. Thus, it made possible that individuals sentenced to longer terms of imprisonment benefit from the law, whilst individuals sentenced to shorter terms do not. The courts alleged that this situation is contrary to the provisions of the Constitution, especially to the principles of equality and the rule of law.

The Constitutional Court considered that parliament has discretionary power regarding the name and application date of the law; it also observed that it may not be asserted that a just differentiation between individuals having a different status and under different conditions is contrary to the equality principle. It depends on just reasons not to include the misdemeanours and felonies provided in different laws such as the Military Criminal Code, the Law on Forests and the Law on Prohibition and Pursuing of Smuggling.

Individuals who committed misdemeanours and felonies requiring longer terms of imprisonment benefit from the law. On the other hand individuals who committed misdemeanours and felonies requiring shorter terms of imprisonment do not benefit from the law. This situation may not be considered as a contradiction to the equality principle since it has just reasons not to include the shorter punishments under the law, for lawful purposes. For that reason, the Constitutional Court rejected applications made according to types of misdemeanours and felonies.

On the other hand, according to the systematic structure of the Turkish Criminal Code, misdemeanours and felonies envisaging the same legal interest should be dealt with at the same division of the Code included within Law 4616. However, some offenders or criminals of the same division did not benefit from Law 4616. The Constitutional Court decided that it is contrary to the Constitution to include serious misdemeanours and felonies within Law 4616 and not to include less serious misdemeanours and felonies despite the fact that they are regulated within the

same division and pursued the same legal interest. Therefore, the Court annulled these provisions.

Furthermore, the Court considered that by laying down the same provisions for life sentences and 36 years' imprisonment, Law 4616 corrupted the balance which had existed between such sentences. Therefore, the Court annulled this provision.

The law did not give an option to individuals to benefit or not to benefit from the law. The law did not provide rules in favour of individuals who had benefited from conditional release before the promulgation of this law. Likewise, it did not provide rules in favour of prisoners disciplined after promulgation of this law. Moreover, the law did not ensure provisions in favour of individuals on whom there is a detention order or a conviction decision if they do not apply to competent authorities within one month after promulgation of the law. The Constitutional Court found that these provisions created inequalities and unjust results. Consequently, these provisions were also annulled.

The Constitutional Court decided that some of the annulled provisions should take effect within six months after publication of the judgment in the Official Gazette.

The President, Mr M. Bumin, and the members, E. Ersoy, S. Akbulut, Y. Acargün, S. Adalı, and A. Hüner, had dissenting opinions.

Languages:

Turkish.



Identification: TUR-2001-3-012

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 22.11.2001 / **e)** K.1999/1 / **f)** Dissolution of a Political Party / **g)** *Resmi Gazete* (Official Gazette), 22.11.2001, 24591 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.3.4.7.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Banning of political parties.

3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.

4.5.10.4 **Institutions** – Legislative bodies – Political parties – Prohibition.

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

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

Keywords of the alphabetical index:

Political party, dissolution / Political party, programme / Minority, language.

Headnotes:

Including the promotion, protection or dissemination of languages or cultures other than Turkish in a political party's programme runs counter to national unity and the indivisibility of the state, and is contrary to Article 78/a-b of the Law on Political Parties and the Constitution.

Summary:

The Chief Public Prosecutor brought an action against the Democratic People's Party to dissolve the party under different provisions of the Law on Political Parties and of the Constitution. After completing the necessary prosecutions the Constitutional Court dissolved the party because of the following reasoning.

According to the Constitution and the Law on Political Parties, the word "Turkish" includes all individuals having Turkish citizenship without considering his or her ethnic origin. The defendant party rejected the concept of a modern nation. The program of the party depended on racial and regional discrimination. It was clear that this kind of conception could corrupt the state order, which depends on territorial and national unity. Therefore, it was found contrary to the provisions of Article 78/a-b of the Law on Political Parties to make any discrimination between Turks and Kurds in the Party's manifesto and to assert that there is an ethnically Kurdish nation which is subjected to assimilation.

Under Article 81/a-b of the Law on Political Parties it may not be claimed that there are minorities depending on national, religious and linguistic discrimination in the territory of the Turkish Republic. It is illegal to try to corrupt national unity by promoting cultures and languages other than Turkish and Turkish culture. In the party's manifesto, it is written that there are minorities depending on cultural, racial and language differences in the territory of the

Turkish Republic. Thus, it was found that the party aimed to create minorities by protecting, by promoting and by disseminating languages and cultures other than Turkish and Turkish culture. Since the Party manifesto contradicts Article 81/a-b of the Law on Political Parties, the Democratic People's Party needed to be dissolved.

The President, Mr M. Sezer, and the members, Mr H. Kılıç, Mr Y. Acargün, Mr S. Adalı and Ms F. Kantarcıoğlu, had dissenting opinions on different points.

Languages:

Turkish.



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)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 42/2001 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.37.3 **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 the first Protocol to the European Convention on Human Rights. Each and every person or entity shall have the right peacefully own his/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:

- *James et al. v. the United Kingdom*, Decision of 21.02.1986, vol. 98, A-series of the decisions of the Court.

Languages:

Ukrainian.



Identification: UKR-2001-3-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.10.2001 / **e)** 14-rp/2001 / **f)** Official interpretation of Article 131.1.1 of the Constitution (case on appointment of judges) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 43/2001 / **h)**.

Keywords of the systematic thesaurus:

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.

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

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

4.7.4.1.3 **Institutions** – Judicial bodies – Organisation – Members – Election.

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

4.7.8 **Institutions** – Judicial bodies – Ordinary courts.

Keywords of the alphabetical index:

Judge, appointments board / Judge, appointment, commission, power of proposal.

Headnotes:

In the Constitution, the dichotomy between election and appointment of a professional judge designates different procedures for holding an office of judge and different forms of acts on this matter, which are ratified accordingly by the President of Ukraine or the parliament (*Verkhovna Rada*).

The concept of “appointment of judges to hold office”, as used in Article 131.1.1 of the Constitution, shall be understood as relating to those persons appointed by the President of Ukraine for the first time as a professional judge of a court of general jurisdiction for the term of five years.

Summary:

According to Article 131.1.1 of the Constitution the Supreme Council of Justice shall, amongst other, make submissions on the appointment of judges.

Article 85 of the Constitution, as it relates to the competences of the parliament (*Verkhovna Rada*) for staff matters, mentions the concepts of appointment and election. Judges for courts of general jurisdiction are to be elected (Articles 85.1.27, 127 and 128 of the Constitution) while other officials are to be appointed. The decisions on appointment and election are to be enacted as a decree of the parliament.

The Constitutional Court concluded that the concepts of appointment and of election for judges in courts of general jurisdiction are different.

As regards the appointment of judges for courts of general jurisdiction, it is the Supreme Council of Justice that makes a submission to the President of Ukraine on the first appointment of professional judges for five years.

The mechanism of electing the citizens of Ukraine to hold the office of judge is implemented by the

Supreme Council of Justice and the Qualification Commission of Judges.

The functions of the Qualification Commission of Judges and the Supreme Council of Justice for the first appointment and election demonstrate that they are assigned different procedures for selecting judges for courts of general jurisdiction. This highlights the difference in the authorities of the Qualification Commission of Judges and the Supreme Council of Justice as to the candidates to hold an office of judge. The Supreme Council of Justice, on recommendation of the Qualification Commission of Judges, makes a submission to the President on the appointment of a citizen to hold an office of judge for the first time. The election process of judges is permanently provided by the parliament as a collegiate body of legislative authorities considering the conclusions made by the Qualification Commission of Judges.

The Supreme Council of Justice makes submissions for appointment of judges, chairpersons for courts of general jurisdiction, their deputies and their retirement from these offices. An analysis of the Constitution reveals that it contains no provisions on the appointment or election of the chairperson for courts of general jurisdiction, vice-chairpersons and their dismissal. Appointment for the administrative offices of chairpersons for other courts of general jurisdiction and their deputies may be defined exclusively by legislation (Article 92.1.14 of the Constitution).

Languages:

Ukrainian.



Identification: UKR-2001-3-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 14.11.2001 / **e)** 15-rp/2001 / **f)** Constitutionality of paragraph 4.1 of the Regulation on Passport Service of the Ministry of Internal Affairs, approved by the Cabinet of Ministers (the domicile registration case) / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.

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

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

3.13 **General Principles** – Legality.

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

5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Residence, free choice / Residence, permit / *Propiska*.

Headnotes:

The system of “*propiska*” (registration of the population’s place of residence), as established by Section 4.1 of the Regulation on the Passport Service of the Ministry of Internal Affairs, requiring a person to obtain, prior to changing of place of residence, a special permit is inconsistent with the freedom of movement guaranteed by Article 3.1 of the Constitution.

Summary:

Members of the parliament applied to the Constitutional Court and requested the Court to declare Section 4.1 of the Regulation on the Passport Service of the Ministry of Internal Affairs unconstitutional. The Court established that the Passport Service organises work related to documenting the population, “*propiska*” (registration of the population’s place of residence), cancellation of such registration, monitoring the residents at their place of residence, and other similar services.

The Constitutional Court noted that pursuant to Article 33 of the Constitution, everyone who is legally present in Ukraine has freedom of movement, free choice of a place of residence and freedom to leave Ukraine. Freedom of movement and freedom to choose a place of residence are essential guarantees of individual freedom and constitute inviolable and incontestable rights (pursuant to the Article 21 of the Constitution). As such, they shall not be restricted, except in cases envisaged by Article 64.1 of the Constitution.

The right to freedom of movement and free choice of a place of residence, as inviolable human rights, are supported by international legal instruments: the General Declaration of Human Rights of 1948, the International Pact on Civil and Political Rights of 1966, and Protocol 4 of the European Convention on Human Rights. Article 2 Protocol 4 ECHR sets forth the rule, pursuant to which the exercise of the right to freedom of movement and freedom to choose a place of residence may not become subject to any restrictions except for those provided for by legislation.

Pursuant to Article 92.1.1 of the Constitution, rights and freedoms of citizens and other individuals, and guarantees of exercising such rights and obligations, shall be determined solely by legislation. The Court noted that analysis of the regulations subject to this legislation shows that “*propiska*” (registration of official residence) has a generally restrictive nature and is executed on the basis of departmental regulations.

Section 4.1 of the Regulation on the Passport Service of the Ministry of Internal Affairs, approved by the Cabinet of Ministers on 10 October 1994, no. 700, pursuant to which the Passport Service applies its restrictive procedure to the choice of a place of residence, is in contradiction to Articles 33.1 and 64.1 of the Constitution.

Languages:

Ukrainian.

*Identification:* UKR-2001-3-010

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 04.12.2001 / **e)** 16-rp/2001 / **f)** Constitutionality of provisions contained in Article 12.2 of the Law of Ukraine “On local state administrations” (case on association office in local state administration with the deputy mandate of local *radas*) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 50/2001 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.

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

Keywords of the alphabetical index:

Deputy, local council / Incompatibility, local government / Incompatibility, public office / Functions, concurrent exercise.

Headnotes:

According to Article 42.2 of the Constitution, the entrepreneurial activity of deputies, state officials, public servants and officials of autonomous local self-government authorities is restricted by law.

The provisions of Article 12.2 of the Law on Local State Administration, precluding heads of local state bodies, their deputies, and managers of departments, divisions and other local structural units to “have other representative mandates”, are unconstitutional inasmuch they represent an unlawful limitation to the right of these persons to be elected guaranteed by Article 38.1 of the Constitution.

Summary:

Article 12.2 of the Law on Local State Administration (“the Law”) establishes that heads of local state bodies, their deputies, and managers of departments, divisions and other local structural units may not become people’s deputies of Ukraine or hold a representative mandate. The provisions contained in Article 12.2 of the Law do not restrict the right, stipulated in Article 38.1 of the Constitution, to be elected to a public authority and/or a local autonomous authority.

The right of citizens “to be elected to a public authority and/or a local autonomous authority” (which is a “passive” electoral right) may not be interpreted literally, as it contradicts the responsibility of the voters to vote for, and elect to office, specific citizens. The right to run for elections does not prevent deputies of *radas* (local state bodies), from meeting the necessary criteria. No prohibition to run for office is contained in Article 12 of the Law. The right to be elected is not identical to the right to have an appropriate representative mandate, acquired by citizens who are brought into power at elections:

people have the right to receive or to refuse this mandate.

The Constitutional Court considered that the provisions contained in Article 12.2 of the Law, according to which the local government officials may not be elected to parliament or hold any other representative mandate, deals with the subject of incompatibility. Article 78.2 of the Constitution states that Ukrainian parliamentarians may not hold other representative mandates or act as civil servants. No other representative mandate may be given to the President of Ukraine (Article 103.4 of the Constitution). Professional judges may not acquire representative mandates (Article 127.2 of the Constitution). In conformity with the Decision of the Constitutional Court of Ukraine dated 13 May 1998, 6-rp/98, the deputies of local *radas* may be heads or deputy heads of local state administrations, managers of local structural units or local state prosecutors.

The managers of central and local executive authorities do not have the right to combine their function with other jobs, with the exception of teaching and scientific and creative research effectuated during non-working hours, and cannot be directors of “for profit” organisations (Article 120.1 of the Constitution). On the other hand, no incompatibility is mentioned in respect of the right to be elected as a deputy of local *radas*.

Citizens holding head offices of local state administrations, their deputies, and managers of departments, divisions and other local structural units, are only subject to limitations established by the law in cases stipulated by the Constitution.

Cross-references:

- Decision of 13.05.1998 (6-rp/98).

Languages:

Ukrainian.



Identification: UKR-2001-3-011

a) Ukraine / b) Constitutional Court / c) / d) 06.12.2001 / e) 17-rp/2001 / f) Compliance with the

Constitution of Ukraine of Articles 5.1, 6.3 and 32 of the Law of Ukraine “On the product sharing agreements” (case on the product sharing agreements) / **g** / **h**).

Keywords of the systematic thesaurus:

- 3.21 **General Principles** – Equality.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.6.10.1.1 **Institutions** – Executive bodies – Liability – Legal liability – Immunity.
- 4.10.8 **Institutions** – Public finances – State assets.

Keywords of the alphabetical index:

Concession / Resource, mineral / Property, public, use / Immunity, state.

Headnotes:

According to Article 116 of the Constitution, the Council of Ministers administers the management of state property in accordance with the law, organises and ensures the exercising of the foreign economic activities within Ukraine (Sections 5 and 8).

Being the holder of the title, the state cannot be devoid, by law, neither of its automatic judicial immunity, nor of the consistency of jurisprudence and compliance with court decisions in product-sharing agreements made with the participation of foreign investor(s).

Summary:

Article 5.1 of the Law provides that the Permanent Interdepartmental Commission of the Cabinet of Ministers of Ukraine (“the Interdepartmental Commission”) is the body in charge to address the issues related to the drafting and performance of the product sharing agreements. The Interdepartmental Commission has none of the characteristics of a central executive authority. It is an auxiliary collegiate authority of the Cabinet of Ministers which wields no state power.

Article 6.3 of the Law does not allow for making amendments to the approved subject or to the specified procedure relating to lists of mineral deposit sites, which are subject to agreements or to tenders for making product-sharing agreements or on which the Interdepartmental Commission or the working authority thereof negotiated on the means for making such agreement.

The Constitutional Court was of opinion that this article contradicted Articles 6, 8, 75, 85 and 91 of the Constitution.

In particular, it was considered that the article restricts the legislative authority of the parliament (*Verkhovna Rada*) – Articles 75, 85.1.3 and 91 of the Constitution – since it limited its authority to make amendments to the parliament approved list of mineral deposit sites that are of special scientific, cultural or natural reserve value, and which may not constitute an object of the product-sharing agreements.

Article 32 of the Law establishes the unconditional disqualification of the state from judicial immunity, and does not allow immunity for protecting consistency in jurisprudential decisions, and for compliance with judicial decisions, which are provided for as binding in the product sharing agreements made with participation of foreign investor(s).

Acting as a party to a product-sharing agreement (Articles 4.1 and 5.1 of the Law), as a subject of property rights (Articles 20 and 23 of the Law), the state – represented by the Cabinet of Ministers of Ukraine and with the participation of the Parliament of the Autonomous Republic of Crimea or local self-government authorities – is in an unequal situation as regards the law, as it is unable to freely provide for important terms and conditions of the agreement.

Languages:

Ukrainian.



Identification: UKR-2001-3-012

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.12.2001 / **e)** 18-rp/2001 / **f)** Compliance with the Constitution of Ukraine Articles 2.4, Articles 6.2, 10.1 and 10.2 of the Law of Ukraine “On youth and children's non-government organisations” (case on youth organisations) / **g** / **h**).

Keywords of the systematic thesaurus:

- 3.3.3 **General Principles** – Democracy – Pluralist democracy.
- 3.5 **General Principles** – Social State.

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

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

Keywords of the alphabetical index:

Association, state funding / Organisation, non-governmental / Organisation, youth and children / Public life, diversification, principle.

Headnotes:

A legislative provision providing for the association of the majority of the existing youth and children's non-government organisations is contrary to the constitutionally guaranteed freedom of association. The association of the majority of such organisations may only be decided on the basis of the free declaration of intent expressed by the members of such non-government organisations themselves.

Recognising the right to receive financial support for activities of youth and children's non-government organisations at the expense of the state budget only to those "unions, whose members are the majority of the registered all-Ukrainian youth and children's non-government organisations" (Article 10.1 and 10.2 of the Law) violates the constitutionally guaranteed human right to freedom of association.

Summary:

The right to freedom of association is one of the main political rights of persons. The principle of diversity of society provides the foundation for the exercise of constitutional rights and establishment of the civil institutions.

Article 1 of the Constitution proclaims Ukraine as a democratic, social and state based on the rule of law. The social state is to provide for the development and support of society and public institutions, including through the target spending for the costs of "social needs" (Article 95.2 of the Constitution). The responsibility of the constitutional state is non-interference in individual's right to freedom of association, and in the activities of such associations.

It was submitted that the provisions of Article 2.4 of the Law that determine the specific union combining the majority of youth and children's non-government organisations, violate the constitutional principles of diversification of the public life, since they assign an exclusive monopoly status to only one of the relevant civic associations.

Article 6.2 of the Law stipulates that the youth movement in Ukraine is co-ordinated by the Ukrainian National Committee of Youth Organisations, which enjoys the status of an all-Ukrainian union of youth and children's non-government organisations. The state has assigned the Committee as the youth movement coordinator in Ukraine and has established the statutory objectives of their civic associations. Such an action of the state contradicts the principle of diversification of the public life and violates the right to freedom of association, in particular the possibility of freely deciding upon valid objectives of different organisations and activities by the participants of civic associations themselves, in conformity with Article 36.1 of the Constitution.

The Constitutional Court has concluded that Articles 2.4, 6.2, 10.1 and 10.2 of the Law on Youths' and Children's Non-government Organisations ("the Law") are unconstitutional and charged the parliament (*Verkhovna Rada*) to making the Law comply with this decision.

Languages:

Ukrainian.



Identification: UKR-2001-3-013

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 21.12.2001 / **e)** 19-rp/2001 / **f)** Compliance with the Constitution of Ukraine of Articles 5.3 and 6.7 of the Law of Ukraine "On the *Verkhovna Rada* of the Autonomous Republic of Crimea" (case on compatibility of the mandate of the deputy of ARC's *Verkhovna Rada* with other activities) / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.

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

4.6.4.4 **Institutions** – Executive bodies – Composition – Status of members of executive bodies.

4.8.6 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects.

Keywords of the alphabetical index:

Mandate, concurrent exercise / Incompatibility, public office.

Headnotes:

The exercise of state power in Ukraine on the basis of the principle of separation of powers (Article 6.1 of the Constitution) does not affect the division of authorities on which the organisation and activities of the parliament (*Verkhovna Rada*) of Crimea and the Council of Ministers of Crimea are based. The specific features of the authority, organisation and activity of the authorities of Crimea are not bound by the principle of separation of powers.

Summary:

The President appealed to the Constitutional Court on the constitutionality of Article 5.3 of the Law on the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea (the Law) providing that “the deputies of the Parliament of the Autonomous Republic of Crimea may not simultaneously be members of the Council of Ministers of the Autonomous Republic of Crimea (“Crimea”), or representatives of the President in Crimea, and have any additional representative mandates”, and Article 6.7 stating that whenever a deputy holds an office which is incompatible with his mandate as a deputy, his authorities shall be terminated.

The Constitutional Court noted that there is no provision, in the Constitution, that prohibits members of the Council of Ministers of Crimea or the permanent representatives of the President of Ukraine in Crimea, to be elected to the Parliament of Crimea and to become deputies in a representative authority of Crimea. A deputy of the *Verkhovna Rada* of Crimea is also permitted to be a member of the Council of Ministers of Crimea or a representative of the President of Ukraine in Crimea, and none of his concurrent powers have to be terminated.

Furthermore, it was noted that neither the Constitution nor the Law on Representation of the President of Ukraine in the Autonomous Republic of Crimea provide for the prohibition on the permanent representative of the President of Ukraine in Crimea serving as a deputy of the *Verkhovna Rada* of Crimea at the same time.

The Constitutional Court therefore concluded that Articles 5.3 and 6.7 do not conform to the Constitution. It also underlined the necessity to terminate the constitutional proceedings in the case of matters of

compliance with the Constitution of an article of the law.

Languages:

Ukrainian.

*Identification: UKR-2001-3-014*

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.12.2001 / **e)** 20-rp/2001 / **f)** Compliance with the Constitution of Ukraine of the Decree of the Presidium of the *Verkhovna Rada* of Ukraine “On temporary termination of the activity of the Communist Party of Ukraine” and “On the interdiction of the activity of the Communist Party of Ukraine” (case on the Decree of the Presidium of the *Verkhovna Rada* of Ukraine on the Communist Party of Ukraine) / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – Separation of powers.

3.9 General Principles – Rule of law.

4.5.10.4 Institutions – Legislative bodies – Political parties – Prohibition.

Keywords of the alphabetical index:

Political party, succession.

Headnotes:

In accordance with Article 37.4 of the Constitution, the activities of the civic associations or political parties may be prohibited only through judicial procedure.

Having prohibited the activities of the CPU, the Presidium of the parliament (*Verkhovna Rada*) of Ukraine undertook the functions of investigative and judicial authorities, therefore violating the constitutionally guaranteed principle of the separation of powers (Article 6).

Summary:

The Communist Party of Ukraine (the CPU) was registered by the Ministry of Justice of the former Ukrainian Soviet Socialist Republic ("UkrSSR") on 22 July 1991. It was registered as a newly founded political party based on the Decree of the Presidium of the parliament (*Verkhovna Rada*) of UkrSSR "On procedure for registration of civic associations". The Party was subject to the procedure, specified by the temporary provisions for consideration of the applications on registration of charters for civic associations, and approved by the Decree of the Council of Ministers of UkrSSR.

The CPU enjoyed the status of an independent political organisation and its objectives and validity in the period from 19-21 August 1991 did not contradict conditions of organisation and activities of the political parties and non-governmental organisations set out in Article 37.1 of the Constitution.

In conformity with Article 4.2 of the Constitution of UkrSSR, governmental and non-governmental organisations, as well as officials, were obliged to comply with the Constitution of USSR, the Constitution of UkrSSR and Soviet law, including the Law of the USSR on public associations, which stated that associations may be dissolved only by a decision of a court (Article 22). The provisions of the Law on the possibility of dissolution of civic associations (political parties) subject to the judicial procedure were binding upon the public authorities. These provisions coincide with Article 37.4 of the current Constitution stating the possibility of prohibiting the activities of civic associations only by way of judicial procedure.

The Constitutional Court found that the Presidium of the parliament (*Verkhovna Rada*) of Ukraine's ratification of the Decrees on respectively, "temporary suspension of the activities of the CPU" and "the prohibition of the activities of the CPU" violated Articles 6 and 19 of the Constitution, which state that public authorities are to act within the limits determined for them by the Constitution, and in compliance with the laws of Ukraine.

In compliance with the 1977 Constitution of the USSR (Article 6) and the 1978 Constitution of UkrSSR (Article 6), the Communist Party of the Soviet Union ("CPSU") was defined as the guiding and directing force of Soviet society, and the core of its political system, and of its government and non-governmental organisations. In contrast with non-government organisations (trade unions, cooperative associations etc.) the previous Constitution did not refer specifically to such organisations (Article 7 of the Constitution of UkrSSR). The Communist Party of Ukraine, which

was registered on 22 July 1991 specifically as a civic association, is not a legal successor of the CPSU or of the Communist Party of Ukraine as a part of the CPSU.

The conclusion of the Constitutional Court on the unconstitutionality of the Decrees of the Presidium of the Parliament of Ukraine dated 26 and 30 August 1991 is to entail no legal consequences concerning nationalisation of the CPSU and the structure of this party, which was active in Ukraine until 22 July 1991 (Law of Ukraine "On nationalisation of the property of the Communist Party of Ukraine and of the CPSU").

The Decrees of the Presidium of the Parliament of Ukraine "On temporary suspension of the activities of the Communist Party of Ukraine" dated 26 August 1991, and "On the prohibition of the activities of the Communist Party of Ukraine" dated 30 August 1991, are inconsistent with the Constitution of Ukraine.

Languages:

Ukrainian.



United Kingdom

House of Lords

Introduction

On 12 November 2001, the United Kingdom (U.K.) Parliament approved an order laid before it by the Secretary of State for the Home Department (interior minister) proposing the U.K.'s derogation from Article 5.1 ECHR. The "Human Rights Act 1998 (Designated Derogation) Order 2001 (S.I. 2001 no. 3644)" came into force on 13 November 2001.

The Order stated that since the terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11 September 2001, there existed a terrorist threat to the U.K. from persons suspected of involvement in international terrorism. In particular, there were foreign nationals present in the U.K. suspected of being concerned in international terrorism, of being members of organisations so concerned or of having links with members of such organisations, who posed a threat to the national security of the U.K.

Therefore, according to the Order, a public emergency, within the meaning of Article 15.1 ECHR, existed in the U.K. As a result, provision was made in the Anti-terrorism, Crime and Security Act 2001 for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the U.K. but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the U.K. is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ("SIAC"), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the U.K. If, at any time, in the government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by

the exigencies of the situation, then the Secretary of State will, by order, repeal the decision.

The Order goes on to state that Article 5.1.f ECHR permits the detention of a person with a view to deportation only in circumstance where "action is being taken with a view to deportation" (*Chahal v. United Kingdom* (1996) 23 EHRR 413, paragraph 112). In *Chahal*, the European Court of Human Rights indicated that detention will cease to be permissible under Article 5.1.f ECHR if deportation proceedings are not prosecuted with due diligence and that it was necessary in such cases to determine whether the duration of the deportation proceedings was excessive (paragraph 113). In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5.1.f ECHR as interpreted by the Court in *Chahal*. This may be the case if the person has established that removal to their own country might result in treatment contrary to Article 3 ECHR, which prevents removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the U.K. and the high standard of proof required.

According to the Order, there may be cases where, notwithstanding a continuing intention to remove or deport a detained person, it is not possible to say that "action is being taken with a view to deportation" within the meaning of Article 5.1.f ECHR. To the extent that the exercise of the extended power may be inconsistent with the U.K.'s obligations under Article 5.1 ECHR, the government decided to avail itself of the right of derogation conferred by Article 15.1 ECHR and will continue to do so until further notice.

The full text of the Order and the official explanatory note are available at Her Majesty's Stationary Office website:

<http://www.hmsso.gov.uk/si/si2001/20013644.htm>

Important decisions

Identification: GBR-2001-3-008

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 11.10.2001 / **e)** / **f)** Secretary of State for the Home Department v. Rehman / **g)** [2001] *United Kingdom House of Lords* 47 / **h)** [2001] 3 *Weekly Law Reports* 877; *The Times*, 15.10.2001; CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.

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

4.7.12 **Institutions** – Judicial bodies – Special courts.

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

5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Immigrant, expulsion / National security, threat / Administrative authority, discretionary power / Terrorism, fight / Proof, standard.

Headnotes:

When determining whether somebody was “a threat to national security” for the purposes of a decision to refuse a foreign national indefinite leave to remain in the U.K., the Secretary of State for the Home Department (U.K. interior minister) was entitled to interpret such a threat to include action against a foreign state that may indirectly affect the security of the U.K. The adverse effect on the U.K. of the person’s activities does not have to be direct or immediate. International co-operation in combating terrorism between states involves a large element of policy which is primarily a matter for the Secretary of State.

Summary:

R. was a Pakistani national granted entry into the U.K. in January 1993 to work as an Islamic minister of religion in Oldham. He later applied for indefinite leave to remain which was refused in December 1998. The Secretary of State said that he was satisfied R. was involved in an Islamic terrorist organisation and that it was undesirable to permit him to remain in the U.K. as his presence represented a danger to national security. The Secretary of State

informed R. of his right to appeal against his decision under the Special Immigration Appeals Commission Act 1997 to a special tribunal (the Commission).

In an open statement to the Commission, the Secretary of State said that the appellant and his U.K. followers were unlikely to carry out acts of violence in the U.K.; his activities directly supported terrorism in the Indian subcontinent; he was partly responsible for an increase in Muslims in the U.K. who had undergone militant “jihad” training; his activities encouraged the radicalisation of the British Muslim community; and that he intended to further the cause of a terrorist organisation abroad.

The Commission considered his appeal in open and closed sessions in August 1999. They held that the expression “national security” should be construed narrowly only to include engagement in or promotion of violent activity targeted at the U.K., its system of government or its people, including activities directed against a foreign government if that government is likely to take reprisals against the U.K. They concluded that the Home Secretary failed to satisfy a “high civil balance of probabilities” that the appellant’s deportation was in the public good because he engaged in conduct that endangered the national security of the U.K.

The Secretary of State appealed to the Court of Appeal who held the Commission had taken too narrow a view of what could constitute a threat to national security and that the test was not whether it had been shown “to a high degree of probability” that the individual was a danger to national security; rather a global approach should be adopted taking into account the executive’s policy with regard to national security. They allowed the appeal. R. appealed to the House of Lords.

The House of Lords held that the “interests of national security” cannot be used by the Secretary of State to justify the deportation of any individual. There must be some possibility of risk or danger to the security or well-being of the nation. But the risk does not have to amount to a “direct threat”. Nor is national security limited to action targeted at the U.K., its government or its people.

In contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the U.K. The sophistication of means available to terrorists to attack other states may affect the safety and well-being of the U.K. or its citizens. To require a “direct” threat to national security limits the discretion of the executive too tightly. There must be a real possibility of an adverse effect on the U.K. but it does not have to be direct or immediate. Whether

there is a real possibility is a matter to be weighed up by the Secretary of State and balanced against the possible injustice to the individual facing deportation.

Reciprocal co-operation between the U.K. and other states in combating international terrorism is capable of promoting national security. This involves a large element of policy which is primarily for the Secretary of State. The Secretary of State can claim that preventative or precautionary action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the U.K.

The U.K. is not obliged to harbour a terrorist who is currently taking action against some other state if that other state could realistically be seen by the Secretary of State as likely to take action against the U.K. and its citizens.

Therefore, the House of Lords held that the Commission had applied too narrow a definition of national security.

In English law for centuries the courts have required varying standards of proof of the existence of facts, depending on the context. In civil proceedings in order to succeed it is only necessary to prove the existence of facts on the balance of probabilities. In criminal proceedings the prosecution must prove the existence of facts beyond reasonable doubt. The incorporation of the Human Rights Convention into English law and a number of other factors have resulted in the introduction of the concept of varying degrees of proof depending on the importance of the issue at stake.

In the present case the House of Lords held that fairness required the state had to prove a threat to national security to the civil standard of proof, that on a balance of probabilities it is more likely than not. But, in regarding all the information in his possession about the activities and connections of the person, the Secretary of State is entitled to have regard to precautionary and preventative principles rather than to wait until directly harmful activities have taken place. He is not merely finding facts but forming an executive judgment or assessment. There must be material on which he can proportionately and reasonably conclude there is a real possibility of activities harmful to national security, but he does not have to be satisfied that all the material before him is proved, and his conclusion justified, to a "high civil degree of probability".

The Commission was therefore wrong to insist the Secretary of State prove his case "to a high degree of probability".

Two of their lordships noted that, whilst their judgments were written before the terrorist attacks in the U.S.A. on 11 September, those events underlined the importance of entrusting to executive discretion decisions involving national security.

The appeal was dismissed.

Languages:

English.



Identification: GBR-2001-3-009

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 29.11.2001 / **e)** / **f)** R v. Director of Public Prosecutions, *ex parte* Dianne Pretty / **g)** [2001] *United Kingdom House of Lords* 61 / **h)** [2001] 3 *Weekly Law Reports* 1598; *The Times*, 05.12.2001; CODICES (English).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 5.2.2.8 **Fundamental Rights** – Equality – Criteria of distinction – Physical or mental disability.
- 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.
- 5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Criminal procedure / Euthanasia / Mercy killing / Prosecutor, undertaking not to prosecute, refusal / Suicide, assisted, crime / Right to die.

Headnotes:

The prohibition, by virtue of the Suicide Act 1961, of a person assisting another in committing suicide was not incompatible with the European Convention on Human Rights. The Director of Public Prosecutions correctly refused to undertake not to prosecute where a sufferer of motor neurone disease wished her husband to assist her commit suicide.

Summary:

P. appealed from a decision of the Divisional Court that the Director of Public Prosecutions (DPP) had correctly refused to undertake not to prosecute P.'s husband if he assisted her commit suicide. P. was a sufferer of motor neurone disease and had only a short time to live. She wished to avoid a painful death and to die at a time of her choosing, with her husband's assistance. P.'s physical incapacity meant she would require assistance to commit suicide. Section 2.1 of the Suicide Act 1961 made it a criminal offence for a person to aid or abet the suicide of another. P.'s husband sought an undertaking from the DPP not to prosecute if he helped P. commit suicide. The DPP refused to give an undertaking on the ground that he had no power to give such undertakings before the commission of crimes.

P. argued that Section 2.1 of 1961 Act was incompatible with the European Convention on Human Rights; Article 2 ECHR, when read with Articles 1 and 2 Protocol 6 ECHR, guaranteed that an individual could choose whether or not to live; the DPP's refusal subjected P. to inhuman or degrading treatment in breach of Article 3 ECHR; Article 8 ECHR contained a right to self-determination, which included a right to choose when and how to die; Article 9 ECHR guaranteed P.'s right to believe in assisted suicide; the U.K.'s blanket ban on assisted suicides was disproportionate in view of P. being in full command of her mental faculties, the absence of harm to anyone else, the imminence of her death and her willingness to commit suicide herself were she able to; and Article 14 ECHR had been breached because the DPP's refusal discriminated against her as a disabled person.

The House of Lords held that there was no infringement of P's rights under the European Convention on Human Rights.

Article 2 ECHR (right to life): the thrust of the language of the article reflected the sanctity of life, protecting the right to life and preventing the deliberate taking of life except in narrowly defined circumstances. Article 2 ECHR could not be interpreted as conferring a right to die or to enlist the aid of another in bringing about one's own death.

Article 3 ECHR (prohibition of torture): this article enshrined one of the fundamental values of democratic societies. Its prohibition of the proscribed treatment was absolute, not to be derogated from even in times of war or national emergency. Article 3 ECHR obliged states to respect the physical and human integrity of individuals.

The absolute and unqualified prohibition on a member state inflicting the proscribed treatment in Article 3 ECHR required "treatment" not to be given an unrestricted or extravagant meaning. It could not be suggested that the DPP or any other agent of the U.K. was inflicting the proscribed treatment on P., whose suffering derived from her disease.

It was not possible to interpret the DPP's refusal to grant immunity from prosecution to P.'s husband, if he committed a crime, as falling within the negative prohibition of Article 3 ECHR.

If Article 3 ECHR did apply and there was no breach of the negative prohibition in the article, the state's positive obligation to take action to prevent the subjection of individuals to proscribed treatment was not absolute and unqualified. While states are absolutely forbidden to inflict the proscribed treatment on individuals within their jurisdiction, the steps appropriate or necessary to discharge a positive obligation would be more judgmental, more prone to variation from state to state, more dependent on the opinions and beliefs of the people and less susceptible to any universal injunction.

The U.K. was not under a positive obligation to ensure that a competent, terminally ill, person who wished but was unable to take his or her own life should be entitled to seek the assistance of another without that other being exposed to the risk of prosecution.

Article 8 ECHR (right to respect for private and family life): the Court held that this right was not engaged at all. Nothing in the Strasbourg jurisprudence suggested otherwise. If that was wrong the infringement was justifiable under Article 8.2. ECHR.

Assisted suicide and consensual killing were unlawful in all Convention countries except the Netherlands,

but even there P.'s husband would be liable if he were to assist P. take her own life.

Article 9 ECHR (freedom of thought): P. might have a sincere belief in the virtue of assisted suicide; she was free to hold and express that belief. But the right to such a belief could not found a requirement that her husband should be absolved from the consequences of conduct which, although consistent with her belief, was proscribed by the criminal law.

Article 14 ECHR (prohibition of discrimination): the Strasbourg Court had repeatedly held that this right was not autonomous but had effect only in relation to Convention rights and as none of the articles on which P. relied gave her the right she claimed, Article 14 ECHR would not assist her even if she could establish that the operation of Section 2.1 of the Suicide Act was discriminatory. In any case, the criminal law could not be criticised as objectionably discriminatory because it applied to all.

The criminal law did not ordinarily distinguish between willing victims and others. "Mercy killing" was in law killing. If the criminal law proscribed the conduct of those who assisted the suicide of the vulnerable, but excused those who assisted the suicide of the non-vulnerable, it could not be administered fairly and in a way which would command respect.

The power to dispense with and suspend laws and their execution without parliamentary consent was denied to the Crown and its servants by the Bill of Rights 1689. Even if the DPP did have power to give the undertaking sought, he would have been wrong to have done so in this case. He had no means of investigating the claims made on behalf of P. He received no information concerning the means proposed for ending her life. No medical supervision was proposed. It would have been a gross dereliction of the DPP's duty and a gross abuse of his power had he ventured to undertake that a crime yet to be committed would not lead to prosecution.

P.'s appeal was dismissed.

Languages:

English.



Identification: GBR-2001-3-010

a) United Kingdom / **b)** Court of Appeal / **c)** / **d)** 19.12.2001 / **e)** / **f)** Saad, Diriye and Osorio v. Secretary of State for the Home Department / **g)** [2001] EWCA Civ 2008 / **h)** *The Times*, 07.01.2002.

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.
 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
 4.7.12 **Institutions** – Judicial bodies – Special courts.
 5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
 5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.
 5.3.35 **Fundamental Rights** – Civil and political rights – Right of petition.

Keywords of the alphabetical index:

Appeal, jurisdiction / Asylum, seeker / Immigrant / Refugee, Geneva Convention / Refugee, status denied.

Headnotes:

Under the Geneva Convention on the Status of Refugees of 1951, an asylum seeker was entitled to have it established by the appropriate authority in the country where he makes his claim whether or not he is a refugee, regardless of whether or not he faces an imminent threat of expulsion from that country.

Summary:

The Claimants all sought asylum in the U.K. The Secretary of State for the Home Department (interior minister) held that they did not fall within the definition of refugee. The Claimants sought to challenge this finding by way of an appeal to the Immigration Appeal Tribunal. Whilst they had all then been given temporary permission to remain in the U.K. they nevertheless wished to pursue appeals so that it might be established that they were in truth refugees.

The cases comprehensively dealt, for the first time, with the rights of a person claiming to be a refugee (an asylum claimant) under the Geneva Convention on the Status of Refugees of 1951 (the Convention) to have his status determined.

The Immigration Appeal Tribunal had held that, once there was no threat of *refoulement*, it had no jurisdiction to consider the substance of the asylum claimant's claim. This was overruled by the Court of Appeal which held as follows:

1. An asylum claimant is entitled under the Convention to have it established by the appropriate authority in the country where he makes his claim whether or not he is a refugee. This is so even if there is no imminent threat of *refoulement*. The Convention gives refugees a number of rights apart from the right not to be *refouled* and recognition is a practical prerequisite to the exercise of those rights.
2. The Convention does not entitle an asylum claimant to a right of appeal against any adverse decision as to his status. However as a matter of proper interpretation of the Asylum and Immigration Appeals Act 1993, such a right was in general given to him by that Act. The Immigration Appeal Tribunal had based itself on an earlier decision of the Court of Appeal, but this was held to be of very narrow application.

Supplementary information:

The provisions of the 1993 Act have now been replaced by the Immigration and Asylum Act 1999, but the Court's decision will continue to guide the courts in the interpretation of that Act.

Languages:

English.



United States of America Supreme Court

Summaries of important decisions of the reference period 1 September 2001 – 31 December 2001 will be published in the next edition, *Bulletin 2002/1*.



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² E.g. Rules of procedure.

³ Including the conditions and manner of such appointment (election, nomination etc).

⁴ Including the conditions and manner of such appointment (election, nomination etc).

⁵ Vice-presidents, presidents of chambers or of sections etc.

⁶ E.g. State Counsel, prosecutors etc.

⁷ Registrars, assistants, auditors, general secretaries, researchers etc.

⁸ E.g. assessors, office members.

⁹ Registrars, assistants, auditors, general secretaries, researchers etc.

¹⁰ Including questions on the interim exercise of the functions of the Head of State.

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¹¹ Referrals of preliminary questions in particular.

¹² Enactment required by law to be reviewed by the Court.

¹³ Review *ultra petita*.

¹⁴ Horizontal distribution of powers.

¹⁵ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁶ Decentralised authorities (municipalities, provinces etc).

¹⁷ This keyword concerns decisions on the procedure and results of referenda and other consultations.

¹⁸ This keyword concerns decisions preceding the referendum including its admissibility.

¹⁹ 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).

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²⁰ As understood in private international law.

²¹ Including constitutional laws.

²² For example organic laws.

²³ Local authorities, municipalities, provinces, departments etc.

²⁴ Or: functional decentralisation (public bodies exercising delegated powers).

²⁵ Political questions.

²⁶ Unconstitutionality by omission.

²⁷ For the withdrawal of proceedings, see also 1.4.10.4

²⁸ Pleadings, final submissions, notes etc.

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²⁹ May be used in combination with Chapter 1.2 Types of claim.

³⁰ For the withdrawal of the originating document, see also 1.4.5.

³¹ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³² For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³³ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters etc).

³⁴ Including its Protocols.

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³⁶ Including the principle of a multi-party system.

³⁷ Includes the principle of social justice.

³⁸ See also 4.8.

³⁹ Separation of Church and State, State subsidisation and recognition of churches, secular nature etc.

⁴⁰ Including maintaining confidence and legitimate expectations.

⁴¹ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴² Prohibition of punishment without proper legal base.

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⁴³ Including compelling public interest.

⁴⁴ Only where not applied as a fundamental right. Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.

⁴⁵ Including questions of treason/high crimes.

⁴⁶ Including prohibition on monopolies.

⁴⁷ For the principle of primacy of Community law, see 2.2.1.6.

⁴⁸ Including the body responsible for revising or amending the Constitution.

⁴⁹ For example presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁰ For example nomination of members of the government, chairing of Cabinet sessions, countersigning of laws.

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⁵¹ For example the granting of pardons.

⁵² Bicameral, monocomameral, special competence of each assembly, etc.

⁵³ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁴ In particular commissions of enquiry.

⁵⁵ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁵⁶ Obligation on the legislative body to use the full scope of its powers.

⁵⁷ Representative/imperative mandates.

⁵⁸ Presidency, bureau, sections, committees etc.

⁵⁹ Including the convening, duration, publicity and agenda of sessions.

⁶⁰ Including their creation, composition and terms of reference.

⁶¹ State budgetary contribution, other sources etc.

⁶² For the publication of laws, see 3.15.

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⁶³ For example incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others.

For questions of eligibility see 4.9.5.

For local authorities see 4.8.

⁶⁵ Derived directly from the constitution.

⁶⁶ See also 4.8.

⁶⁷ The vesting of administrative competence in public law bodies independent of public authorities, but controlled by them.

⁶⁸ Civil servants, administrators etc.

⁶⁹ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁰ Other than the body delivering the decision summarised here.

⁷¹ Positive and negative conflicts.

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⁷² For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

⁷³ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁴ See also 3.6.

⁷⁵ And other units of local self-government.

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⁷⁶ See also keywords 5.3.39 and 5.2.1.4.

⁷⁷ Proportional, majority, preferential, single-member constituencies, etc.

⁷⁸ For aspects related to fundamental rights, see 5.3.39.2.

⁷⁹ E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

⁸⁰ Tracts, letters, press, radio and television, posters, nominations etc.

⁸¹ Impartiality of electoral authorities, incidents, disturbances.

⁸² E.g. signatures on electoral rolls, stamps, crossing out of names on list.

⁸³ E.g. in person, proxy vote, postal vote, electronic vote.

⁸⁴ E.g. Panachage, voting for whole list or part of list, blank votes.

⁸⁵ E.g. Auditor-General.

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⁸⁶ Parliamentary Commissioner, Public Defender, Human Rights Commission etc.

⁸⁷ E.g. Court of Auditors.

⁸⁸ Institutional aspects only: questions of procedure, jurisdiction, composition etc are dealt with under the keywords of Chapter 1.

⁸⁹ Including state of war, martial law, declared natural disasters etc; for human rights aspects, see also keyword 5.1.4.

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⁹¹ For rights of the child, see 5.3.42.

⁹² The question of "Drittwirkung".

⁹³ See also 4.18.

⁹⁴ Taxes and other duties towards the state.

⁹⁵ Here, the term "national" is used to designate ethnic origin.

⁹⁶ For example, discrimination between married and single persons.

⁹⁷ This keyword also covers "Personal liberty" It includes for example identity checking, personal search and administrative arrest.

⁹⁸ Detention by police.

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⁹⁹ Including questions related to the granting of passports or other travel documents.

¹⁰⁰ May include questions of expulsion and extradition.

¹⁰¹ 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.

¹⁰² This keyword covers the right of appeal to a court.

¹⁰³ Including the right to be present at hearing.

¹⁰⁴ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

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¹⁰⁵ This keyword also includes the right to freely communicate information.

¹⁰⁶ Militia, conscientious objection etc.

¹⁰⁷ Aspects of the use of names are included either here or under "Right to private life".

¹⁰⁸ Including compensation issues.

¹⁰⁹ For institutional aspects, see 4.9.5.

¹¹⁰ This keyword also covers "Freedom of work".

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¹¹¹

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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